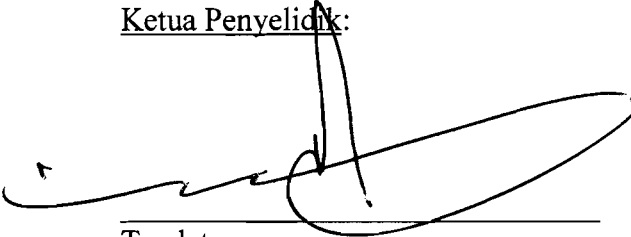


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ABSTRACT

A housing developer requires land for housing development projects. In Malaysia, the land which is to be developed into a housing development project may be originally owned by the housing developer, the developer may obtain it through purchase from an interested seller, through a joint venture agreement with the land proprietor, or through alienation of land granted by the State Authority. The alienation of land is made based on the approval of the State Authority during the application to alienate the land to the applicant housing developers. There have been cases whereby the State Authority has approved the applications to alienate the land to the housing developers without duly taking into consideration the capability and suitability of the applicant housing developers concerned in carrying out the intended housing development project and the suitability of the land. The incapability of the developers includes lack of experience of the applicant housing developers in housing development projects or lack of funds to run housing development projects. These shortcomings, in the extreme case, may result in the problematic housing development projects. The questions that arise include: Why had the State Authority approved the applications to alienate lands to incapable housing developers and/or alienated unsuitable lands? What are the power, responsibility, and liability of the State Authority in alienating lands to applicant housing developers for housing development projects? This research aims to explain the scenarios occurring in Kedah regarding the powers and responsibilities of the State Authority dan its machinery in alienating lands for housing development projects to applicant housing developers. It also identifies the problems and issues in alienation of lands for housing development projects which may lead to problematic housing development projects. The methodology used in this research is a composite of the qualitative case study and legal research. Further, this research compares between the positions of the law and practice on alienation of lands in the Republic of Singapore and New South Wales, Australia. This research rounds off with the researcher recommending certain legal approaches to overcome these problems and issues in the alienation of lands to applicant housing developers for housing development projects by the State Authority in order to avoid problematic housing development projects and other pressing issues which are detrimental to the housing developers. This research also proposes certain legislative amendments to the act governing alienation of land in order to avoid possible re-occurrences of issues and problems as identified.

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National Land Code 1966 (Act No. 156).
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LIST OF ABBREVIATIONS

AC	Appeal Cases
Act 301	Singapore Land Authority Act 2001 (Cap. 301)
Act 340	Urban Redevelopment Authority Act (Cap. 340) 1989
AIKOL	Ahmad Ibrahim Kulliyah of Laws
All ER	All England Reports
ALR	All India Law Reports
CA	Court of Appeal
CLA	Crown Lands Act 1989
CLD	Crown Lands Division
CLJ	Current Law Journal
CLR	Crown Lands Regulations 2006
COD	Crown Office Digest
DARS	Darul Aman Realty Sdn Bhd
EPAA	Environmental Plannings and Assessment Act 1979
EXCO	State Executive Council
FC	Federal Constitution
FELCRA	Federal Land Consolidation and Rehabilitation Authority
FELDA	Federal Land Development Authority
GCHQ	Government Communication Head-Quarters
GLC	Government Linked Company
GPA	Government Proceedings Act 1956 (Act 359)
HL	House of Lords
IIUM	International Islamic University Malaysia
Imm AR	Immigration Law Reporter
ISO	International Standard Organization
JAS	Jabatan Alam Sekitar (Department of Environment)
JBA	Jabatan Bekalan Air (Water Supply Department)
JBPB	Jabatan Perancangan Bandar dan Desa
JCA	Justice Court of Appeal
JKR	Jabatan Kerja Raya (Public Works Department)
JPS	Jabatan Parit dan Saliran (Department of Irrigation and Drainage)
KB	Kings Bench Division
KODAYA	Koperasi Pekebun Kecil Daerah Kuala Muda/Yan
KPI	Key Performance Index
KTMB	Keretapi Tanah Melayu Berhad
LMS	Lesen Menduduki Sementara (Temporary Occupation of Licence)
LNS	Law News Services
LOS	Land Ordinance (Sabah Cap. 68)
MARDI	Malaysian Agricultural Research and Development
MB	Menteri Besar
MCDM	Multi-Criteria Evaluation and Multi-Criteria Decision Making
MHLG	Ministry of Housing and Local Government
MLJ	Malayan Law Journal
MUWHLG	Ministry of Urban Wellbeing, Housing and Local Government
NLC	National Land Code 1965

NLCL	National Land Council
NSW	New South Wales, Australia
PA	Power of Attorney
PC	Privy Council
PE	Population Equivalent
PEMUDAH	Pasukan Petugas Khas Pemudahcara Perniagaan (Special Task Force to Facilitate Business)
PKB	Permodalan Kedah Berhad
PM	Pajakan Mukim (Lease Hold Land)
PTU	Pengarah Tanah dan Ukur Sabah (Sabah Director of Land and Survey)
QB	Queens Bench Division
SA	South Africa Law Reports
SADA	Syarikat Air Darul Aman Sdn. Bhd.
SDBA	Street, Drainage and Building Act 1974 (Act
Setara	Setara Damai Sdn. Bhd (183067-U)
SLA	Singapore Land Authority
Sri LR	Sri Lanka Law Report
TCPA	Town and Country Planning Act
TOL	Temporary Occupation of Licence
WLR	Weekly Law Reports

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUNDS OF RESEARCH

The Malaysian Federal Constitution ('FC') provides certain powers to the State Government to make laws on certain matters and to carry out its execution. These powers are specifically spelt out in List II (State List) and List III (Concurrent List)¹ to the 9th Schedule of the FC and read together with article 74 and article 80 of the FC.

One of the powers of the state is concerning land matters (List II(2)(a) to 9th Schedule FC). The power concerning land matters includes the power to alienate land. This is elaborated clearly in section 76 of the National Land Code 1965 ('NLC'). Accordingly, 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.² The State Authority may alienate land to any person or body subject to conditions as prescribed under the NLC (sections 76 and 79(2) of the NLC).

¹ Note that pursuant to section 9C of the Concurrent List (List III) to the 9th Schedule, both the Federal Government and the State Government have power to deal with "housing" and "provisions for housing accommodation".

² See section 5 of the NLC read together with 8th Schedule to the FC and the decision in *Lebbey Sdn. Bhd v Chong Wooi Leong & Anor* [1998] 5 MLJ 368. See also section 3 of the Street, Drainage and Building Act 1974 ('SDBA') and section 2 of the Local Government Act 1976 (Act 171) ('LGA'). However in section 2 of the LGA, State Authority is defined as, *inter alia*, the Ruler in-Council or Governor-in-Council. In *Lebbey Sdn. Bhd. v. Chong Wooi Leong & Anor & other Applications* [1998] 5 MLJ 364 at p. 374, 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". EXCO means the members of the State Executive Council (Majlis Mesyuarat Kerajaan Negeri). See also *Honan Plantations Sdn. Bhd. v. Kerajaan Negeri Johor* [1998] 5 MLJ 129 at 150-151 and *Yee Seng Plantations Sdn. Bhd. v. Kerajaan Negeri Terengganu & 3 Ors* [2000] 3 AMR 3208. See also section 34(1) of the Laws of the State of Kedah Darul Aman ('the Kedah Laws'), where it states that the executive authority of the State shall be vested in the Ruler and exercisable, subject to the provisions of any State law, by Him or by the State Executive Council or the Menteri Besar but the Legislative Assembly may by law confer executive functions on other persons. Pursuant to section 39(1) of the Kedah Laws, the Ruler shall act in accordance with the advice of the Executive Council or of a member thereof acting under the general authority of the Council except as otherwise provided by the FC or the Kedah Laws. Pursuant to paragraph 1 to Schedule 8 of the FC, the Ruler or Governor must act on the advice of the State Executive Council. Thus, State Authority under the NLC refers to the Ruler or Governor acting upon the advice of the State Executive Council insofar as the functions under the NLC are concerned.

Section 76 of the NLC provides:

“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;

(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.”

In the exercise of the power to alienate land and its decision making process, the State Authority has absolute power.³ For instance pursuant to section 108 of the NLC where there is a conflict between a by-law or restriction imposed by the planning authority and any conditions⁴ imposed under the NLC, the latter shall prevail. Hence, this provision undermines the importance of the views and advice of the planning authority.

³ Nuarrual Hilal Md. Dahlan, *Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework*, Ph.D in law dissertation, International Islamic University Malaysia, Gombak, 2009, 215. See also article 95 of the FC which states that the Federal Government cannot inspect any activities of the State Government involving matters that fall under the exclusive legislative authority of the State.

⁴ For example express conditions imposed by the State Authority upon alienation of land vide section 76 and section 120 of the NLC.

Alienation of land can be made either on the application of the Federal Government to the State Authority or to other persons⁵ if the grant will serve public purposes and there is special circumstance warranting the State Authority to alienate lands (section 76(aa)(i)(ii)(iii) of the NLC).

Before any application for alienation of land can be considered by the State Authority, views and references from certain departments/agencies are required. Reference to the Department of Town and Country Planning or local authority (if the land is within the jurisdiction of the local authority) is important so that the intended alienated land is to be used in accordance with the land use planning requirements. For instance, if the land is to be used for agriculture by the applicant, advice from the Department of Agriculture is needed. This is to ensure that the land intended for agriculture is truly fit and suitable for the intended purpose. Equally, view from the Public Works Department (PWD) is required if the land is located adjacent to the main road. Meanwhile, reference to the Department of Irrigation and Drainage (Jabatan Parit dan Saliran ('JPS')) is paramount if the land is located near river or water irrigation. To expedite the receipt of reports from these departments/agencies, the state authority may require joint site visits over the lands with the relevant technical agencies.⁶

All applications for alienation of land made for consideration of the State Authority approval must be supported by a work paper that contains:

- 1) Information of the applicant;
- 2) Qualifications of the applicant in respect of section 43⁷ of the NLC and the restrictions under any written laws such as the Malay Reservation Enactment and Kelantan Land Reservation, 1938;
- 3) Proposed land use by the applicant;
- 4) Location (should be provided in the plan) and descriptions of land;

⁵ These persons may include natural persons other than minors, corporations, sovereigns, government and organisations. See section 43 of the NLC.

⁶ Koperasi Pegawai Pentadbiran dan Pengurusan Tanah Malaysia Berhad, Manual Kanun Tanah Negara, 9-10, 2003, Koperasi Pegawai Pentadbiran dan Pengurusan Tanah Malaysia Berhad dengan kerjasama Jabatan Ketua Pengarah Tanah dan Galian, Kuala Lumpur.

⁷ Section 43 of the NLC: Persons and bodies to whom land may be disposed of.

- 5) Views from related departments;
- 6) Measurement of the land (delineated in the plan) certified for approval (relating to section 79(1) of the NLC⁸);
- 7) Duration for alienation other than in perpetuity;
- 8) Freehold land area and its description (relating to section 79(2)(c) of the NLC⁹ – this should conform with section 77(3) of the NLC¹⁰);
- 9) Amount of quit rent chargeable in accordance with the respective States' Land Rules (section 79(2)(d) of the NLC¹¹);
- 10) Amount of premium payable and in accordance with the States' Land Rules (relating to section 79(2)(e) of the NLC¹²);
- 11) Approved categories of land use which is to be imposed on the applicant (section 52 of the NLC¹³);

⁸ Section 79(1) of the NLC states:

“Where any approval of the State Authority to the alienation of land under this Act relates to land which (under sub-section (2) of section 77) is required to be surveyed before it can be held under final title, it shall be given by reference to a plan and description sufficient to enable the land and its boundaries to be provisionally identified and ascertained pending the survey.”

⁹ Section 79(2) of the NLC provides:

“The following matters shall be determined by the State Authority at the time it approves the alienation of land under this Act to any person or body -

(a) the area approved for alienation or (in the case of land requiring to be surveyed) the area provisionally approved;

... “

¹⁰ Section 77(2) of the NLC provides:

Land may be alienated under qualified title at any time after its alienation has been approved by the State Authority, but may not be alienated under either of the forms of final title aforesaid unless -

(a) it has been surveyed in accordance with the provisions of section 396 (whether for the purposes of the alienation in question or on some previous occasion), or

...;

¹¹ Section 79(2)(d) of the NLC states:

“The following matters shall be determined by the State Authority at the time it approves the alienation of land under this Act to any person or body -

... “

(d) the rate per hectare or other lesser unit of area at which the rent to be reserved thereon is to be calculated;”

¹² Section 79(2)(e) of the NLC states:

“The following matters shall be determined by the State Authority at the time it approves the alienation of land under this Act to any person or body -

... “

(e) the question whether any premium is to be charged and, if so, the rate per hectare or other lesser unit of area at which it is to be calculated;”

¹³ Section 52 of the NLC: Categories of land use, and application thereof to lands alienated under this Act.

- 12) The approved express conditions, which are to be imposed (sections 120, 121 and 122 of the NLC)¹⁴;
- 13) The express conditions and approved restrictions in interest, which are to be imposed (section 120 of the NLC)¹⁵; and,
- 14) If necessary, specifications of the depth limit of the underground land for the alienated land (section 92B of the NLC¹⁶).¹⁷

References to the appropriate authorities and technical agencies are made to ensure coordinated, informed decision and good governance in dealing with the application for alienation of land. Thus, the State Authority may refer to certain good practices or federal directives/policies issued by the National Land Council ('NLCL') and the standard procedures prescribed by the Federal Director General of Lands and Mines such as the federal land administration circulars issued from time to time¹⁸ and the NLC land manual¹⁹.

This good practice includes the need to refer to and consult with relevant authorities for example the Department of Town and Country Planning (Jabatan Perancangan Bandar dan Desa (JPBD)), Department of Irrigation and Drainage (Jabatan Pengairan dan Saliran) and Public Works Department (Jabatan Kerja Raya (JKR)) and to seriously consider these professionals' views before alienation of land can take place. These referral authorities may consist of the appropriate authorities²⁰ and/or technical agencies²¹.

¹⁴ Section 122 of the NLC: Categories: Building and Industry.

¹⁵ Section 120 of the NLC: Imposition of express conditions and restrictions in interest on alienation under this Act.

¹⁶ Section 92B of the NLC: Specification of rights in respect of underground land upon alienation.

¹⁷ Koperasi Pegawai Pentadbiran dan Pengurusan Tanah Malaysia Berhad, *Manual Kanun Tanah Negara*, 10.

¹⁸ See circulars issued by the Director General of Lands and Mines of Ministry of Natural Resource and Environment, Putrajaya, from time to time.

¹⁹ See Koperasi Pegawai Pentadbiran dan Pengurusan Tanah Malaysia Berhad, *Manual Kanun Tanah Negara*, 2003, Koperasi Pegawai Pentadbiran dan Pengurusan Tanah Malaysia Berhad dengan kerjasama Jabatan Ketua Pengarah Tanah dan Galian, Kuala Lumpur.

²⁰ Pursuant to section 5 NLC, 'appropriate authority' means 'when used in relation to any consent or approval, means the authority having power under any written law to grant such consent or approval, as the case may be'. Instances of the appropriate authorities are the Department of Sewerage Services (Jabatan Perkhidmatan Pembetungan (JPP)), Keretapi Tanah Melayu Berhad (KTMB), local authorities, Tenaga

1.2 PROBLEM STATEMENTS

It is evident that in the alienation of land for housing development²² the State Authority has failed to get sufficient and appropriate advices and views, inadvertently or otherwise, from the relevant authorities (appropriate authorities and technical agencies) or that the decision of the State Authority in alienation of land is not grounded on good information and professional considerations. For instance, the State Authority fail to alienate land to suitable housing developers for the developers to carry out a particular development on the alienated land or that the alienated land is not suitable for the purpose of housing development projects. These may result in the purported housing development not succeeding to the detriment of the stakeholders (for example the purchasers). This problem is evident in the occurrences of abandoned housing projects, floods, soil erosions and land slides which have resulted in heavy injuries and huge losses to the interested parties and stakeholders, especially the purchasers and the developers.

The unsuitability of the location for housing development projects can be seen in the following housing development projects:

- 1) Taman Harmoni, Balakong, Cheras, Selangor. Where in this project, a part of the location of the project contained slime soils which was not suitable for a housing development project. The developer had to extract this soil and replaced it with suitable soils in order to proceed with the intended development. This resulted in the increase of construction cost which ultimately affected the developer's overall budget for the project and resulted in the inadequacy of funds to complete the project. As a consequence, half of the project was abandoned due to the shortage of funds;²³

Nasional Berhad (TNB), Ministry of Housing and Local Government (MHLG) and the Department of Environment (Jabatan Alam Sekitar (JAS)).

²¹ The definition of 'technical agencies' has not been defined in the NLC. It is opined, technical agencies should be the agencies that the State Authority should refer to for views other than the appropriate authorities. It is opined that technical agencies, for instances, may include the Department of Mineral and Geo-science (Jabatan Mineral dan Geo-sains), Department of Irrigation and Drainage (Jabatan Pengairan dan Saliran) and the Economic Planning Unit of the Prime Minister Department.

²³ File No: KPKT/08/824/6037-1 & 2 and KPKT/BL/824/6037-1.

- 2) Taman Lingkaran Nur, Kajang, Selangor. This project is divided into northern and southern parts. In the middle of the project location lies Sungai Long. The river water flows had eroded part of the project land. Due to this erosion, the developer had to construct concrete walls along the river banks and repair the eroded land as well as the river banks to reduce and eliminate soil erosions. This additional work had added a new financial burden on the developer and had affected the smooth running of the project development;²⁴
- 3) Desa Kerayong Indah, Ijok, Selangor. The location of the project land is on a hilly land. The land was alienated to the purchasers by the Selangor State Authority. The housing project was carried out by one contractor by name of Bumi Circle Sdn. Bhd ('Bumi'). Bumi was also appointed by the State Authority to undertake the construction of houses belonging to the purchasers on the alienated land. All purchasers were required to appoint Bumi as the housing contractor. However Bumi failed to complete the project as underneath the project location there were a lot of huge and hard rocks and granite. To complete the project Bumi needed additional funds to extract the rocks and granite, which they lacked of. Due to insufficient fund, Bumi abandoned the project to the detriment of the purchasers. To date the rehabilitation of the project seems impossible;²⁵
- 4) Taman Perwira, Phase 2, Jerantut, Pahang. This project location is not suitable for housing development as the land involved geo-technical problems;²⁶
- 5) Taman Sri Bayu, Seremban, Negeri Sembilan. The development of this project was terminated due to insufficient funds of the developer to carry out infrastructure works of the project as the project was located on top of two hills not suitable for housing development;²⁷
- 6) Taman Dayang, Mukim Kuah, Langkawi, Kedah. In this project a part of the housing development project could not be implemented as the project's location

²⁴ File No: KPKT/08/842/4275 and KPKT/BL/4275-1 Jld 1 & 2.

²⁵ Letter from the Kuala Selangor District and Land Office dated 17 September 1999, which the author obtained from one Kamarolzaman bin Ismail, being a purchaser in an abandoned housing project at Desa Kerayong Indah, Mukim Jeram, District of Kuala Selangor, Selangor.

²⁶ File No: KPKT/08/824/3947-5. This project involves 260 units of single storey terrace house. The completed date should be in 1996. The project was left abandoned at 10% stage only.

²⁷ File No: KPKT/08/5227-1. This project involved 127 units of house. The project was terminated at 75% completion in 1996.

contains hard rocks which render the piling and levelling works on the land impossible;²⁸ and,

- 7) Taman Villa Fettes, Lots 141 and 3622, Mukim 18, North East District, Penang. The project location is not suitable for housing development project as underneath the project land there are huge and hard granatic rocks.²⁹

According to a research finding, one of the factors which has caused problematic housing development projects is the failure on part of the State Authority to fully and professionally consider the suitability of the land and the applicant developers before approving applications for alienation of land. There are times where, the State Authority only carries out *ad hoc* approvals for the applications of alienation of lands by applicant developers, for the latter to undertake housing development projects. True, there are certain parties which the State Authority might have been consulted for views, for instance the planning authority, Public Works Department (Jabatan Kerjaraya (JKR)), Health Department (Jabatan Kesihatan), Water Authority (Jabatan Bekalan Air (JBA)), Department of Lands and Mines and District and Land offices over the purported applications.³⁰ However, the views provided by these parties do not relate to the physical suitability such as the soil conditions of the land in question and the capability of the applicant developers to carry out the intended housing development projects, especially in term of the housing development management experience and monetary capability. In other words, the views given are insufficient. Due to this inadequacy, the purported housing development project may later fail and become problematic.³¹

In addition, it is evident that, in consideration of the application for alienation of land for housing development projects being granted by the State Authority to certain applicant developers, the State Authority also has imposed on the applicant developers, certain unreasonable selling prices for the housing units, which are to be sold to public. These selling price rates have not been adequately evaluated by balancing and considering the

²⁸ File No: KPKT/08/824/4285-1. This project consists of 165 units of houses. The project should have been completed in 1995.

²⁹ File No: KPKT/08/824/63 97-1 & 2 and KPKT/BL/19/6397-1.

³⁰ Koperasi Pegawai Pentadbiran dan Pengurusan Tanah Malaysia Berhad, 2003, p. 10.

³¹ Nuarrual Hilal Md. Dahlan, *Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework*, pp.211-212.

costs and the capability of the applicant developers who have to bear in implementing development of the housing projects. In consequence, the proceeds obtained through the sales of the units may not be enough to meet the full costs of the housing development projects for ensuring their duly completion.³²

The State Authority also do not seek views from the Housing Authority i.e the Ministry of Housing and Local Government (MHLG), regarding the capability of the applicant developers who would be carrying out the purported housing development projects. Because of this factor, certain projects which are to be erected on certain alienated lands granted by the State Authority, have failed and abandoned in the mid-stream of the development. In abandonment of housing projects, usually the aggrieved parties are the purchasers themselves and the rehabilitation of the projects also may not be easy to be carried out by the rehabilitating parties.³³ In the worst situations, rehabilitation cannot be practically carried out and leaving the aggrieved purchasers in the lurch.

As mentioned above, the failure on part of the State Authority to sufficiently undertake evaluation and assessment over the purported location of the land, conditions for alienation and the capability, in term of financial strength and management experience, of the applicant developers has partly contributed to the problematic housing development projects.³⁴

This problem is largely due to the administrative inefficiencies on part of the State Authority and legal weaknesses of the existing provisions in the National Land Code 1965 (NLC). These inefficiencies and weaknesses also, based on a research finding, is rooted from the inadequacy of section 108 of the NLC. Section 108 of the NLC clearly undermines the function of the planning authority and the local authority, if restrictions made by the latter (the planning authority and local authority) are in conflict with the conditions imposed by the State Authority. This provision (section 108 of the NLC) has directly given an absolute power to the State Authority, not to be bound by any

³² Ibid, pp. 212-213.

³³ Ibid, p. 213.

³⁴ Ibid, pp. 211—217.

restrictions or views of the planning authority, let alone of the other technical agencies (for instances the Department of Minerals and Geo-science, Department of Canal and Irrigation (JPS), Department of Environment (DOE), JKR, JBA, TNB, IWK etc), which have not been expressly provided in the NLC. This may lead to the approval of alienation applications made in an unprofessional manner, being made on an *ad hoc* 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)).

Likewise 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. These lacunae may later, to a certain extent, contribute to the occurrences of problematic and abandoned housing projects, land erosion and land slides and other physical catastrophes which caused huge pecuniary and non-pecuniary losses, physical damage and injury to residents and death toll of hundreds of lives. These problems can be seen in the development of Taman Harmoni, Balakong, Cheras, Selangor and Taman Lingkaran Nur, Kajang, Selangor³⁵, soil erosions and land slides in Kampung Sungai Gahal, Hulu Langat on 21 May, 2011³⁶, Highland Tower collapse³⁷, Bukit Antarabangsa landslide³⁸, Taman Hillview Bungalow Collapse³⁹ and the like.

The absolute power possessed by the State Authority, may lead to abuse of powers. The meaning of State Authority, in the practical sense, are the members of the State Executive Council (Majlis Mesyuarat Negeri or Exco) (*Lebbey Sdn. Bhd v. Chong Wooi Leong &*

³⁵ Ibid, pp. 211- 217, 291-294.

³⁶ Blog.myfriends2u, "Kanak-kanak Rumah Anak Yatim Madrasah Al-Taqwa Tertimbus" accessed 14 June, 2011; available at <http://blog.myfriends2u.com/2011/05/23/kanak-kanak-rumah-anak-yatim-madrasah-al-taqwa-tertimbus>; internet.

³⁷ Wikipedia, "Highland Tower Collapse" accessed 14 June, 2011; available at http://en.wikipedia.org/wiki/Highland_Towers_collapse; internet.

³⁸ Wikipedia, "2008 Bukit Antarabangsa landslide" accessed 14 June, 2011; available at http://en.wikipedia.org/wiki/2008_Bukit_Antarabangsa_landslide; internet.

³⁹ Wikipedia, "2002 Taman Hillview Bungalow Collapse" accessed 14 June, 2011; available at http://en.wikipedia.org/wiki/2002_Taman_Hillview_Bungalow_Collapse; internet.

Anor & other Applications [1998] 5 MLJ 364 & 374). EXCO's decisions may be highly influenced by the Menteri Besar/Ketua Menteri. Usually, a large number of the members in the EXCO are from the same political party. A problem may arise as 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.

It should be noteworthy that the powers of the State Authority in respect of land administration are delegated to land officers (State Director of Lands and Mines, the Land Registrar, Land Administrators and their officers). This is mentioned in sections 12 and 13 of the NLC.

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. Thus, it is timely to research into the functions and duties of State Authority in the NLC and its composition as well as the powers granted under the Delegation of Powers Act 1956, for possible legal revamp to ensure that the decisions made by the EXCO (State Authority) are not driven purely on political self-interest and considerations but are made subject to valid and sufficient professional considerations.

1.3 OBJECTIVES

The objectives of this research are:

- 1) To study the duties and functions of the Kedah State Authority in the decision making process in alienating lands to applicant housing developers for housing development projects;
- 2) To study the current legal provisions and practices in regard to the alienation of land for housing development projects exercised by the Kedah State Authority;
- 3) To suggest certain measures (legal and non-legal) to improve the administrative machinery and decision making process of the Kedah State

Authority in alienating lands for housing development projects in order to avoid any possible occurrences of abandoned housing projects, land slides, land erosions and other problematic housing development projects; and,

- 4) To comparatively study the laws and practices applicable in New South Wales Australia and the Republic of Singapore in regard of alienation of lands for housing development purposes by the land authorities, which the land authority in Malaysia (in particular Kedah) can learn and adopt for the betterment of the alienation of lands in housing development decision making process.

1.4 RESEARCH QUESTIONS

- 1) Why the State Authority have alienated lands not suitable for housing development projects?
- 2) Why have not, at the outset and onset of the application for alienation of lands, the State Authority studied the suitability of lands and the applicant developers' positions for undertaking housing development?
- 3) How to improve the machinery of the State Authority in their decision making process in alienating lands for housing development projects in order to ensure the success of the projects?
- 4) How can the provisions in the NLC be improved, if necessary, bearing on the above questions and considerations for the betterment of the housing industry in Peninsular Malaysia and to avoid occurrence of problematic housing development projects in the future?
- 5) In respect of alienation of lands by the State Authority, how to ensure the stakeholders' interests in housing development projects can be protected all the time?

1.5 HYPOTHESES

- 1) The current practices and law involved in the approval of applications for alienation of land for housing development projects carried out by the State

Authority should be re-examined in order to find any possible weaknesses, if any, which may have resulted in the problematic housing development projects; and,

- 2) Certain suggestions, legal and non-legal, should be introduced to eliminate any problems and weaknesses in the approval of applications for alienation of land for housing development projects exercised by the State Authority in the protection of the stakeholders in housing development projects and to avoid any possible occurrences of problematic housing development projects in the future.

1.6 SIGNIFICANCE OF STUDY

This study provides evidences of certain weaknesses in the administration of land particularly in the alienation of lands for housing development carried out by the State Authority in the State of Kedah Darul Aman. Following identification of the weaknesses, certain suggestions will follow to overcome it. The suggestions may include certain amendments to the NLC and the current practice of the State Authority in exercising alienation of lands for housing development projects. The suggested amendments to the relevant statutes concerning alienation of lands for housing development projects will certainly improve the existing law and practice for the benefits of the stakeholders in housing development and prevent possible problems emanating from the current lacunae of the law and practices in the alienation of land for housing development projects.

The stakeholders who may get benefits from the findings of this research will be the Kedah State Authority and the Malaysian Federal Government in term of providing them with some proposed amendments to the NLC and other related laws in order to overcome the problems and issues identified by this research. Further, indirectly, by having promulgated the proposed legislative amendments, the occurrences of problematic and abandoned housing projects, due to the weaknesses in decision making process in alienation of lands, will proportionately be reduced. Thus, this will avoid altogether any consequential grievances to the housing developers and public purchasers.

1.7 LIMITATION AND SCOPE OF RESEARCH

In the course of undertaking the current research, the researcher only found one hurdle in collecting data. This hurdle is the refusal of the two land administrators, viz the Kuala Muda Land Administrator and the Pokok Sena Land Administrator allowing the researcher access to carry out file reviews of the files concerning the two housing development projects under study. The data collections from these two data sources were only interviews. Be that as it may, the information collected from the interviews were supported and triangulated by the file reviews undertaken at the office of Director of Lands and Mines Alor Setar, who allowed access to the researcher. Thus, the issue of validity and reliability of the data collected by way interviews at the Kuala Muda and Pokok Sena Land Offices would not be affected.

The researcher would like to emphasise that this research only concerns the law and practices in Kedah on alienation for housing development at two housing development projects. The facts and legal findings from these data sources were compared with the positions in the Republic of Singapore and New South Wales, Australia by way comparative legal analysis. The objective of this comparative approach is to find out the law and practices in the these two jurisdictions that can be learned and adopted in Kedah for the betterment of the Kedahan law and practices in the alienation of land for housing development projects.

As a caveat to this current research, the laws, facts and information are up until 31 January, 2014.

CHAPTER TWO

LITERATURE REVIEW

2.1 INTRODUCTION

Chapter one elaborates the problem statements, issues and objective of this research concerning alienation of land for housing development project. This chapter only deals with the related writings on alienation of lands. In the observation of the researcher there is inadequate legal literature which directly discuss the instant issue – the legal issues in the alienation of lands for housing development projects.

The researcher also has not found any reported case law that has directly dealt with the legal issues in the alienation of lands for housing development and liability and responsibility of the State Authority on it. 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:

- 1) *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 in Sandakan)

In this case there was an alienation of land to 27 plaintiffs by the Director of Lands and Surveys of Sabah (Pengarah Tanah dan Ukur Sabah ('PTU')). However it was contended that the alienation was null and void and thus the subsequent issuance of title deed arising from the alienation of land was null and void *ab initio* and of no legal effect on the ground that the PTU or Land Utilisation Committee had approved the said application beyond their power and jurisdiction when the said application should have been approved by the Chief Minister of Sabah. In this case, it was contended by the parties that no approval had been given by the Chief Minister. Pursuant to section 9(1) of the Land Ordinance (Sabah Cap. 68) ('LOS'), the PTU

may alienate state land on such terms or in such manner as is authorized by LOS and may also impose special conditions in respect of it. Be that as it may, in carrying out this function, the PTU is still subject to any general or special direction of the Cabinet including the Chief Minister of Sabah.

- 2) *Sa Mal (Sabah) Corporation Sdn. Bhd v Director of Lands and Surveys, Sabah* [1994] MLJU 398; [1994] 3 CLJ 229.

In this case, there was an allegation that the Director of Lands and Surveys ('PTU') failed to comply with the rules of natural justice when he did not issue offer to alienate land to the appellant. In this case the judge decided that in exercising his duty in alienation of lands, the PTU may invoke his discretionary power under section 9 of the Land Ordinance (Sabah Cap. 68) ('LOS') for which the rules of natural justice do not pertain. Pursuant to section 41(1)(d) and read together with section 41(2) of the LOS, the alienation of land by the PTU is non-appealable.

- 3) *Hiew Kon Fah and Anor v Kwn Ngen Wah & Ors* [2008] MLJU 95 (High Court at Sandakan), *Lim Fong Tsin & 23 Ors v The Assistant Collector of Land & 2 Ors* [1997] 1 LNS 7; and *Burhan Ating & Ors v. Directors of Lands & Survey & Ors* [1992] 2 CLJ (Rep) 211.

These cases highlight the same law as mentioned under section 9 and 41(1)(d) of the LOS. The courts in these cases decided that the PTU has a discretionary power whether to approve or not to approve any application for alienation of land, subject to any general or specific direction of the State's Minister/Cabinet.

- 4) *Hamdan bin Johan & Ors v FELCRA Bhd & Ors* [2010] 8 MLJ 628 (High Court of Malaya at Johor Bahru).

The plaintiffs in this case were invited by the first defendant (Felcra Bhd) into a project for the development of an oil palm plantation known as Felcra Tebing Runtuh ('FTR'). During the occupation and development of the FTR, the Menteri Besar of

Johor agreed in principle that a certain acreage of FTR land be alienated to the plaintiffs. However to the dismay of the plaintiffs, after several years working on the FTR land, the land was subjected to the development of a new Malaysia-Singapore second link and development of Bandar Nusa Jaya. Due to this, they could not proceed with the plan to develop the FTR land and suffered losses and damage. Further, the compensations given by UEM Bhd were too low, unreasonable and inadequate. The UEM compensations were in the form of certain monetary value and a plot of land together with a house. To lessen the plaintiffs' grievances, the first defendant also agreed to allot certain lands in the FTR to the plaintiffs in replace of the acquired FTR land that had been subject to the second link development and Bandar Nusa Jaya and that due to the acquisition, the plaintiffs were required to leave FTR. Nonetheless, the first defendant (Felcra Bhd) failed to keep their promise i.e to allot the lands to the plaintiffs. The plaintiffs contended that they had been cheated by the first defendant (Felcra Bhd), in that, the plaintiffs did not get any land as promised and that the quantum of damages was inadequate and requested for a higher quantum. The court allowed the plaintiffs' claims against the first defendant (Felcra Bhd) but not to the second defendant (Johor Bahru Land Administrator) and the third defendant (Johor State Executive Council). The second and the third defendants were not liable as there was no alienation of lands decision ever made to the plaintiffs. In other words, the plaintiffs had no *locus standi* and cause of action against the second and the third defendants. The court held that the plaintiffs were the aggrieved parties in the promise as the result of the breach of the first defendant (Felcra Bhd) and thus they are entitled to get appropriate damages from the first defendant (Felcra Bhd).

2.2 WRITINGS AND RESEARCHES ON ALIENATION OF LAND FOR HOUSING DEVELOPMENT PROJECTS

There are few writings and researches which had been undertaken and highlighted some problems in the alienation of lands for housing developers. Due to some problems in the exercise of alienation of land to developers, the purported housing developments are problematic, failed or abandoned. Examples of writings and researches that so far highlight this aspect of land administration (alienation) are:

- 1) Nuarrual Hilal Md. Dahlan, Phd Thesis entitled “Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework”. This thesis was the result of an extensive research conducted by the researcher from 2005 until 2008 at the Ahmad Ibrahim Kulliyah of Laws (AIKOL), International Islamic University Malaysia (IIUM);¹
- 2) Sharifah Zubaidah Syed Abdul Kader, SJD Thesis entitled “Legal Control of Commercial Land Development in Kuala Lumpur and Petaling Jaya”. This Thesis was done by Sharifah Zubaidah Syed Abdul Kader aljunid for her SJD degree from the University of Bond Australia;²
- 3) An article entitled “Power to Decide on Development Applications Under the National Land Code” written by Sharifah Zubaidah Syed Abdul Kader aljunid. This article was published in the IIUM Law Journal in 2004;³
- 4) A book chapter entitled “Perspectives, Policy Issues In Land Use And Environmental Sustainability: The Malaysian Scenario” in a book entitled ‘Land Use Planning and Environmental Sustainability in Malaysia: Policies and Trends’, published in 2006. This book chapter was written by Hunud Abia Kadouf and Sharifah Zubaidah Syed Abdul Kader aljunid.⁴
- 5) Newspaper article written by Dr. Ibrahim Komo in Berita Harian at Rencana section, page 32 on 28 May, 2011 entitled “Kejahilan, Tamak Mengundang Tragedi”.⁵
- 6) A conference paper entitled “A Critical Assessment of Provisions of the Federal Constitution with regard to Federal-State Relationship on Land Law” written by Adibah Awang. This paper was presented at the International Conference on

¹ Nuarrual Hilal Md. Dahlan, *Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework*, Ph.D in law dissertation, International Islamic University Malaysia, Gombak, 2009.

² Sharifah Zubaidah Syed Abdul Kader, *Legal Control of Commercial Land Development in Kuala Lumpur and Petaling Jaya*, Unpublished SJD dissertation, Bond University, Australia, 2001.

³ Sharifah Zubaidah Aljunid, Power to Decide on Development Applications Under the National Land Code 1965: The Position of Selangor [2004] 12 IIUMLJ, 85.

⁴ Hunud Abia Kadouf & Sharifah Zubaidah Aljunid, Perspectives, Policy Issues in Land Use and Environmental Sustainability: The Malaysian Scenario, in *Land Use Planning and Environmental Sustainability in Malaysia: Policies and Trends*, ed. by Hunud Abia Kadouf and Sharifah Zubaidah Aljunid, (Kuala Lumpur: Research Centre, International Islamic University Malaysia, 2006).

⁵ Berita Harian, May, 28 2011. Dr. Ibrahim Komo. *Kejahilan, Taman Mengundang Tragedi*, 32.

Contemporary Issues of Law, Syariah & Legal Research, Faculty of Syariah, University of Jordan, Amman, 14 December 2008.⁶

- 7) An article entitled “Land Conversion, Subdivision and Amalgamation” also written by Adibah Awang, published in Buletin Geoinformasi, April 1997, Penerbitan Akademik Fakulti Kejuruteraan & Sains Geoinformasi.⁷

Some of the salient points emphasized by the above researches and writings are as follows:

- 1) Inadequate coordination and insufficient integrated policies and practices (legal and administrative), between the State Authority, the Planning Authority, the Building Authority, the technical agencies and the housing authority (MHLG) over the purported housing development projects;
- 2) No legal provision in the National Land Code 1965 (NLC) requiring the State Authority to refer to and to be bound by the views of the technical agencies and the planning authority (the professionals) for exercising alienation of lands involving housing development projects;
- 3) Problem of section 108 of the NLC which undermines the function and the relevancy of the planning authority and the local authority acting under the provisions of the Town and Country Planning Act 1976, Street, Drainage and Building Act 1974 and the Uniform Building By-Laws in the exercise of its powers conferred by the NLC, for example in the implementation of the alienation of lands for housing development projects;
- 4) The possible abuse of power by the State Authority in the exercise of alienation of lands for housing development projects;
- 5) The possible abuse of power by the Menteri Besar (Chief Minister) exercised through powers conferred by the Delegation of Powers Act 1956 (Revised 1988);

⁶ Adibah Awang, *A Critical Assessment of Provisions of the Federal Constitution with regard to Federal-State Relationship on Land Law*, Paper presented at the International Conference on Contemporary Issues of Law, Syariah & Legal Research, Faculty of Syariah, University of Jordan, Amman, 14 December 2008, 9, at http://eprints.utm.my/9697/1/AdibahAwang2008_A_critical_assessment_of_provisions.pdf (accessed August 9, 2012).

⁷ Adibah Awang, *Land Conversion, Subdivision and Amalgamation*, Buletin Geoinformasi, Jld 1, Ni. 1, ms 37-44, April 1997, Penerbitan Akademik Fakulti Kejuruteraan & Sains Geoinformasi, 38. http://eprints.utm.my/4851/1/land_conversion.pdf (accessed 9 August, 2012).

- 6) Absence of multi-criteria evaluation and multi-criteria decision making (MCDM) development plans, absence of comprehensive criteria or multi factors affecting housing development projects during the process of approval of alienation of lands;⁸ and,
- 7) The problems and issues emanating from the separation of power and jurisdiction between the Federal Government and State Governments in accord with the provisions under the Federal Constitution in the administration of land, including the power to alienate lands, to the effect that no standardized, coordination and uniformity in the laws and practices of alienation of lands throughout states in Malaysia.

Nonetheless the above researches and writings focus only on the case in Selangor Darul Ehsan. Secondly, the above researches and writings are not current (before 2008). It follows that certain researches should be undertaken to highlight the contemporary issues in the policy and law in exercising alienation of lands by the State Authority for housing development projects in other states as well. Thus, this research and its finding may explain the current phenomena, problems and issues regarding the same, which the previous writings and researches have not or might have not explained. Be that as it may, the above writings and researches at least will serve as “the prior development of theoretical propositions to guide data collection and analysis” that the researcher will implement through the instant research analysis and report.⁹

2.3 THE RESEARCH GAP

One of the lacunae of the above writings and researchers are that the writings focus on the State of Selangor and do not deal with the other states in Malaysia, for instance the state of Kedah Darul Aman. The position of the law, practice and issues in alienation of land for housing development projects in Kedah may be different from what have been highlighted in Selangor. This is because as the administration of land falls under the jurisdiction of states and not the federal government in Malaysia, there may be certain

⁸ Nuarrual Hilal Md. Dahlan, 2009, pp. 340-341.

⁹ Robert K. Yin, *Case Study Research, Design and Methods*, (London: Sage Publication, London, 3rd edn., 2003), pp. 13, 25, 31, 124.

local laws and practices that available in Kedah that can deal adequately with the issues that are similarly faced in Selangor.

The second lacuna in the above writings and researches is that, the findings and analyses done were before 2008. Logically, there might be new development in the laws and practices in the alienation of land for housing development projects after 2008 that have occurred which are warranted for discovery. Thus, new analysis should be carried out to research into the contemporary position, laws and practices in the alienation of land for housing development projects that merit discussion for the sake of knowledge and its dissemination to the benefits of the stakeholders and the interested parties such as the government of the day.

Further, the instant research also discusses administrative law issues such as legitimate expectation, fiduciary duties, vicarious liability, discretionary power and natural justice of the State Authority apart from the constitutional law and land law issues. The administrative law issues have not been dealt with by the above writings and legal literature concerning alienation of lands.

Thus the current and instant research intends to fill in the above gaps and attempt to provide additional analyses and proposals to overcome the problems as illustrated. The instant research also is the first and foremost done in the country that analyses and discusses the legal issues in the alienation of lands for housing development projects in the state of Kedah Darul Aman.

CHAPTER THREE

RESEARCH METHODOLOGY

3.1 INTRODUCTION

There are several types of research methodologies that the researcher used in this research. One of them is the legal research methodology. The other part is social research. Due to this hybrid of methodologies, this research is a socio-legal research.

3.2 RESEARCH DESIGN

This research will apply:

- 1) Legal research methodology; and,
- 2) Social research methodology.

3.2.a Legal Research Methodology

According to Anwarul Yaqin, legal research means a systematic study of legal rules, principles, concepts, theories, doctrines, decided cases, legal institutions, legal problems, issues or questions or a combination of some or all of them.¹

The laws that involved in this legal research are the land law, constitutional law and administrative law relating to power of the State Authority in exercising alienation of lands for housing development projects in state of Kedah Darul Aman. The constitutional law was analyzed in respect of the powers and jurisdiction of the states and Federal Government in Malaysia vis-à-vis the alienation of lands for housing development projects, its issues and problems. On the other hand, the researcher identified and discussed the powers of the State Authority in the alienation of lands pursuant to the provisions under the National Land Code 1965 (NLC), its conditions and requirements as well as its limitation in light of the issue plaguing problematic housing projects. While, in respect of administrative law, the researcher focused on the duties and

¹ Anwarul Yaqin, *Legal Research and Writing* (Kelana Jaya: LexisNexis, 2007), 3.

responsibilities of the State Authority in dispensing its duty in alienation of land towards the stakeholders in housing development projects, namely being the housing developers and purchasers.

The legal research that the researcher undertook is a mixture between applied research and academic research. Basically applied research is concerned with action or practical research in order to improve the applicability of the legal rules.² This research is an applied research as the findings can be used to amend and modify some provisions under the NLC in order to suit the needs of refining better provisions for the benefits of the stakeholders in the alienation of land for housing development projects.³ On the other hand, academic research concerns analyzing and criticizing certain aspects of the law in order to improve the law and the legal theory.⁴ Bearing on the objectives and research questions of this research fit, it is unequivocally clear that this research falls into the definition of applied research and academic research.

In another category, this research too comprises an analytical research, critical research and descriptive legal research. This research is analytical as it involved a careful examination and evaluation of something in order to understand or explain it or draw inferences and conclusions from it. In this research, the examination was done over the laws that contained in the NLC concerning alienation of lands and comparing it with the issues and problems that embrace problematic housing development projects due to the weaknesses in the alienation of land administration. While, critical approach is similar to analytical but it is further meant for examining and judging things carefully, points to inadequacies, drawbacks or disadvantages, expresses opinion, and approves or disapproves something on some rational basis. In this respect, this research can fall under critical research approach because this research examined the problems and issues in the alienation of land for housing development projects. Secondly, apart from evaluating the problems in the alienation of land, this research looked into the provisions under the NLC

² Dr. Mahdi Zahraa, *Research Methods for Law Postgraduate Overseas Students*, (Kuala Lumpur: Stilglow Sdn. Bhd), 1998, pp.18 & 19.

³ Anwarul Yaqin, 132.

⁴ Zahraa, 18 & 19.

which deal with alienation of land and the possible its possible ensuing problems. It follows that, upon the examination of the law on alienation of land and identification of its problems, certain legal ideas and principles can be identified to improve the current laws in the NLC in dealing with the alienation of lands for the benefits of the stakeholders in housing development projects.

On the other hand, descriptive research means to find out what happened, involving ascertainment of the state of affairs of any problems, issues or questions.⁵ The objective of descriptive research is to discover facts or describe actual realities. It is used to ascertain and describe social events, institutions, groups and behavioural patterns.⁶ In respect of this research, this research describes the reasons as to why there are still occurring problems to the housing development projects on lands alienated by the State Authority. The problems include abandonment of the housing projects, landslides, erosion and others to the detriment of the housing development progress. The descriptions are important as they can lead to certain legal ideas and proposals in order to amend or adjust the legal provisions under the NLC dealing with alienation of land.

This research clearly fell under these categories of research – analytical, critical and descriptive researches. This can be proved from the problem statements, objectives, research questions, hypotheses, data sources, the findings and analyses of the findings that have been explained throughout this report.

The nature of this research fits the features of analytical and critical legal research for example this research analyzed, explained, drew inferences and identified the weaknesses in the decision making process in the alienation of land for housing development projects by the State Authority and the land authority.⁷ Further, this research succeeded in finding out issues and problems faced by the housing developers in the alienation of land for

⁵ Anwarul Yaqin, 15—17.

⁶ Ibid., 129.

⁷ Zahraa, 23.

housing development projects, that might have been overseen by the State Authority and the Land Authority.⁸

This research also is a hybrid of two types of approaches. The first one is the theoretical, doctrinal or pure legal research. The second type is the socio-legal research. Doctrinal research means the materials needed by a researcher may be available in libraries, archives and other databases. Normally, the primary sources for doctrinal research are the judgment of the court and statutes. Nevertheless, other sources might also be useful such as Parliamentary Hansard, secondary legal sources for instance article journal, proceedings and seminars or even reliable internet sources. The main objective of this doctrinal research is to discover, explain, examine, analyse and present in a systematic form, facts, principles, provisions, concepts, theories or the working of certain laws or legal institutions based on the stated data sources.⁹ Doctrinal legal research uses specialized legal research tools and legal reasoning to evaluate legal rules to suggest recommendations for further development of the law.¹⁰ According to Mc Conville and Chui, doctrinal research aims to systematize, rectify and clarify the law on any particular topic by a distinctive mode of analysis to authoritative texts that consist of primary and secondary sources. One of its assumptions is that ‘the character of legal scholarship is derived from the law itself’.¹¹

The main sources for this research that had been subject to analyses and examinations are the legal provisions concerning alienation of lands and the relevant case law that concern alienation of land including constitutional law, land law and administrative law. Apart from these, secondary legal literature were referred to for instance legal books, legal articles and proceedings. Thus, this research is a doctrinal legal research.

On the other hand, this research also had, to a certain extent, embraced and fallen under the category of socio-legal research. Socio-legal research is defined as a non-doctrinal

⁸ Ibid.

⁹ Anwarul Yaqin, 10.

¹⁰ Mike McConville & Wing Hong Chui, “Introduction and Overview”, in *Research methods for law*, ed. Mike McConville & Wing Hong Chui (Edinburgh: Edinburgh University Press. 2007), 19.

¹¹ Ibid, 4 &19.

research. It is a field study. It refers to the study of some aspect of 'law in operation', 'law in context', 'uncover actual and factual realities' and 'law in action'. In addition it also means a study of how law operates in a social context or how law deals with a social problem, issue or question.¹² The main references or data sources that this research had been partly relied were from the previous researches' findings and writings dealing with the problems and issues in alienation of lands for housing development projects. These problems will further be augmented with the current phenomena and problems occurring in Kedah involving alienation of lands for housing development projects. The data and information about the problems were accumulated either through file reviews, interviews¹³, observation¹⁴, news from the media, case law, secondary sources such as legal literature, paper proceedings and journal articles as well as legislations.

From this socio-legal research, fresh, original and authentic legal problems can be discovered and identified. These outcomes are not affordable through the use of doctrinal legal research.¹⁵ It follows that the discussion and analyses that this research provided will be more enriching, useful and thorough. Indirectly, this helped the researcher to focus on the 'real', 'live' and realistic issues faced by the stakeholders – the housing developers and purchasers in housing development projects built on land alienated by the State Authority and other housing troubles in Kedah grounded upon 'hard', independent and empirical evidences, data-sources and proof, free from personal views, individual biases, individual judgments and individual prejudices.¹⁶

This legal research is also a library-type. Library-type research means the research and issues involved and their sources of reference are widely available in libraries, internet and computer software. The research activities also included the discovery of the

¹² Anwarul Yaqin, *Ibid.*

¹³ Interview is also considered on the survey methods. See *ibid.*, 149.

¹⁴ Observation is one of non-survey methods. See *ibid.* Observation refers to direct and systematic viewing of people or objects in their natural setting with the purpose of collecting information on any specific matter. Observation is the systematic process of recording the behaviour patterns of people, objects and occurrences without questioning or communicating with the individuals under investigation. See *ibid.*, 157.

¹⁵ Mike McConville & Wing Hong Chui, "Introduction and Overview," in *Research Methods for Law*, ed. Mike McConville & Wing Hong Chui (Edinburgh: Edinburgh University Press, 2007), 4 & 5.

¹⁶ Anwarul Yaqin, *Ibid.*, 10—14.

principles, rules, case law relating to the alienation of lands in order to explain and resolve the issues, problem statements and to achieve the outlined objectives. The sources are normally that of the traditional legal authorities, revolving principally around the land, constitutional and administrative laws that are relevance to the topic under study. The examples of these sources are the statutes, case law, practice notes, circulars and directions etc.¹⁷ Further the sources of this type of research also consist of the contemporary legal textbooks on land, constitution and administrative laws, conferences, seminar and proceedings papers.¹⁸ The main libraries which currently store vast amount of relevant legal literature corpus that had been visited by the researcher for undertaking library research were the International Islamic University Malaysia (IIUM) Library and UUM Sultanah Bahiyah Library.

Apart from the legal position in respect of alienation of lands in Kedah, the laws in New South Wales, Australia and the Republic of Singapore, concerning alienation of land had also been comparatively studied. This study aims at finding certain legal aspects which the Malaysian government (in particular the state of Kedah Darul Aman) and the State Authority (the Kedah State Authority) can learn and adopt for the betterment of the Malaysian land law, policy and practice relating to the land alienation, the State Authority's decision making process and administrative function in considering and approving applications to alienate lands for housing development projects.

It follows that, this research is also a comparative legal research as it compared between the positions in Kedah (Malaysia), the Republic of Singapore and New Wales, Australia as regards the law and practices involved in the alienation of lands for housing development projects. Comparative legal research aims to facilitate the researcher's understanding of the nature, functions and operations of different legal systems and

¹⁷ Mike McConville & Wing Hong Chui, "Introduction and Overview," in *Research Methods for Law*, 1 & 4

¹⁸ Zahraa, 23.

jurisdictions and its impacts on the formulation of public and legal policy in an era of global interdependence.¹⁹

These two foreign jurisdictions were selected, because both jurisdictions apply the Torrens system of land registration similar to that applicable in Peninsular Malaysia. The study of the land law relating to alienation of land for housing development projects in these two jurisdictions and the findings would be beneficial to the improvement of the land law relating to alienation of land for housing development projects in Kedah and Peninsular Malaysia and in particular to address the problematic housing projects in Peninsular Malaysia due to inadequacies and weaknesses on part of the State Authority and decision making process in considering and approving applications for alienation of lands.

The data sources of these two jurisdictions are the relevant website internet, law reports, reported case law, legal books and literature as well as statutes.

Last but not least, this research can be called also an exploratory study. Why had the researcher said so? This is because, this research is the first of its kind that had been undertaken so far in Kedah and generally, in Malaysia, which specifically studied and examined the law and practices of alienation of lands for housing development projects by way of socio-legal research methodology. According to Anwarul Yaqin, an exploratory study works on a relatively unstudied topic or area of knowledge with the purpose of finding out unknown or partly known facts or findings. Under this approach, usually, the objective of the researcher is to develop and suggest some kind of rational explanation and new proposal for his new exploratory research endeavors.²⁰

The findings of this research will be published in the refereed legal literature, journals and in the law seminars and conferences.

¹⁹ Mike McConville & Wing Hong Chui (Eds). *Research methods for law*. Edinburgh: Edinburgh University Press. 2007, 6 & 7.

²⁰ Anwarul Yaqin, 15 & 128.

3.2.b Social Research Methodology

Under this topic, the type of methodology was qualitative methodology rather than quantitative methodology on the reason that the researchers intended to do in-depth and detailed case studies of certain alienations of lands to housing developers for undertaking housing development projects in Kedah Darul Aman. In addition, as the nature of the research is of a case study, it warrants the qualitative approach be employed. Qualitative methodology is concerned with exploring people's life, histories or everyday behaviour that quantitative research is unable to grasp, understanding complex social phenomena, allow holistic and meaningful characteristics of real-life events – individual life cycles, organizational and managerial processes.²¹ Quantitative methodology, on the other hand, limits the information that certain sources could offer. The weakness of the quantitative methodology is that, it is subject to limited variables set out at the outset of the research.²²

David Silverman said:

“Generalizability is a standard aim in quantitative research and is normally achieved by statistical sampling procedures....Such sampling procedures are, however, usually unavailable in qualitative research. In such cases, our data often derived from one or more cases and it is likely that these cases will have been selected on a random basis. Very often a case will be chosen simply because it allows access. Moreover, even if you were able to construct a representative sample of cases, the sample size would be likely to be so large as to preclude the kind of intensive analysis usually preferred in qualitative research (Mason, 1996: 91).”²³

There may be other social and cultural variables and cultures that have not been contemplated and measured by previous researchers or their knowledge. The implications of this defect are that, the results produced may not be confident enough and may not represent the true state of the situation under research. It could be misleading and spurious. Much of quantitative research leads to the use of a set of *ad hoc* procedures to

²¹ Max Travers, *Qualitative Research Through Case Studies* (London: SAGE Publications, 2001), 12-14; Bruce L. Berg, *Qualitative Research Methods For the Social Science*, 2nd. Edition, (London: Allyn and Bacon, 1995), 9 & 10; Joyce V. Zerwekh, Lee SmithBattle, Margaret Diekemper, Mary Ann Drake, “Qualitative Research Experience with a Community Focus,” in *The Researcher Experience in Qualitative Research*, ed. Susan Diemert Moch & Marie F. Gates (London: Sage Publications, Inc, 2000), 35—53.

²² Silverman, 2000, pp. 1, 2, 14, 89 & 90), Yin, 1994, pp. 14 & 15, Yin, 2003, pp. 3, 14 & 15.

²³ Silverman, 102.

define, count and analyze its variable. On this basis, qualitative researchers have preferred to describe how, in everyday life, researchers actually go about defining, counting and analyzing.²⁴

By using the qualitative method, information gathered will be more and enriching as it involves an in-depth and deeper understanding and study of a particular matter. For example, quantitative research could not answer questions and matters which have not been planned or thought about. As regards the administrative and decision making process for considering and approving applications for alienation of lands for housing development projects executed by the Kedah State Authority and Land Authority, it is evident that there are many information that are un-explorable by simply answering the specific set of sample questions affordable by using quantitative research methodology. These matters include the idea of individual context, experience, feelings and intuitions. Thus, it is suggested that it is more prudent to use qualitative research methodology than quantitative research so that the findings and information would be meaningful and enriching. By using qualitative methodology, many new aspects of problems can be identified and thus, once they are identified, suggestions would then follow, resulting in the research results and findings being more valuable, effective, beneficial and practical.²⁵

Further, due to the nature of this research, which is humanistic and subjective, this study will utilize the qualitative research approach.²⁶

In this research, the description is about the phenomena of the administration, decision making process and the law involved and undertaken by the Kedah State Authority and Land Authority in considering and approving applications for alienation of lands to applicant housing developers for development of housing projects at certain particular locations by way of case study. The objective is to get as much as possible the in-depth information about the alienation of lands in Kedah. In regard to the accuracy, it is opined

²⁴ Ibid, 4, 5 & 7.

²⁵ Ibid, 1, 2 & 8.

²⁶ Ibid, 9—11.

that, it would not be a problem as the sources are the preserved and maintained files and documents available in the Kedah Department of Lands and Mines, Kedah Land Offices, the housing developers and the technical agencies. The researcher carried out the case studies based on the file reviews and information available at the selected land offices i.e Kuala Muda Land Office, Pokok Sena Land Office and Alor Setar Office of Lands and Mines. Further the information collected from these data sources will be collaborated and synthesized with the data from the files available from two developers, viz Permodalan Kedah Berhad (PKB) and Darul Aman Realty Sdn. Bhd (DARS). The files and housing development locations are selected based on random sampling method depending on access.²⁷ From these data sources, the data will be triangulated with the other data sources such as the data from the technical agencies (for instance the Department of Town and Country Planning).

Further information will also be elicited via interviews from the officers and the directors of the applicant developers. It should be noted that, these sources are independent sources out of the jurisdiction and control of the researcher. In addition, by having various and multiple sources, triangulations and means of data collection, viz vide the documents, texts (by way of internet search and manual reading), observations (including observation on the housing development project sites), file reviews/archival records/documents and interviews from the above mentioned and related parties and the multiple and various data sources, the data would be more corroborative to each other and will improve the reliability of the other side of data source, thus enhancing their trustworthiness, validity and reliability of the research and its findings. The research had also maintained the chain of evidence (to follow the derivation of any evidence from initial questions to ultimate case studies conclusions) to increase the reliability of the information in the case studies.²⁸

In addition thereto, the data are substantially primary data, not secondary. These sources are direct, authoritative, original, genuine, free from views and not influenced by

²⁷ Ibid, 102.

²⁸ Yin, 2003, 32-38, 45, 80-99, 149-150; Silverman, 98-99.

anybody's opinion. This would also be the case for statutes, legal provisions, reported case law and other legal literature and sources that are referred to in the course of the research writing. Thus, the issue of availability, biasness, reliability, credibility and validity that may be contemplated by opponents of the qualitative research would not be tenable.²⁹

3.3 DATA ANALYSIS

In order to analyse the sources of the data collected and as well as to achieve the research objectives, the researchers relied on the conventional, analytical and comparative legal methods of analyses. The reason why these methods were adopted by the researchers was to make sure that the research objectives mentioned earlier on at the end of the research could be achieved and the research questions answered.

The legal conventional method that the researcher used was to identify the relevant rules and principles, by examining the cases, statutes and law reports derived from the legal literature and the legal data sources, be it primary or secondary. The examinations involved the finding of the facts, principles and precedents that are relevant to the issues under study. Once these are identified, the researcher analyzed them in light of the alienation of land for housing development projects. For instance, what are the legal requirements that the State Authority need to comply with before alienation of land can be made to the interested parties? By analyzing the relevant law relating to alienation of land, the researcher found certain obligations on part of the State Authority that need to be carried out before a valid alienation of land can be exercised. Through this process, the researcher was able to answer the research questions and meet the research objectives.

On the other hand, analytical method refers to identifying the problem situations and ascertaining what elements compose it and what laws are applicable to each part of the subject and its problems.³⁰ For example, through the literature review, the problem statements and the case studies undertaken, the researcher found certain weaknesses in

²⁹ Hammersley, 1992, 163; Mason, 1996, 6; Silverman, 2000, 98 & 99; Charterjee, 2000, 20-27.

³⁰ Zahraa, 57.

the alienation of lands to the developers. Through analytical method, the researcher found the lacunae and loopholes of the law that have rendered the weaknesses to occur. By identifying the weaknesses in the law, the researcher was able to focus the relevant issues in the case studies that thus help the researcher to formulate legal and non legal measure to face the problems. Through both methods i.e. conventional and analytical, the researchers was able to achieve all the research objectives and answered the research questions mentioned earlier on.

As this research also has an element comparative methodology, the researcher, firstly, approached the research by way of comparing between the facts and findings between two case studies on housing development projects viz the housing development project at Gurun (as illustrated in Chapter Four) and the housing development project at Pokok Sena (as illustrated in Chapter Five). The method used in this aspect of research is qualitative case study. The aim of this comparative case studies is to find out the similarities and dissimilarities between these two housing development projects in term of its alienation of lands, problems and issues. The second type of comparative methodology is the legal comparison between the legal positions in the Republic of Singapore and New South Wales, Australia, in respect of the law and practices in the alienation of land for housing development. The objective of this comparative legal research over these two foreign jurisdictions was to compare the positions in Kedah (Malaysia) and to identify the suitable law and practices that can be followed in Kedah (Malaysia) with these two foreign jurisdictions for the betterment in the exercise of alienation of land for housing development in the latter.

CHAPTER FOUR

CASE STUDY ONE

THE PROPOSED MIXED DEVELOPMENT (HOUSING AND COMMERCIAL) ON A LAND KNOWN PM 473, LOT 3842, MUKIM OF BANDAR GURUN, DISTRICT OF KUALA MUDA, (FORMERLY KNOWN AS H.S.(M) 2180, PT 655, MUKIM OF GURUN), KEDAH DARUL AMAN

4.1 INTRODUCTION

The first case study for this research is the proposed housing development located at Land LMS 753/1993. This land was formerly known as H.S.(D) 55/1977, Mukim of Gurun, District of Kuala Muda, Kedah. This land is now known as Pajakan Mukim (PM) 473, Lot 3842, Bandar Gurun ('the said land').

Formerly this land was operated by Koperasi Pekebun Kecil Daerah Kuala Muda/Yan, Kedah Berhad, also known as KODAYA (278082-U), through a Temporary Occupation Grant--LMS No. 753/1993. The land was used as a rubber nursery operated through the Temporary Occupation of Licence (TOL).

The discussion will deal with the application for alienation of land for housing development project by the applicant developer and its approval process. By utilizing the case study method to research into the application and process of approving the alienation application for above proposed housing development project, the questions of 'how' and 'why' relating to such application and its approval process can be answered. After the elaboration of the application and its process, legal analyses will follow suit.

The investigation and discussion, the sources of data and information, and the application for alienation of land and its approval process are summarized and illustrated by **Figure 4.1**.

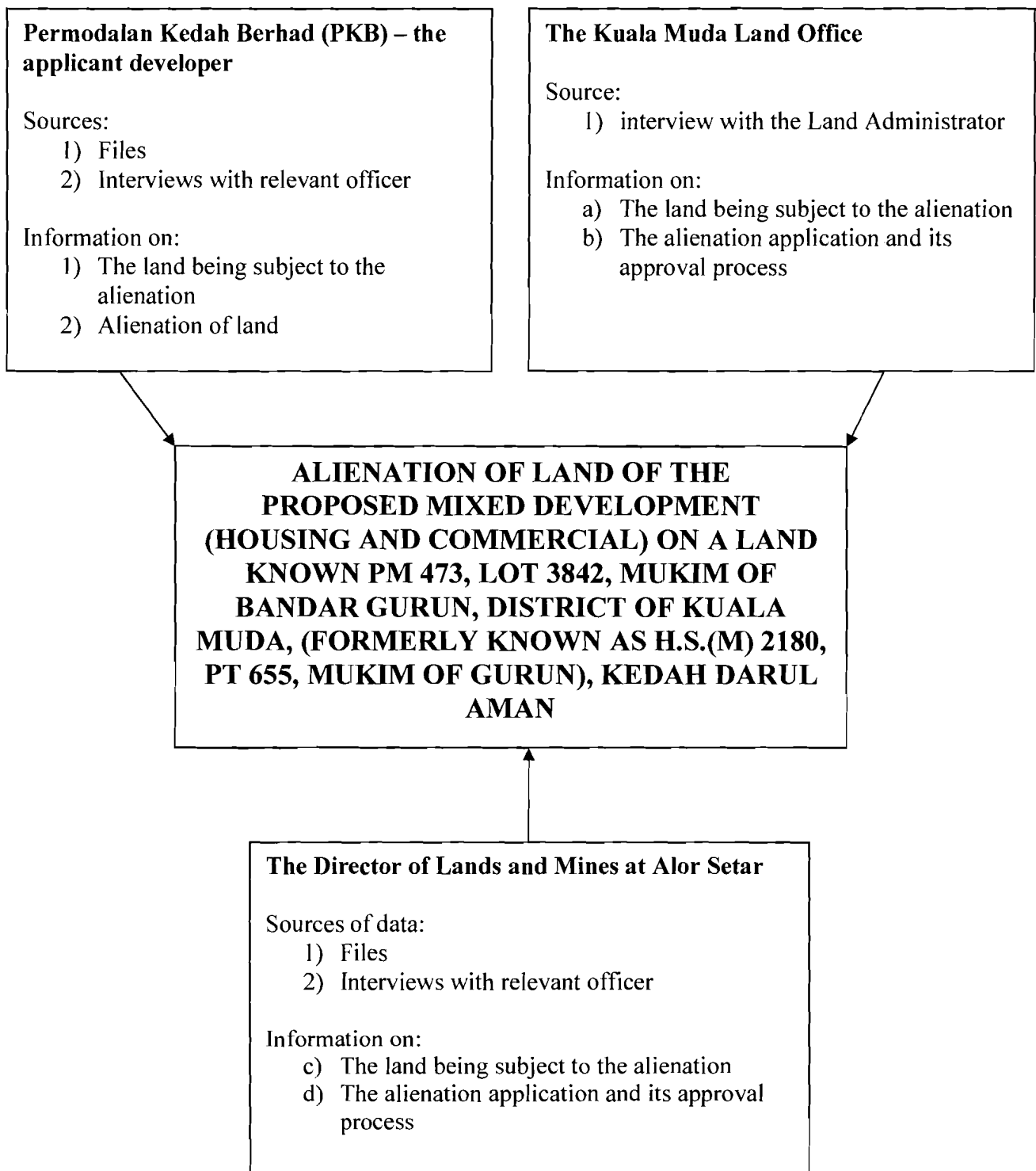


Figure 4.1: Summary of the Sources of Data and Information at the Proposed Mixed Development (Housing And Commercial) on a Land Known PM 473, Lot 3842, Mukim of Bandar Gurun, District of Kuala Muda, (Formerly Known As H.S.(M) 2180, PT 655, Mukim of Gurun), Kedah Darul Aman.

4.1.a. Location

The location of the said land is at Kampung Kilang Ketapan, Gurun, beside the Gurun Forest Ranger office. The width of the said land is 16.87 acres. The said land was not a Malay Reserved Land, located approximately 5 km to the southward of Gurun Town. The distance between the said land and Bandar Sungai Petani is 23 km, whereby Sungai Petani lies at the southward of the said land. There are two housing estates in the vicinity of the said land, namely Taman Lindungan Jerai and Perumahan Awam Sri Jerai. The said land locates between the Sungai Petani-Alor Setar Federal Road and the Bukit Mertajam-Alor Setar Railway Line.¹ (see pictures 5.1 until 5.20).

4.1.b. Brief History Of The Said Land

This land was operated by KODAYA.² KODAYA was a cooperative society registered under the Cooperative Act 1948 (amended in 1993) with registration number IP5430/1 on 28 August 1980. The area of operation of KODAYA is the Kuala Muda District and Yan, Kedah Darul Aman. Currently the cooperative consists of 2006 members with 100% of the Malay race. The accumulated share of the cooperative is RM 418,512.78.³

The TOL land status was issued on 11 September 1991 by the State Authority (the Kedah State Executive Council). This land was used as a rubber nursery by KODAYA. As KODAYA had occupied the said land since 1988 and incurred costs for maintaining and developing the land amounted to RM 73,132.84, all the cooperative members agreed to apply to the state for the State Authority to convert the land (TOL land) into a freehold land favourable to KODAYA. Nonetheless, their application to the State Executive Council was rejected. Likewise was their application to the Menteri Besar at that time. On the other hand, the Menteri Besar suggested to KODAYA to form a joint venture with

¹ Kertas Mesyuarat No. 5.1.1, Cadangan Pembangunan Bercampur di Atas Tanah LMS 753/93, Kg. Kilang Ketapan, Mukim Gurun, Daerah Kuala Muda, Kedah, in Permodalan Kedah Berhad File No. PKB/O/KM.40/01 JLD 1.

² A report on Proposed Mixed Development (Housing & Commercial) on H.S.(M) 2180, PT 655, Mukim of Bandar Gurun, District of Kuala Muda, Kedah in Permodalan Kedah Berhad File No. PKB/O/KM.40/01 JLD 4.

³ Ibid.

Permodalan Kedah Berhad (PKB) being the State's Government Linked Company (GLC) to develop the said land.⁴

4.2 THE PROPOSED JOINT VENTURE BETWEEN KODAYA AND PERMODALAN KEDAH BERHAD (PKB)

There was a joint venture agreement between PKB and KODAYA in 70-30 ratio. PKB would be responsible on all development matters on the said land. To develop the said land, PKB agreed to find a project developer and this would also be in a joint venture. On 31st October 2001, KODAYA received an official offer letter from a project developer, by name of Setarai Damai Sdn. Bhd (183067-U) ('Setara')⁵ to develop the said land by way of joint venture with PKB into a commercial and housing development project. The said land would be developed with 77 units of terrace houses, 50 units of double houses, 2 units bungalow house and 19 units of shop-house. The potential purchasers would be the KODAYA members and local Gurun people. The development cost would be RM 8,989,000.00 and the sales would be RM 11,950,000.00, leaving a gross proceeds of RM 2,961,000.00. This gross proceed would be divided between PKB, KODAYA and the joint venture developer – Setara.⁶

On 3rd December 2001, the PKB's Board of Director agreed with Setara to jointly develop the said land by way of joint venture together with KODAYA subject to certain conditions. The proposed project is known as A Proposed Mixed Development (Housing and Commercial) on government land at Mukim of Gurun, District of Kuala Muda, Kedah.

⁴ Id, and Permodalan Kedah Berhad File No. PKB/O/KM.40/01 JLD 2.

⁵ Setara Damai Sdn. Bhd's registered and business address is at No. 1303, 13th Floor, Menara PJ, AMCORP Trade Centre, No. 18, Jalan Persiaran Barat, 46200 Petaling Jaya, Selangor Darul Ehsan. The company is an investment holding company. The directors are Cheah Soo Ling, Chean Min Loong and Ng Yune Ming (secretary). From the profit and loss account, the un-appropriated profit of the company which was carried forward from the previous year was RM 1,392.00 and the unappropriated profit brought forward was RM 2,030.00. While from the balance sheet the current asset of the company was RM 1,980.00 with current liabilities of RM 488.00. This information is based on the Permodalan Kedah Berhad File No. PKB/O/KM.40/01 JLD 2.

⁶ Kertas Mesyuarat No. 5.1.1, Cadangan Pembangunan Bercampur di Atas Tanah LMS 753/93, Kg. Kilang Ketapan, Mukim Gurun, Daerah Kuala Muda, Kedah in Permodalan Kedah Berhad File No. PKB/O/KM.40/01 JLD 1.

The JV between PKB and Setara Damai Sdn. Bhd was effected on 7 February 2006.⁷ The JV provided that PKB as the land proprietor and that Setara as the project developer to develop the land. Among the terms in the JV are these:

- 1) Setara shall be appointed as the contractor/developer to the said mixed development project on the said land;
- 2) All development costs shall be borne solely by Setara;
- 3) The gross proceeds receivable from the development of the project would be RM 2.68 million;
- 4) The proceeds to be received by PKB would be RM 1,405,515.00. PKB will discuss with KODAYA regarding the latter's entitlement to the proceeds viz RM 421,654.50 representing 30% of the proceeds that would be received by PKB;
- 5) The mode of payment of the respective parties to the JV agreements shall be as follows:
 - a) Setara shall pay RM 100,000.00 to PKB on the execution of the JV agreement⁸;
 - b) Setara shall pay the land premium of 1,274,485.00 as prescribed under Notice 5A issued by the Land Authority (Kuala Muda Land Administrator);
 - c) The subsequent payments shall be made after the contractor/developer's licence and sale permit have been issued by the Ministry of Urban Wellbeing, Housing and Local Government (MUWHLG);
 - d) The subsequent payments shall be made according to the progress development and this would be further discussed by the respective parties to the JV agreement.

In order to grant an authority and power to the developer (Setara) to execute and implement the housing development project on the said land, a Power of Attorney (PA) had been executed between PKB as the donor and Setara as the donee/attorney on 3 August 2006.⁹ Among the terms in the PA are as follows:

⁷ The JV also mentioned that one i-PEC Consultants will be appointed as the planner for the development.

⁸ This payment was paid by Setara to PKB on 27 January 2006 to the Kuala Muda Land Administrator.

⁹ Power of Attorney between PKB and Setara dated 3 August, 2006 in PKB's file number in file PKB/0/KM.04/01 JLD 2 and in Pejabat Tanah dan Galian Kedah in file number PTG.KED/A/121/2010.

- a) the developer (Setara) had agreed to develop the said land into a housing estate on certain terms and conditions;
- b) PKB appointed the developer to be PKB's attorney to deal with all matters in connection with the said land and in connection with the sale and the development of the said land into a housing estate;
- c) In consideration of the developer's agreement to develop the said land, PKB revocably appointed the developer to execute and perform at the developer's costs and expenses all or any of the following acts and things concerning the sale and development of the said land into a housing estate, *viz*:
 - i) to apply to the appropriate authorities for subdivision, conversion, merger and surrender and re-alienation of the said land into individual building lots; and,
 - ii) to deal with, look after and manage or superintend the management of all the PKB's (as donor) rights, titles, shares and interests to and in any manner whatsoever and to enter the said land or any part thereof as often as the developer (as attorney) shall think fit.

4.2.a Application For Alienation Of Land

On 24 March 2002, PKB applied for an alienation of the said land from the State Authority. The application was made at the Kuala Muda Land Office/Kuala Muda Land Administrator.¹⁰ The application was supported by an application letter, application payment and statement of the purpose of alienation *viz* to carry out mixed development project by way of a joint venture with KODAYA and Setara Damai Sdn. Bhd on the said land. The application was further supported by a report of a licensed land surveyor—Jurukur Chai & Rakan-rakan¹¹ on the physical conditions of the said land, a report by one

¹⁰ Letter dated 24th March, 2002, from PKB CEO (Dato' Mat Rejab bin Kassim) to the Kuala Muda District and Land Administrator, Kuala Muda District Land Office, 08000 Sungai Petani, Kedah, in Report on Proposed Mixed Development (Housing & Commercial) on H.S.(M) 2180, PT 655, Mukim of Bandar Gurun, District of Kuala Muda, Kedah (Location of the Land: Kilang Ketapan) in file PKB/o/KM.40/01 JLD 3.

¹¹ Of No. 25, Tingkat Satu, Kompleks Perniagaan Sultan Abdul Hamid, Persiaran Abdul Hamid, 05050 Alor Setar, Kedah. The licesend land surveyor responsible to undertake the survey work was one Lee Seng Huat.

i-PEC Consultant¹², information of Setara and the Memorandum of Understanding ('MOU')¹³ between PKB, KODAYA and Setara. The application was also enclosed with copies of layout plan of the said land for consideration and administration of the Kuala Muda Land Administrator.

According to a report prepared by a land surveyor Messrs Jurukur Chai & Rakan-rakan, before the alienation was taken place, there were boundary stones on the said land. The said land was of a measurement was 64,886 square meters or 16.034 acre. The said land also were covered by bushes and palm oil trees. On the left side of the said land there were palm oil tree nursery area belonged to KODAYA. While beside the nursery lies an eating stall and a vacant hall. According to the land surveyor report, there were about 56 houses erected and occupied by illegal squatters on said the land. Through a site visit and observation by the researcher, even after the alienation, the illegal squatters are still residing on the said land. There are also a vacant land meant for football field, a mosque and a Hindu temple. See pictures 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, 4.7, 4.8, 4.9 and 4.10 at the ending pages of this chapter.

According to an information of the Kuala Muda Land Administrator office and the Alor Setar Director of the Lands and Mines Office, the said land was a country land (tanah desa), situated in the Mukim of Gurun, not being a Malay Reservation Land and the said land was not subject to the Sungai Petani Municipal Council Assessment. The said land was also of a Temporary Occupation of Licence (TOL) land granted to one Koperasi Pekebun Kecil Daerah Kuala Muda/Yan pursuant to LMS No. 753/93. According to the visual investigation by the Settlement Officer ('SO') – by name of Rajah Arjunan of the Kuala Muda Land Administrator Office, generally, the height level of the said land was quite low with 0.5-1 meter from the Bedong-Gurun Federal Road level. There were 20-30 palm oil trees of 6 year age worked by KODAYA on the said land. Nevertheless there

¹² Of No. 173, Tingkat 1 (Unit 2), Pusat Bandar Taman Ria Jaya, Jalan Kelab Cinta Sayang, 08000 Sungai Petani, Kedah.

¹³ The memorandum stated that PKB, KODAYA and Setara agreed with the proposed joint venture project and that no parties are allowed to vest in the project or commit any external obligation with other parties without written consent of all the parties to the memorandum.

was no building erected on the said land.¹⁴ The portion of land that was subject to the alienation application included portions 1 and 2. Portion 1 (LMS No. 754/2002) was approved for a TOL as a nursery area to one Jaapar bin Harripin since 1993. This portion was about 1.238 hectare. According to the SO investigation, on the said nursery TOL portion 1 area there was a wooden house with measurement of 20 x 30 square feet.¹⁵ Probably this house belonged to Jaapar Harripin, being the TOL holder to that part of land.

On the other hand, portion 2 (LMS 1495/2002) was also a TOL Land granted to one Ramlah@Sifah binti Cha for the purpose of carrying out eating stall/restaurant operation in 2001. On the said land there was a wooden house with 20 x 29 square feet and a restaurant or about 929 square meter.¹⁶

In addition, according to the SO, the road and the railway reserves of the said land were adequate. The said land also had not been subjected to any government development plan. The estimated value of the said land was at the rate of RM 107,540.00 per hectare.

The said land was sided by a Federal main-road at its western side. On its eastern side, there is a railway line connecting Bukit Mertajam to Arau in the north Peninsular Malaysia. A Forest Ranger office was at the northern side of the said land. To the south of the said land, there was a land with agriculture status. The said land also is situated 2.5 km southward of Bandar Gurun. The width of the land was 64,886 square meter.¹⁷

¹⁴ However, contrary to the visual observation by the author, there are many illegal squatters entered the said land and erected permanent concrete brick houses.

¹⁵ Kertas Kerja bagi permohonan Tanah Kerajaan oleh Permodalan Kedah Berhad in file PTG KED K/2100/2004/03. See also Laporan Pegawai Petempatan in the Kedah Director of Lands and Mines office's file number PTG KED K/2100/2004/03.

¹⁶ Ibid.

¹⁷ Id.

Based on the file review, the researcher discovered that the application for alienation of land was approved by the State Authority on 22 June 2005.¹⁸ The conditions of the alienation were the following:¹⁹

- a) the application for the alienation was approved but the alienation would not involve the two (2) TOL lands that are still in operation by the legal TOL holders;
- b) the width of the land involved in the alienation was 14.252 acre (57,676 square meter) at Kampung Kilang Ketapan, Mukim of Gurun, District of Kuala Muda granted to PKB for the purpose of building residential houses subject to certain expressed conditions and restrictions in interest.

Thus there was about 3 ½ year for the State Authority to process and consider the application.

After the alienation, on 25 September 2005 the Kuala Muda Land Administrator issued a Form 5A notice to PKB and required PKB to pay the land premium and other costs amounted to RM 1, 274,485.00. The width of the alienated land is 57,676 square meter or 14.25 acre and the condition is for residential purpose.²⁰ Only on 14 February 2008 was premium paid to the Kuala Muda Land Administrator office. The issue document of title bore PKB's name as the proprietor. The registration of the proprietorship was made on 5 June 2008. The reference number for the said alienation land is PT No. 655, Bandar Gurun, District of Kuala Muda, Kedah situated at Kampung Kilang Ketapan. This land was gazetted as a leasehold land for 99 years and shall only expire on 4 June, 2107.²¹

¹⁸ Cabutan Keputusan Majlis Mesyuarat Kerajaan Negeri Kedah Darul Aman, Kertas No. 7(E)197/2005 in the Kedah Director of Lands and Mines office's file number PTG KED K/2100/2004/03.

¹⁹ Ibid.

²⁰ The issue document of title in PTKM(k)/4/25/89 and in file PKB/O/KM.40/01 JLD 3.

²¹ Kertas Kerja bagi permohonan Tanah Kerajaan oleh Permodalan Kedah Berhad in file PTG KED K/2100/2004/03 and in the working paper prepared by one Yazlan Sunardie b Che Yahaya, being a Penolong Pentadbir Tanah II, Kuala Muda to Dato' Pengarah Tanah dan Galian, Negeri Kedah, Wisma Negeri, 05576 Alor Setar in fail No. PTG KED K/2100/2004/03.

4.2.b Comments from the Technical Agencies

There were several federal government and state government agencies that had been referred to by the State Authority in determining the application for the said alienation.

These agencies were as follows:

- 1) Department of Town and Country Planning (Jabatan Perancangan Bandar Dan Desa Negeri Kedah ('JBPB'))
- 2) Kuala Muda/Sik Public Works Department ('JKR')
- 3) Majlis Perbandaran Sungai Petani
- 4) Keretapi Tanah Melayu Berhad ('KTMB')

The following are the comments and views forwarded by these agencies to the State Authority.

- 1) Kedah Department of Town and Country Planning (Jabatan Perancang Bandar Dan Desa Negeri Kedah)

According to this department, pursuant to the Sungai Petani Local Plan gazetted on 31 January 2002, the said land fell under the residential zone and Mukim land lots. The said land is also adjacent to the main road which allows and suitable for erection of shop and commercial buildings for business.²² This department had no objection to the proposed development on the said land as the proposed developer would fulfill the Sungai Petani Local Plan projections. This department was also of the opinion that the purported development on the land should also exempt the TOL land worked by the TOL holders *viz* Jaafar bin Harripin and Ramlah @ Sifah bt Cha. Alternatively, if the TOL was to be used, this department suggested the developer to replace other lands to Jaafar and Ramlah for them to work on the lands.²³

- 2) Kuala Muda/Sik Public Works Department (Jabatan Kerja Raya Kuala Muda/Sik)

²² Letter from the Kedah Department of Town and Country Planning to Permodalan Kedah Berhad dated 12 October 2003 in file PKB/0/KM.04/01 and in file Department of Town and Country Planning, Alor Setar JPBD/KG/19330.

²³ Letter from Department of Town and Country Planning Negeri Kedah to Land Administrator, Kuala Muda Land Office dated 5 March 2003 in file PTG KED K/2100/2004/03.

In the view of the Public Works Department, they had no objection against the developer's intention to carry out development on the said land. Nonetheless certain conditions needed to be fulfilled:²⁴

- a) The proposed development site must take place beyond the existing road reserve;
- b) The proposed site must be surrendered to the State Government without any compensations, in return, if the developer later wishes to re-develop the said land;
- c) The applicant developer was required to construct sewerage lines in a prescribed measurement at the main entrance and the main exit leading to the purported project site.

3) Majlis Perbandaran Sungai Petani (Sungai Petani Town Council)

This agency basically had no objection against the proposed development on the said land which was to be carried out by the developer.²⁵

4) Keretapi Tanah Melayu Berhad (KTMB)

This agency required full information of the below matters, before they could provide any comments over the purported development on the said land:

- a) the detailed land survey plan endorsed by the licensed land surveyor and which was capable of showing the position of the railway reserve and the land that was to become the subject of the said application.
- b) Development plan that would be carried out by the applicant developer including the layout plan of the said development.
- c) Revision over the intended development application should also be required, if warranted, to ensure the smooth running of the double track railway line works if the applicant developer wished to commence the purported development on the said land.

²⁴ Letter from Kuala Muda/Sik Department of Public Works dated 11 March, 2003 to the Kuala Muda Land Administrator in file number PTG KED K/2100/2004/03.

²⁵ Letter from Majlis Perbandaran Sungai Petani to Kuala Muda Land Administrator without date in file number PTG KED K/2100/2004/03.

4.2.c Problems on the Said Land

The problem in the development of the said land is the issue of illegal squatters who have been residing and building illegal houses and buildings on the said land.²⁶ They have resided on the said land even before the State Authority alienates it. According to an investigation in 2005, there were about four (4) illegal concrete buildings having been built on the said land. These buildings were a house, a hall, a store and a warehouse/godown. In 2006 and 2007 there were additional buildings on the said land. These included a Muslim praying hall (surau), a public hall, nine (9) houses, an eating stall and a motorcycle workshop. However, a site inspection by the researcher found that in 2012, there were numerous illegal houses and buildings have been built on the said land. The residents who had been identified occupying the said land and their respective addresses are as follows:

- a) Mansor bin Yahaya of Lot 035, Kampung Kilang Ketapan, 08300 Gurun, Kedah;
- b) Rosli bin Baharom of No. 24, Kampung Kilang Ketapan, 08300 Gurun, Kedah;
- c) Said bin Ahmad of No. 25-B, Kampung Kilang Ketapan, 08300 Gurun, Kedah;
- d) Navabsa bin Ibramsah of No. 6, Taman Sri Utama, 08300 Gurun, Kedah;
- e) Azmi bin Yahaya of No. 267, Jalan Seroja 2/7, Persiaran Amanjaya 2, Bandar Amanjaya, 08000 Sungai Petani, Kedah;
- f) Mat Azmi bin Hassan of No. 2-B, Kampung Risda, 08300 Gurun, Kedah;
- g) Abd. Halim bin Abd Rahman of Kampung Dato Abdullah, Simpang 3, Sungai Limau, 06680 Alor Setar, Kedah; and,
- h) Zakaria bin Samat of No. 30, Kampung Kilang Ketapan, 08300 Gurun, Kedah.

In another news, KODAYA admitted that during their TOL tenure over the said land, they had unilaterally rented part of the said land for occupation to more than 10 people at

²⁶ Ammar Bin Dato' *Shaikh* Mahmood Naim, interview by author, 23 May, 2013, Sungai Petani, Kedah, Kuala Muda Land Administrator, Sungai Petani, Kedah, note writing.

the rate of RM 30.00 per month chargeable on each occupant. These illegal occupants included Anita Ismail, Azmi Yahaya, Zakaria Samat and Faridah Aziz. On discovering this, PKB requested KODAYA not to rent to other new people any more and they should stop this illegal rental. PKB also required KODAYA to evict these illegal squatters off the said land. On 27 October 2009, PKB appointed one Messrs Omayah, Nawal & Partners, advocate & solicitor, to commence legal action against the illegal squatters residing on the said land. On 15 December 2009, PKB board of directors unanimously agreed that all illegal squatters on the said land must be evicted failing which legal action would be commenced against them. On 1 February 2010, through Messrs Omayah, Nawal & Partners²⁷, PKB had submitted eviction notices on all the illegal squatters on the said land and requested them to deliver vacant possession of the land to PKB. The notice stated that, the squatters must vacate the land in 3 months from the date of the notice. The 3 month notice expired on 30 April 2010. As the squatters failed to respond positively to the said eviction and vacant possession notices, PKB had not other alternative but to commence legal actions against them in the Sungai Petani Sessions Court.²⁸

Apart from this there are a few people who have been using parts of the said TOL land as nurseries. These persons are Ramlah @ Sifa bt Chik and Jaafar bin Harripin, who hold, TOL lands with registration numbers LMS 754/02 and LMS 1495/2002, respectively. PKB applied to the State Authority to exempt these two TOL lands from being subject to the said alienation.²⁹

4.2.d. Issues In The Alienation Process By The State Authority

- 1) The State Authority was not bound by any directives, guidelines and procedures adopted by the Federal Government agencies such as the Director General of Lands and Mines and the technical agencies in dealing with the application for alienation of land;
- 2) The technical agencies referred by the State Authority were not adequate;

²⁷ Of No. 1562, 1st Floor, Jalan Kota, 05000 Alor Setar, Kedah.

²⁸ Report in the PKB's file with reference: PKB/0/KM.04/01 JLD 2.

²⁹ Ibid.

- 3) The State Authority was not bound by the views of the planning authority;
- 4) Inadequate coordination and integrated approach between the decision and policies of the State Authority and the technical agencies in dealing with application for alienation of land for housing development projects;
- 5) The application for alienation of land took about 3.5 years to finalize and this had caused unnecessary waiting costs to the developer (Setara).

4.2.d.i *The State Authority Was Not Bound By Any Directives, Guidelines And Procedures Adopted By The Federal Government Agencies Such As The Director General Of Lands And Mines And The Technical Agencies In Dealing With The Application For Alienation Of Land*

According to one Madihah Mohd Mokhtar, an executive at PKB, the application for alienation of land in Kedah in respect of the instant land was subject solely to the discretions of the State Authority. They had the absolute power and authority to impose any conditions that it thought expedient. For an example even though the exemption of a duty to build low cost houses had been given to the developer and the proprietor, they were still subject to a levy of RM 10,000.00 per unit. In this case, the State Authority also did not refer to the Ministry of Urban Wellbeing, Housing and Local Government (MUWHLG) as the housing authority to determine the fitness of the developer and the suitability of the project location. Neither was there any formal investigation conducted to determine the degree of market demand for housing in Gurun area. According to Puan Madihah, initially Setara, being the JV partner in the development, proposed to the Menteri Besar ('MB') at that time (Dato' Seri Syed Abdul Razak) to develop the said land. However, as the land was a state land, the developer could not proceed with the intended development. They had to form a joint venture arrangement with the Kedah Government Linked Company (GLC) in order to get the said land. To effect this plan, the Menteri Besar requested Setara to discuss with PKB. The method of the development would that, PKB would apply alienation of land from the State Authority and then once the application approved, the developer could proceed with the development of the project. The cost of construction, including the alienation costs and premium would solely be borne by the developer (Setara). Thus, it is opined, this project is a political

project as the MB himself involved in the initial planning for the development of the project. In approving and examining the application for alienation, the State Authority did not refer to the Department of Environment (DOE) and Department Mineral and Geo-Science to determine the suitability of the project location and fitness of its soil. Nonetheless, there were certain agencies that the State Authority had received feedbacks for instance the Kedah Department of Town and Country Planning (Jabatan Perancang Bandar & Desa Negeri Kedah)³⁰, Keretapi Tanah Melayu Berhad (KTMB)³¹, Public Works Department³², and Majlis Perbandaran Sungai Petani³³.

4.2.d.i.a *The Power of the State Authority to Alienate Land*

The Malaysian Federal Constitution (FC) provides certain powers to the State Government to make laws on certain matters and to carry out their executions. These powers are specifically spelt out in List II (State List) and List III (Concurrent List)³⁴ to the 9th Schedule of the FC and read together with article 74 and article 80 FC.

One of the powers of the state is over land matters (List II(2)(a) to 9th Schedule FC). The power over land includes power to alienate land. This is elaborated clearly and enshrined in section 76 of the National Land Code 1965 ('NLC'). Accordingly, 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.³⁵ The

³⁰ Letter from JPBD Kedah to Pentadbir Tanah, Pejabat Tanah Kuala Muda, 08000 Sungai Petani, Kedah dated 5 March 2003 in file PTG KED K/2100/2004/03.

³¹ Letter from Keretapi Tanah Melayu Berhad to Pentadbir Tanah Kuala Muda dated 15 January 2004 in file number PTG KED K/2100/2004/03.

³² Letter from JKR to Pentadbir Tanah Kuala Muda dated 11 March, 2003 in file number PTG KED K/2100/2004/03.

³³ Puan Madiah Mohd Mokhtar, PKB's General Executive, interview by author, 21 February 2012. See also letter from MPSP to Pentadbir Tanah dan Daerah Kuala Muda not dated in file number PTG KED K/2100/2004/03.

³⁴ Note that pursuant to section 9C of the Concurrent List (List III) to the 9th Schedule, both the Federal Government and the State Government have power to deal with Housing and provisions for housing accommodation.

³⁵ See section 5 NLC read together with 8th Schedule to the FC and the decision in *Lebbey Sdn. Bhd v Chong Wooi Leong & Anor* [1998] 5 MLJ 368. See also section 3 of the SDBA and section 2 of the Local Government Act 1976 (Act 171). (LGA). However in section 2 of the LGA, State Authority is defined as, *inter alia*, the Ruler in-Council or Governor-in-Council. In *Lebbey Sdn. Bhd. v. Chong Wooi Leong & Anor & other Applications* [1998] 5 MLJ 364 at p. 374, 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". EXCO means the members of the State Executive Council. See also *Honan*

State Authority may alienate land to any person or body subject to conditions as prescribed under the NLC (sections 76 and 79(2) NLC).

In the exercise of alienation of land and its decision making process, the State Authority, it seems that, has an absolute power.³⁶ Its power prevails over other bodies for instance the planning authority. This can be illustrated in section 108 of the NLC – that where there is a conflict between a by-law or restriction imposed by the planning authority and any condition imposed under the NLC, the latter shall prevail. Hence, this statutory provision undermines the importance of the views and advice of the planning authority. In other words and an implication, the State Authority is allowed not to refer to the planning authority for advice and views in the alienation of land. Similarly, the State Authority though having received the views and advices by the planning authority in the course of making decision involving alienation of land, they are still not bound by the latter's advices or views.

Nonetheless to ensure prudence, good judgment/decision, coordinated and informed decision and good governance in dealing with the application for alienation of land, the State Authority may refer to certain professional standard practices or federal directives/policies issued by the National Land Council (NLCL) and the standard procedures prescribed by the Federal Director General of Lands and Mines such as federal land administration circulars issued from time to time³⁷ and the NLC land

Plantations Sdn. Bhd. v. Kerajaan Negeri Johor [1998] 5 MLJ 129 at 150-151, *Yee Seng Plantations Sdn. Bhd. v. Kerajaan Negeri Terengganu & 3 Ors* [2000] 3 AMR 3208. See also section 34(1) of the Laws of the State of Kedah Darul Aman ('the Kedah Laws'), where it states that the executive authority of the State shall be vested in the Ruler and exercisable, subject to the provisions of any State law, by Him or by the State Executive Council or the Menteri Besar but the Legislative Assembly may by law confer executive functions on other persons. Pursuant to section 39(1) of the Kedah Laws, the Ruler shall act in accordance with the advice of the Executive Council or of a member thereof acting under the general authority of the Council except as otherwise provided by the FC or the Kedah Laws. Pursuant to paragraph 1 to Schedule 8 of the FC, the ruler or governor must act on the advice of the State Executive Council. Thus, State Authority under the NLC refers to the ruler or governor acting upon the advice of the State Executive Council insofar as the functions under the NLC are concerned.

³⁶ Nuarrual Hilal Md. Dahlan, *Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework*, Ph.D in law dissertation, International Islamic University Malaysia, Gombak, 2009, 215. See also article 95 FC which states that the Federal Government cannot inspect any activities of the State Government involving matters that fall under the exclusive legislative authority of the State.

³⁷ See circulars issued by the Director General of Lands and Mines of Ministry of Natural Resource and Environment, Putrajaya, from time to time.

manual³⁸. This practice includes the need to refer and get advices and views from relevant authorities for example the Department of Town and Country Planning (Jabatan Perancang Bandar dan Desa (JPBD)), Department of Water and Irrigation (Jabatan Saliran dan Tali Air) and Department of Public Works (Jabatan Kerja Raya (JKR)) and be bound by these professionals' views before alienation of land can take place. These referral authorities may consist of the appropriate authorities³⁹ and/or technical agencies⁴⁰.

From the case study, it is evident that State Authority has failed to get sufficient and appropriate advices and views, inadvertently or otherwise, from the relevant authorities (appropriate authorities and technical agencies) in the exercise of land alienation or that the decision of the State Authority in alienation of land is not grounded on certain good, informed decision and professional considerations. For instance in Taman Lingkaran Nur Kajang, Selangor, the State Authority failed to alienate land to suitable housing developers for the developers to carry out certain development on the alienated land or that the alienated land is not suitable for housing development projects' purposes. These may result in the purported housing development not succeeding to the detriment of the stakeholders (for example the purchasers). This problem is evident in the occurrences of abandoned housing projects, floods, soil erosions and land slides which have caused heavy injuries and huge losses to the interested parties and stakeholders, especially the purchasers and the developers.

³⁸ See Koperasi Pegawai Pentadbiran dan Pengurusan Tanah Malaysia Berhad, Manual Kanun Tanah Negara, 2003, Koperasi Pegawai Pentadbiran dan Pengurusan Tanah Malaysia Berhad dengan kerjasama Jabatan Ketua Pengarah Tanah dan Galian, Kuala Lumpur.

³⁹ Pursuant to section 5 NLC, 'appropriate authority' means 'when used in relation to any consent or approval, means the authority having power under any written law to grant such consent or approval, as the case may be'. Instances of the appropriate authorities are the Department of Sewerage Services (Jabatan Perkhidmatan Pembetungan (JPP)), Tenaga Nasional Berhad (TNB), Ministry of Urban Wellbeing, Housing and Local Government (MUWHG) and the Department of Environment (Jabatan Alam Sekitar (JAS)).

⁴⁰ The definition of 'Technical Agencies' has not been defined in the NLC. It is opined, technical agencies should be the agencies that the State Authority should refer to for views other than the appropriate authorities. It is opined that technical agencies, for instances, may include Department of Mineral and Geo-science (Jabatan Mineral dan Geo-sains), Department of Irrigation and Canal (Jabatan Parit dan Saliran) and the Economic Planning Unit of the Prime Minister Department.

In the view of the researcher, the State Authority has an absolute power and not be bound to anybody in the alienation of land, not even the National Land Council ('NLCL') and the Federal Government unless restricted by the FC and NLC. NLCL is a body established under FC consisting of the representatives from the Federal Government and the State Government (article 91(1) of the FC). Its duty is to formulate from time to time in consultation with the Federal Government, the State Governments and the National Finance Council a national policy for the promotion and control of the utilization of land throughout the Federation for mining, agriculture, forestry or any other purpose, and for the administration of any laws relating there to (article 9(5) and (6) of the FC)). Once formulated and the required consultancy has successfully been conducted, the policy so formulated shall become binding on the Federal and State Governments to follow (article 9(5) and (6) of the FC). Unless and until there has been a consultation between the Federal and State Government over certain land policies, the NLCL's land policies, it is submitted, are not binding on both the Federal and State Government including the State Authority.⁴¹

NLCL is conferred with legislative functions, comprises of State Representatives with a Federal Minister as Chairman. This means that while the states have a choice in this body, the control lies with the federal government. The question is this: since land is a state matter, whether it is mandatory for the State Authority to abide by the policy formulated by the NLCL? The NLCL has in the past formulated broad based policies on squatters, land speculation and use of land for industries. As land is a state matter it can be expected that each state will want to decide on what it can do with its land rather than be subjected to a national policy. Hence, the ground for the diversity in land use policy amongst the states in Malaysia.⁴²

⁴¹ See Article 91(5) of the FC that in order to cause any land policy to be binding over the state government, there must be prior consultation over the purported policy between the NLCL, the State Government, the Federal Government and the National Finance Council. Thus, if there is no consultation between and among these parties, any policy for the promotion and control of the utilization of land throughout the Federation for mining, agriculture, forestry or any other purpose, and for the administration of any laws relating there to, shall not be binding over the state government. See also section 9 of the NLC (National Land Council: initiation of action with respect to certain matters).

⁴² Adibah Awang, Land Conversion, Subdivision and Amalgamation, Buletin Geoinformasi, Jld 1, Ni. 1, ms 37-44, April 1997, Penerbitan Akademik Fakulti Kejuruteraan & Sains Geoinformasi, 38. http://eprints.utm.my/4851/1/land_conversion.pdf, 9 August, 2012.

Thus even if the NLCL have issued directives to the State Authority to exercise due diligence and care in alienation of lands, the directives do not bind the State Authority. Secondly, to date, there is only one National Land Policy over alienation of land issued by the NLCL through the directives of the Federal Director General of Land and Mines.⁴³ This policy concerns alienation of land in special circumstances for freehold lands under section 76(aa)(iii) of the NLC.⁴⁴ However, this alienation of land policy does not concern, at all, alienation of land for housing development purposes and it does not impose a responsibility and liability on the State Authority to duly exercise alienation of lands for housing development projects to the benefit and welfare of the stakeholders (housing developers and purchasers). For example, this directive policy does not prescribe any mandatory procedures that the State Authority should comply with in the exercise of alienation of land for housing development projects for instance imposing obligation on the State Authority to only alienate lands to capable developers or be subject to the views of the planning and environmental authorities or that the State Authority must ensure that the location of the land is suitable for housing development purposes. Equally there is no responsibility on part of the State Authority to be bound by all the views and advices of other technical agencies and appropriate authorities in the exercise of their decision making process on alienation of lands for housing development purposes.

However, it is argued that the issue of whether the policy adopted by the NLCL is binding or otherwise may be a political one. In other words, coordination between the federal government policies which are in the form of the directive policies issued by the

⁴³ See circular of the Federal Director General of Lands and Mines bil. 1/2009 – the 64th Resolution of the National Land Council concerning alienation of land in perpetuity under special circumstances under section 76(aa)(iii) of the NLC, prepared by Seksyen Kajian Penyelidikan dan pembangunan, Bahagian Kemajuan Pengurusan dan Perundangan, Jabatan Ketua Pengarah Tanah dan Galian Persekutuan, Kementerian Sumber Asli dan Alam Sekitar, Putrajaya, 2010. See also Sharifah Zubaidah al-Junid, *Controlling Changes of Use of Land in Malaysia: Dual Authorities and The Dilemma of Certainty vs. Flexibility*, in Hunud Abia Kadouf & Sharifah Zubaidah al-Junid, *Land Use Planning and Environmental Sustainability in Malaysia: Policies and Trends*, International Islamic University Malaysia, 2006, 221.

⁴⁴ Pekeliling Ketua Pengarah Tanah dan Galian Persekutuan, Bilangan 1/2009, Ketetapan Majlis Tanah Negara Ke-64 mengenai Pemberimilikan Tanah Dalam Keadaan-keadaan Khas untuk Pegangan Selama-lamanya di Bawah Seksyen 76(aa)(iii) Kanun Tanah Negara 1965 in Pekeliling Ketua Pengarah Tanah dan Galian Persekutuan, 5-41—5-42. Jabatan Ketua Pengarah Tanah dan Galian Persekutuan, Kementerian Sumber Asli dan Alam Sekitar, Putrajaya. 2010.

NLCL could be achieved if the state government and the federal is from the same political party.⁴⁵ It follows that if there are political differences between the states and the federal government, coordination in land administration, policies and procedures between the states and the federal government may not actualize. This may result in uneven and non-uniformity of the land administration procedures in all states in Malaysia which can lead to some problematic consequences.⁴⁶

According to Adibah Awang the governance problems relating to land development process including, it is submitted alienation of land, due to the absence of proper documented national land use planning policy. According to her, this is perhaps grounded on the fact that since land is a state matter, each state has the prerogative of drawing up its own land policy.⁴⁷

Further, according to Sharifah Zubaidah Syed Abdul Kader aljunid, to this day, there has as yet any National Land Use Policy in place, although the NLCL has issued several circulars relating to amendments of the NLC.⁴⁸ In the result, the function of NLCL, it is opined, could be deemed irrelevant in practice, by the State Authority.

4.2.d.i.b Question to Ponder

Now, after elaborating the scenario of the instant case study and the powers that the State Authority and Federal Government have, the next important question in respect of alienation land for housing development is this:

⁴⁵ Abdul Aziz Bari, *Malaysian Constitution: A Critical Introduction*, The Other Press, Kuala Lumpur, 2003, 127, 134, 135, 140, 141. See also Adibah Awang, 38, 43.

⁴⁶ Adibah Awang, *A Critical Assessment of Provisions of the Federal Constitution with regard to Federal-State Relationship on Land Law*, Paper presented at the International Conference on Contemporary Issues of Law, Syariah & Legal Research, Faculty of Syariah, University of Jordan, Amman, 14 December 2008, 9, at http://eprints.utm.my/9697/1/AdibahAwang2008_A_critical_assessment_of_provisions.pdf (accessed August 9, 2012).

⁴⁷ Adibah Awang, *Land Conversion, Subdivision and Amalgamation*, Buletin Geoinformasi, Jld 1, Ni. 1, ms 37-44, April 1997, Penerbitan Akademik Fakulti Kejuruteraan & Sains Geoinformasi, 38, 43, 44.

⁴⁸ Sharifah Zubaidah, *Controlling Changes of Use of Land in Malaysia: Dual Authorities and The Dilemma of Certainty vs. Flexibility*, 221.

Does The State Authority Owe A Legal Responsibility To Ensure Fitness And Suitability Of Lands For Alienation And Select Capable Housing Developer For Implementing Housing Development Projects?

First and foremost, insofar as the knowledge and research of the researcher are concerned, there has as yet any case law that have dealt with the issue of liability and responsibility of the State Authority to act fairly and reasonably in the alienation of land for housing development projects. Likewise, there is no action so far commenced by any aggrieved housing developers or purchasers in the problematic housing development projects and the abandoned housing projects due to the wrong/mistake/negligent decision made by the State Authority in alienating of lands. Be that as it may, certain legal theory may be generated in respect of the issue of liability and responsibility of the State Authority to their statutory duty fairly and reasonably in alienating lands for housing development projects to the benefits of the stakeholders based on the available legal resources and the reported case law.⁴⁹

In the opinion of the author, despite the absolute power of the State Authority have in the alienation of land and its superiority over planning authority and other authorities,⁵⁰ it is submitted 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.⁵¹ In other words, if

⁴⁹ Note that even if the State Authority and the Local Authority have acted negligently in the exercise of the prescribed duties under the Street, Drainage and Building Act 1974 and the Uniform Building By-Laws 1984, they are still exempted from any liability and immune from any legal action by the aggrieved parties. See section 95(2) of the SDBA and in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 (FC) ('the Highland Tower case'). However, the local planning authority does not have such an immunity if they have acted negligently in carrying out their duties as prescribed under the Town and Country Planning Act 1976 and the States' Planning Rules. See also Nuarrual Hilal Md. Dahlan, *Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework*, Phd Thesis in Law, International Islamic University Malaysia, 2009, 226 and Sharifah Zubaidah Syed Abdul Kader, *Legal Control of Commercial Land Development in Kuala Lumpur and Petaling Jaya*, Unpublished SJD dissertation, Bond University, Australia, 2001, 162.

⁵⁰ In the Republic of Singapore, land use control is entirely in the hands of the planning authority in Singapore. Thus there is no necessity for any interrelation between land law and planning law in respect of land use control. Thus, if alienation were to take place, the authority carrying out alienation must comply with the planning authority directives. See Sharifah Zubaidah Syed Abdul Kader al-Junid, 244.

⁵¹ See also The Rt Hon Lord Denning Master of the Rolls, *The Discipline of Law*, London, (London: Butterworths, 1979), 92—94 under the sub-heading 'The duty to act fairly'. Lord Denning said at page 93:

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 entitle to certain legal and equitable remedies.⁵² This contention is made on the following grounds:

- 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 is the housing developers and the purchasers;
- 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 fair and reasonable manner in the alienation of lands for housing development projects and appoint suitable and fit housing developer to carry out housing development to the benefit of its subject (the housing developers and the purchasers); and,
- 3) Even though the State Authority have a wide discretionary and statutory power to alienate lands and to appoint developers to carry out housing development projects, this statutory and prerogative power is not unfettered one. This power is still subject to the principles of natural justice, equity and fairness.

It is significant to note that the person entitles to commence legal suit against the wrongful public authority, according to Lord Denning, may even consist of an ordinary man who has not been directly aggrieved by the very misconduct of the public authority provided he still potentially can become the affected subject of the public authority's acts. Lord Denning said as follows:

“...They are not bound, he says, to obey the rules of natural justice any more than any other executive body, such as, I suppose, the Board of Trade, which grants industrial development certificates, or the Television Authority, which awards television programme contracts. **I cannot accept this view. I think the Gaming Board are bound to observe the rules of natural justice....**” (emphasis added).

⁵² Note that pursuant to section 22 of the NLC, the land officers shall be liable if they do not carry out their duties in good faith.

“...the applicant must have ‘a sufficient interest in the matter to which the application relates’. What is the test of ‘sufficient interest’? The Rules Committee have not attempted a definition; but I would suggest that it is legitimate to adopt the test laid down in *Blackburn* and *McWhirter* cases. **The Court will not listen to a busybody who is interfering in things which do not concern him, but it will listen to an ordinary citizen who comes asking that the law should be declared and enforced, even though he is only one of a hundred, or one of a thousand, or one of a million who are affected by it.** As a result, therefore, of the new procedure, it can I hope be said that we have in England, an *action popularis* by which an ordinary citizen can enforce the law for the benefit of all—as against public authorities in respect of their statutory duties”(emphasis added).⁵³

4.2.d.i.c *Fiduciary Duty*

The duty of the State Authority to exercise alienation of land in a reasonable and fair manner 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 undertaken by the developers.⁵⁴

This duty is enunciated in *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 (Court of Appeal). In this case, the State Government of Selangor (the first defendant-owner of all un-alienated land in the state)⁵⁵ was held liable to have acquired the land (Bukit Tampoi) occupied and belonged to the plaintiffs (aboriginal peoples) with the second defendant (UEM Berhad), third defendant (Malaysian Highway Authority) and fourth defendant (Federal Government), by depriving the plaintiffs’ proprietary rights without adequate compensations in accordance with the Land Acquisition Act 1960. Secondly, the defendants were liable for having unlawfully

⁵³ The Rt Hon Lord Denning Master of the Rolls, *The Discipline of Law*,...133.

⁵⁴ *Kin Nam Development Sdn. Bhd v. Khau Daw Yau* [1984] 1 MLJ 256. In this case the land authority imposed a condition that the sale of land, together with buildings to be built on it, which would be subject to conversion, should be reserved to at least 30% of bumiputra purchasers. As the purchasers were all made by non-bumiputra purchasers, the application for conversion, thus, could not be effected. This left the non-bumiputra purchasers without any remedy except by way of damages. It is opined, the condition was more appropriate for the local planning authority to issue as it involved planning and development policy and did not concern the land use. Thus, on this footing, it is opined that, the decision of the State Authority was not reasonable and was unfair, which may warrant its nullity.

⁵⁵ Pursuant to section 3(1) of the LAA, the State Authority is given power and right to acquire lands within their jurisdiction.

evicted the plaintiffs from their lands as the 14 day notice was unreasonable and insufficient, not being compliant with the Land Acquisition Act 1960 procedure. The defendants were also liable for trespass.

The first defendant (the State Government of Selangor) had also breached their fiduciary duties in not having gazetted the un-gazetted area for the welfare and benefit of the plaintiffs as aboriginal reserve area. They failed to gazette the area despite their knowledge and awareness that such non-gazetted area was also occupied and needed by the plaintiffs to carry out their customary practices.

The court held that the discretionary power of the State Authority or public body is not unfettered one in light of its responsibility towards the welfare and in trust of its subjects(stakeholders). The exercise of the power must be in accordance with the law and for public good. Thus it follows that they are fiduciary to the public.

The above principles are also found in the cases such as Australian cases in *Mabo No 2 (Mabo & Ors v State of Queensland & Anor* [1986] 64 ALR 1 and *Wik People's v The State of Queensland & Ors* [1996] 187 CLR 1. In other parts of the commonwealth this principle is also entrenched in cases such as *Premachandra v Major Montague Jayawickrema* [1994] 2 Sri LR 90. In this case at page 105, GPS De Silva CJ when delivering the judgment of the Supreme Court of Sri Lanka said:

“There are no absolute or unfettered discretions in public law; discretion are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted” (emphasis added).

In Malaysia the above principle had also been adopted in *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn. Bhd* [1979] 1 MLJ 135 (Federal

Court at Kuala Lumpur)⁵⁶ and *Savrimuthu v Public Prosecutor*[1987] 2 MLJ 173 (Supreme Court)⁵⁷.

It is submitted, a fiduciary duty exists on part of the State Authority in the exercise of alienation of land for housing development projects. Following this, it is obligatory for them to obtain the requisite advices and views from all relevant parties and decide prudently in a reasonably and fairly manner before deciding to alienate lands to housing developers. Even though based on author's view there has as yet any case law pointed to this position, it is submitted, through common law and the case law, the State Authority is under a fiduciary duty in carrying out their public duties, for instance in dealing with the applications for alienation of land for housing development projects.

⁵⁶ In this case the applicant company was the registered proprietor of a piece of land held in perpetuity. The land was in the Federal Territory and the applicant applied to the Federal Government for subdivision of the land and for conversion to have the express condition relating to the user of the land amended to allow the applicant to put up a hotel for which planning permission had been granted. It also applied to surrender part of the land to Government for use as service roads, side and back lanes. The matter was referred to the Land Executive Committee and subsequently the Director of Lands and Mines, Federal Territory informed the applicant that the application would be approved if certain conditions were complied with. The applicant agreed to all of them except one which was that on surrendering the land, the applicant was to receive back in respect of the part to be retained by him not title in perpetuity but a lease of 99 years. The applicant applied to the court for an order that the approving authority approve its application for subdivision upon the usual terms and conditions. In the High Court, Harun J. gave judgment for the applicant. The Land Executive Committee thereupon appealed to the Federal Court (FC). The FC held, *inter alia*, that (1) the Government had no power to make the applicant give up its freehold title and receive in exchange a 99 year lease. The condition which the applicant objected to did not relate to the permitted development. It was unreasonable and was used for an ulterior object, the object being the developed land into line with newly alienated land as to which only leases not titles in perpetuity are granted; (2) in reconsidering the applications the Land Executive Committee should act fairly and not arbitrarily and should bear in mind that it had already approved the application subject to the other conditions set out therein.

⁵⁷ In this case the applicant had been charged in the Sessions Court at Georgetown, Penang with an offence under section 39B of the Dangerous Drugs Act, 1952 on 7 October, 1982. On 25 April 1983, the Public Prosecutor's sanction was tendered and the Court proceeded to fix the date of hearing. Subsequently the prosecution tendered the Public Prosecution's requisition under section 41(2) of the Act with a view to have the case tried by the High Court. However, the learned President of the Sessions Court refused to transmit the case to the High Court, being of the view that the applicant had acquired a vested right to be tried in the Sessions Court once the Public Prosecutor had indicated his election to have the trial held in that court by tendering his consent to prosecute. The Public Prosecutor appealed to the High Court. The learned trial judge stayed the proceedings and referred the following question to the Supreme Court: Whether for the purpose of Article 7(1) of the Federal Constitution an accused person derives a vested right when (1) he is charged or (2) after his trial has commenced. The court held, *inter alia*, that pending cases could still be tried in the Sessions Court unless the Public Prosecutor chooses to have them tried in the High Court by the issue of a requisition under section 41(2) of the Dangerous Drugs Act, 1952.

4.2.d.i.d Legitimate Expectation

An issue that can be raised under this sub-topic is this: Whether the aggrieved purchasers and the housing developers, as the case may be, in problematic and/or abandoned housing projects has a legitimate expectation against the State Authority that the State Authority would alienate suitable land and select suitable developer for carrying housing development project?

The principle behind the doctrine of legitimate expectation is founded on the duty to act fairly as a necessary element or concomitant of good governance or good administration.⁵⁸ The doctrine of legitimate expectation was initially recognized by Lord Denning in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 (CA) 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.⁵⁹

The principle of legitimate expectation has been used by the courts on numerous occasions and in different contexts for examples in *R v Devon County Council, ex p Baker and Johns* [1995] 1 All ER 73 (CA), *R v Secretary of State for the Home Department, ex p Ruddock & Ors* [1987] 2 All ER 518 and *R v Liverpool Corpn, ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299 (CA).

In the Privy Council case of *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 (PC), Ng Yuen Shiu an illegal immigrant challenged a deportation order. He contended that the Hong Kong government had previously given an undertaking that each case would be considered on its merits and that he was denied the opportunity of being heard. The Privy Council ('PC') held that Ng had a legitimate expectation that a certain procedure would be followed and that it was in the interest of good administration that

⁵⁸ W Wade & C Forsyth, *Administrative Law* (8th Ed), Oxford University Press, Oxford 2000, 494—495 and Fiadjoe, *Commonwealth Caribbean Public Law* (2nd Ed), Cavendish Publishing Limited, London, 1999 34-35.

⁵⁹ *Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 MLJ 309 (COA). But bear in mind the limitation imposed by the Civil Law Act 1956 that restricts the application of English law in Malaysia. The question is whether courts in Malaysia can apply English cases that have been decided after the cut off point date?

the authorities should act fairly by implementing its stated policy. Lord Fraser said that 'legitimate expectation in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis'. His Lordship identified three practical questions underlying all legitimate expectation cases. They are:

- a) To what has the authority committed itself?
- b) Has the authority acted unlawfully in respect of its commitment?
- c) What should the court do about it?

In *Ng Yuen Shiu*, their Lordships in the PC held, in quashing the deportation order, that when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as the implementation does not interfere with its statutory duty.

Sedley J in *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714⁶⁰ at pp 724 and 731 said that:

⁶⁰ The applicant in this case purchased a beam trawler with a view to taking advantage of a government policy (the Ministry of Agriculture Fisheries and Food). The policy permitted the transfer of pressure stock licences from one vessel to another. Pressure stocks were species of fish capable of sustaining unrestricted fishing within the limits of the applicable European Community quota. The applicant obtained the transfer of other vessels' miscellaneous species licences to the trawler, which enabled it to fish for any non-pressure stock in any sea area. Further the Ministry of Agriculture decided to allow capacity aggregation, a system by which similar types of licences might be transferred from existing vessels to a larger. However, this was permitted if the total capacity of the fleet was not increased. On knowing this, the applicant purchased two vessels which had been trawl licences with the intention of transferring those licenses to the larger trawler and proceeded to downsize the trawler's engines in anticipation of the transfer. However, not long after the announcement of the aggregate policy, the Ministry of Agriculture imposed a moratorium against the policy in order to reduce fishing effort. This had affected the interest of the applicant and they had incurred costs in purchasing new vessels. The applicant applied for a judicial review of the Ministry's moratorium decision. The applicant contended that they had a legitimate expectation, *inter alia*, that any change in licensing policy would not be such as to frustrate the completion of the process of licence aggregation for the trawler. On the other hand, the Ministry rebutted that it was not reasonable to expect that possession of hip-pocket licence (licence entitlements capable of being used at some future date by way of aggregation to obtain a licence) would shield the applicant and other such licence-holders from the effects of changes in licensing policy, since any such limitation would seriously handicap the Ministry's performance of its duty to monitor and control the intensity of fishing. The court dismissed the application. The court held that there must be a balance between allowing the act of the Ministry of imposing the moratorium and the interests of the applicant, before the court could make a decision. The court held that the act of the Ministry was fair to exclude from the policy's transitional provisions enterprises in the position of the applicant, notwithstanding that the latter (the applicant) had embarked on the acquisition of transferable licence entitlements in anticipation and with the genuine intention of being able to aggregate them on to a vessel for the purpose of beam trawling for pressure stock. Fairness did not require the perceived need for

“...the real question is one of fairness in public administration...It follows that it cannot be any less unfair to frustrate a legitimate expectation that something will or will not be done by the [public authority] than it is to frustrate a legitimate expectation that the applicant will be listened to before the [public authority] decides whether to take a particular step...While policy is for the policy-maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court’s concern...To postulate this is not to place the judge in the seat of the minister...It is the court’s task to recognize the constitutional importance of the ministerial freedom to formulate and reformulate policy; **but it is equally the court’s duty to protect the interests of those individuals whose expectation of different treatment has a legitimacy which in fairness out-top the policy choice which threatens to frustrate it**” (emphasis added).

In *R v Secretary of State for Transport, ex parte Richmond upon Thames Borough Council & Ors* [1994] 1 WLR 74, the contention that there was a legitimate expectation on part of the public body to act in certain manners was denied. However, the court went further to say that where an applicant can demonstrate that a legitimate expectation has arisen, the applicant has a powerful argument against a public body which has otherwise acted pursuant to the discretionary powers or duties lawfully conferred upon it. It is germane to state that a legitimate expectation in its procedural form arises when there has been a failure to follow an agreed, or customary, process or consultation. In the substance, legitimate expectation concerns the quality of the decision making process. Substantive expectation is often protected procedurally by extending to the person affected an opportunity to make representations before the expectation is taken away. Therefore, in *Administrator Transvaal v Traub* 1989 (4) SA 731, the court took a view that where the recommended applicants for hospital posts were rejected in breach of a long established practice because they had complained about bad conditions, the applicants were held entitled to a hearing before being rejected.

The dominant and prevailing law and practice of the court illustrates that court will indispensably emphasize the doctrine of legitimate expectation in litigation cases

a swift limitation of North Sea beam trawling for pressure stock to be sacrificed in favour of a class whose expectations, however reasonable and however genuine, might well have eventually undermined the policy. The means adopted by the Ministry bore a fair proportion to the end in view, both in respect of what was included in and of what was excluded from the pipe-line provisions.

involving the exercise of public duties or prerogative powers by the public body/public authority in order to avoid injustice and abuse of power towards its subjects. In this situation, the function of the court is to protect the stakeholders of the public authority against the latter's abuses caused by the denial of procedural and substantive legitimate expectation. In respect of the substantive legitimate expectation, the Court of Appeal in *R v North and East Devon Health Authority, ex parte Coughlan (Secretary of State for Health and another, interveners)* [2000] 3 All ER 850 said, at page 879:

“Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different court will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy...The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding on Wednesbury grounds...On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentionous that the court itself require the opportunity for consultation to be given unless there is an overriding reason to resile from it...in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires”(emphasis added).

In *R v North and East Devon Health Authority, ex parte Coughlan (Secretary of State for Health and another intervening)* [2000] 3 All ER 850 provides example of what amounts to substantive legitimate expectation. In that case, a tetraplegic victim of a road accident in 1993 was housed in a health institute called Mardon House, a NHS facility for the long term disabled. It was represented to the victim by the health authority that he could stay at Mardon House ‘for as long as they chose’. When the health authority decided to close Mardon House without providing alternative suitable accommodation, the Court of Appeal held that, in view of the representation, a breach of this legitimate expectation amounted to an abuse of power and the substantive promise was upheld.

In *Oloniluyi v Secretary of State for the Home Department* [1989] Imm AR 135 (CA), the legitimate expectation doctrine was vigorously applied. In this case, the plaintiff Oloniluyi had been given a limited leave to remain in the United Kingdom as a student until 31 January, 1987. She applied for an extension to allow her to continue with her studies. Intending to go to Nigeria for a holiday, she visited the offices of the immigration department. She was told that if she went away she would have no trouble in returning so long as she came back to the United Kingdom before 31 January 1987. On her return on January 15 she was refused leave to enter. The immigration officer refusing leave was acting in pursuance of his discretionary power under the immigration rules. The immigration officer was not satisfied that she was a genuine student who intended to leave the United Kingdom on completion of her studies. His decision, however, was quashed by the court because the assurances she had been given about her return had created a legitimate expectation that she would be admitted without difficulty. It is noteworthy that the doctrine of legitimate expectation may also arise due to circumstances, not dependent of the existence of any promise, custom or ordinary practice. It can also be established due to the justice of any given case. This wider meaning of legitimate expectation can also arise on the public authority duty to act fairly. There are many cases to illustrate this. For an instance in *R v Birmingham CC ex p Dredger* [1993] COD 340, the stall-holders in a market are entitled to be consulted before charges are increased.⁶¹

Thus, it follows and it is submitted that, even though the State Authority has an absolute power to alienate land pursuant to the provision of the NLC, the States' Land Rules and the enshrined provisions in the FC and that all other agencies views and recommendations, including the Federal Government agencies' and the planning authority's are subservient to the State Authority, nonetheless the doctrine of legitimate expectation dictates that the State Authority as a public authority must adhere to it in the sense of following the good practice and procedures in alienation of land and that the

⁶¹ However there is no legitimate expectation on part of the local authority to consult the residents in an old people's home on whom no promise of consultation has been made in order to the local authority to justify the closure order of their homes (*R v Devon County Council ex p Baker* at p 89 adopting the approach of *Attorney-General (NSW) v Quinn* (1990) 93 ALR 1 at p 39).

public authority/body including the State Authority are duty bound to comply with the views and comments of the authorities, be it the federal authority or state agencies, to ensure that the decision involving alienation of land is correct, being an informed decision and responsible inclusive decision as well as it is fair and reasonable to the stakeholders. In other words, the absolute power of the State Authority on land matters, for instance in the exercise of alienation of land is subject to the perimeters and constraints provided by the principles of justice, fairness, equity and to be exact the principle underscored by the doctrine of legitimate expectation, in procedure as well as in its substance.

In *Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 MLJ 309 (Court of Appeal at Putrajaya),⁶² at page 333, the Court of Appeal said

⁶² In this case the appellants were from several villages in Perlis. They were displaced and resettled in an area known as Lubuk Sireh in Perlis as a result of the decision of the second respondent (Government of Perlis) to build the Timah Tasoh dam project in Perlis. The appellants were promised, *inter alia*, compensation for loss of land, house etc; a plot of land each at Lubuk Sireh to build their houses and participation in the agricultural scheme undertaken by the third respondent – Lembaga Penyatuan dan Pemulihan Tanah Persekutuan ('FELCRA') at Lubuk Sireh. However, by a letter dated 27 June 2000 the appellants were informed that they ceased to be the members of the Koperasi Peserta-Peserta Rancangan FELCRA Lubuh Sireh on the alleged ground that they were not on the list of settlers who were allotted shares by the first respondent (Majlis Mesyuarat Kerajaan Negeri Perlis). It was the appellants' contention that, in consideration of them moving to Lubuk Sireh, the second respondent (Government of Perlis) had promised to provide them not only compensation for loss of land, houses, etc and a plot of land to build their houses, they were also promised participation in the agricultural estate undertaken by FELCRA i.e 'Rancangan FELCRA Lubuh Sireh' ('FELCRA Scheme'). In fact, at the material time, they were and had already been accepted and recognized as participants of the FELCRA Scheme. They further pointed out that they were re-settled at Lubuk Sireh to enable them to participate in the FELCRA scheme as their resettlement at Lubuk Sireh was part and parcel of the FELCRA Scheme. The first and second respondents, on the other hand, contended that the offer made to the appellants to participate in the FELCRA scheme was conditional and not final. The final decision was only made on 17 November 1999, after interviews were conducted to select the successful candidates. It was also contended that it was the privilege and prerogative as well as the discretion of the first respondent in making the final decision on the allotment of shares in the scheme to the participants. The learned trial judge held that the appellants had never been selected and accepted as participants of the FELCRA scheme and that both the appellants and the FELCRA were under 'wrong assumption' that the appellants were already participants of the FELCRA scheme before the first respondent's decision on 17 November 1999. The court allowed the appellants' appeal and, *inter alia*, held that, via judgment of Abdul Malik JCA, it was clear from the evidence that the appellants relied on the representations and promises advanced by the second respondent (Government of Perlis) and re-settled at Lubuk Sireh. The second respondent (Government of Perlis) could not plead ignorance since it knew that the appellants were already participants at the scheme. Further, both FELCRA and the second respondent (Government of Perlis) were active partners at the FELCRA Lubuk Sireh scheme and that at FELCRA Lubuh Sireh, the second respondent (Government of Perlis) had acted through FELCRA. Therefore, the second respondent's decisions were totally irrational and could neither be justified nor accepted. Further, the decision to reduce the number of participants without assigning any reasons, justifications nor explanations whatsoever was a display of irrationality and arbitrariness.

that where an applicant can demonstrate that a legitimate expectation has arisen, he has a powerful argument against a public body which has otherwise acted pursuant to the discretionary powers or duties lawfully concerned upon it. It is germane to state that a legitimate expectation in its procedural form arises where there has been a failure to follow an agreed or customary, process of consultation. In the main, it is concerned about the quality of the decision making process.

In *Dr Michael Jeyakumar Devaraj v Ketua Pengarah Unit Penyelarasan Pelaksanaan di Jabatan Perdana Menteri & Ors* [2011] 6 MLJ 824 (High Court at Kuala Lumpur) the argument of legitimate expectation was successfully pleaded by the applicant and the court agreed that legitimate expectation arose in the circumstance of this case. In this case the court held the application of the applicant being a Member of Parliament for the Sungai Siput constituency for leave for judicial review against the decision of the respondents (being the Director General of the Implementation Coordination Unit (ICU) of the Prime Minister's Department and the Director of the Perak State Development) who rejected the applicant's application for funds from the special constituency allowance for schools, orphanage and aid to the *orang asli* was allowed by the court. The court stated that the exercise of discretion on part of the respondents in dealing with the application of the applicant may well be based on policy considerations within the management prerogative but the respondents evidently had acted capriciously and in breach of the legitimate expectation that they owed to the applicant, with bias and/or for improper purpose, had failed to take into account relevant factors and had taken into account irrelevant factors.

In *Sipadan Dive Sdn Bhd & Ors v The State Government of the State of Sabah* [2011] 3 MLJ 357 (High Court of Borneo at Kota Kinabalu) again the court found that legitimate expectation existed on part of the State Government towards the plaintiffs. In this case the plaintiffs were awarded by the court for compensation or damages as the defendant being the state government breached the plaintiffs' legitimate expectation in that the plaintiffs were not given reasonable notice to wind down their business that had resulted in the plaintiffs' losses due to the demolition of the plaintiffs' buildings by the defendant

and losses of the plaintiffs' equitable or proprietary interests in the plaintiffs' diving resorts. The legitimate expectation was also created on the request of the defendant that the fifth plaintiff to prepare a master plan proposed for Pulau Sipadan. Further, legitimate expectation existed when the plaintiffs were allowed to continue operating on Sipadan island even after Malaysia had gained sovereignty over the island. Evidence which the plaintiffs relied on was that the defendant actively used the presence of the plaintiffs on the island to promote Malaysia's tourism industry and to argue Malaysia's sovereignty rights over the island to the International Court of Justice.

In *R v Secretary of State for the Home Department, ex parte Khan* [1985] 1 All ER 40 (Court of Appeal, Civil Division)⁶³, Watkins LJ said at page 41 put as follows:

“where a member of the public affected by a decision of a public authority had a legitimate expectation **based on a statement or undertaking by the authority that it would apply certain criteria or follow certain procedure in reaching its decision, the authority was under a duty to follow those criteria or procedures**” (emphasis added).

⁶³ A Home Office circular giving guidance to persons in the United Kingdom who wished to adopt a child from abroad stated that, although the immigration rules did not permit a foreign child to enter the United Kingdom for the purpose of adoption, the Secretary of State would in exceptional circumstances exercise a discretion to allow a child to enter the United Kingdom for adoption if certain specified criteria were met. The circular set out the procedural steps to be taken when such an application was made and stated, inter alia, that when an application was referred to the Secretary of State he would make certain inquiries within the Department of Health and Social Security whether there were any reasons for an adoption order to be refused by the court. The applicant and his wife, who were settled in England, wished to adopt a relative's child who lived with its natural mother in Pakistan. The applicant obtained a copy of the Home Office circular and applied for an entry clearance certificate for the child. The application together with the entry clearance officer's report on the child was referred to the Secretary of State. There was nothing in the report to indicate that the criteria set out in the circular would not be met. However, the Secretary of State did not make any inquiries within the Department of Health and Social Security or apply the criteria, namely the criteria for deciding whether to admit for settlement children who were already adopted by persons settled in the United Kingdom, and applying those criteria he decided that the child should not be given leave to enter. The applicant applied for judicial review by way of an order of certiorari to quash the Secretary of State's decision refusing entry clearance for the child, contending that he had a legitimate expectation arising out of the terms of the circular that the criteria and procedure there set out would be followed. The secretary of State contended that he had an unfettered discretion regarding the grant of leave to a child to enter for the purpose of adoption and in exercising that discretion he was entitled to take into account considerations other than those stated in the circular. The court dismissed the application. However on appeal, the court of appeal in majority (Parker and Dunn LJJ concurring, Watkins LJ dissenting) allowed the appeal of the applicant on the ground of legitimate expectation that Secretary of State should have exercised his duty fairly and reasonably. In this case the court of appeal found that the Secretary of State had acted unfairly and unreasonably in processing the applicant application.

In *Toh Huat Khay v Lim A Chang (in his capacity as the executor of the estate of Toh Hoy Khay, deceased)* [2010] 4 MLJ 312 (Federal Court at Putrajaya), legitimate expectation existed on part of the State Authority to ensure that the requirements of the law relating to the land transfer had been observed and complied with. The court also held that due to the failure of the State Authority to comply with the legal requirements relating to land transfer, the State Authority had breached its fiduciary duty. In this case the State Authority consented to a land transfer despite the fact that is still subject to restrictions in interests of 10 years prohibition of sale,⁶⁴ from the date of alienation. Due to this, the court held that the transfer was null and void, despite there was a consent given by the State Authority. It follows that, according to the court, such a transfer could not give any indefeasibility of title to the transferee as the registration of the land was procured by means of an insufficient or void instrument pursuant to section 340(2)(b) of the NLC.⁶⁵

In *Lam Eng Rubber Factory (M) Sdn Bhd v Pengarah Alam Sekitar, Negeri Kedah dan Perlis & Anor* [2006] 2 MLJ 493 (Court of Appeal at Putrajaya)⁶⁶, Gopal Sri Ram JCA respecting legitimate expectation, at page 500, said as follows:

⁶⁴ Pursuant to section 124(1)(b) of the NLC.

⁶⁵ Notwithstanding that the act of the State Authority was wrong and had breached the fiduciary duty and duty of care in the above case, there was no penalty or compensation paid to the aggrieved party by the State Authority in this case. It is opined that the court did not penalize the State Authority as there was no prayer over the same by the plaintiff/appellant in the pleading and that the State Authority had not been named as the defendant.

⁶⁶ The appellant operated a rubber factory in Sungai Petani, Kedah since 1940. In November 1993, the appellant applied for the licence from the Department of Environment, Kedah. The first respondent, the director of environment for Kedah and Perlis responded in mid-February 1994, saying that the appellant's application for a licence could not be considered. In actual fact, an earlier court judgment of KC Vohrah J between the appellant and the state director, Kedah and the land administrator, Kuala Muda, Sungai Petani, Kedah had held that the appellant had not infringed the condition of the issue document of title to their land -- therefore, there was no necessity for the appellant to apply for a change of land user. After some correspondence and a reminder from the appellant, the department did not respond further. The following year, the appellant applied for the licence for 1995. Its application was refused, the reason given was that the area surrounding the factory had become a residential area and it was unsuitable for the appellant to carry on operations there. The appellant was dissatisfied and appealed to the Appeal Board created by the Environment Quality Act 1974 ('the EQA'). However, its appeal was purportedly refused by the first respondent. The appellant accordingly moved to the High Court for *certiorari* to quash the first respondent's decision. Its application failed. The High Court held that since the appellant had no licence for the year 1994 they had carried on their factory illegally and had no legitimate expectation to have a licence for 1995. The Court of Appeal in majority allowed the appeal with costs. The court (Gopal Sri Ram, JCA, Mohd Ghazali JCA concurring), *inter alia*, held that Parliament had conferred upon the first respondent the

“In my judgment, each and every member of the public has a legitimate expectation to have his or her written communication to a government department looked into and dealt with in a timeous, courteous and efficient manner. It may be an application for a licence. It may be a letter of query. Or it may be a letter of complaint. Whatever the nature of the communication, there must be a response within a reasonable time. Otherwise it will be a case of poor administration. And the law does not sanction poor administration. Indeed, in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, the House of Lords approved Lord Denning's dissent in the Court of Appeal in that case where he said:

Good administration requires that complaints should be investigated and that grievances should be remedied.” (emphasis added).

Thus, following the above legal principle and courts' decision, in the submission of the researcher, the defaulting developer and the aggrieved purchasers in problematic or abandoned housing projects due to failure of the State Authority to alienated suitable land for housing development have a legitimate expectation, procedurally and substantively, that the State Authority, as a public authority, should have alienated or should alienate suitable lands for housing development projects and that only suitable, capable and qualified housing developers should be appointed to implement the purported projects. Thus, the State Authority is under a responsibility and a duty to ensure that the alienation of land for housing development and appointment of housing developer to carry out housing development works are properly, fairly and reasonably executed. Otherwise, if the land is not suitable for housing development projects and the housing developers are not qualified and incapable, the projects may not succeed and as a consequence, abandonment may occur to the detriment of the purchasers and the developers.

discretion to decide whether to issue the licence or not. But the law requires him to exercise this power or discretion fairly, justly and without misdirecting himself on the law or the facts (see para 5); *Savrimuthu v Public Prosecutor* [1987] 2 MLJ 173 and *Laker Airways Ltd v Department of Trade* [1977] QB 643 followed. Any reasonable man in the appellant's shoes would have been led by the words and conduct of the first respondent to believe that the 1994 licence would be issued once the problem about the condition in the title to the land had been resolved. As for conduct, he accepted the payment made by the appellant and also did not respond at all to the appellant's reminder. Then at the hearing came the suggestion that the appellant was not entitled to relief because it carried out its operations in 1994 without a licence. There was a smacking of unfairness and injustice in administration.

It is submitted that the foundation for the creation of procedural and substantive legitimate expectation of the public stakeholders toward the State Authority 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 public good, public equity and public welfare/wellbeing.

There is an exception to the doctrine of legitimate expectation. This exception is when a person is unaware of an undertaking made by public authority, he cannot expect compliance with that undertaking. In *Chundawadra v Immigration Appeal Tribunal* [1988] Imm AR 161, where an unincorporated but ratified treaty of which the claimant was unaware could not found legitimate expectation. Further a taxpayer, for example, must rely upon a representation from the Revenue before his expectation will be protected (see *Matrix-Securities Ltd v Inland Revenue Commissioners* [1994] 1 WLR 334). However taxpayers seeking revenue clearance for their proposals must make full disclosure before the Revenue's assurances will be binding (see *R v Inland Revenue Commissioner ex p MFK Underwriting Agencies Ltd and related application* [1990] 1 WLR 1545).⁶⁷

From the above cases, the conclusion is that the State Authority owes a fiduciary duty and that its subjects (housing developers and purchasers) have procedural and substantive legitimate expectation that they (State Authority) would approve all applications for alienation of suitable lands and appoint suitable housing developers in a fair and reasonable manner for the benefits of the stakeholders (housing developers and purchasers). The failure of the State Authority to comply with this legitimate expectation will trigger a cause of action for the aggrieved stakeholders and entitle the stakeholders to any damages and other legal and equitable remedies.

⁶⁷ See judgment Abdul Malik Ishak JCA in *Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 MLJ 309, at page 337.

4.2.d.i.d Discretionary Power

The public authority/body must carry out their discretionary, prerogative and statutory powers fairly and reasonably. They are not allowed to use these powers arbitrarily and in disregard of the justice itself. Thus, in respect of the power to alienate land by the State Authority, they must carry out their discretionary power within the means allowed by the law and equity. In other words, the exercise of the power must not involve any inequitable elements, *mala fide*, *ultra vires* the natural justice and any irrelevant matters which can lead to the arbitrariness, injustices, unfairness and anarchy to the exercise of such power to the detriment and chagrin of the stakeholders being the subjects of the public authority in their exercises of the discretionary powers.⁶⁸

Lord Denning had also opined regarding the legal restrictions over the exercise of public authority's discretionary power which can succinctly be put as follows:

“The court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section it seems to me that the court can interfere with the Minister’s decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law....It seems to me that, when the Act conferred powers on the Minister or other authority, it did so in the belief—and on the condition—that the Minister would exercise them in accordance with the law, and exercise a sound discretion in accordance with the requirements of natural justice. If the Minister broke this condition—by going wrong in law, or by acting on irrelevant considerations, or by doing something contrary to natural justice—then he was going outside his powers....” (emphasis added).⁶⁹

There are two cases that concern discretionary power of the public authority which merit discussion here. The first case is *Associated Provincial Picture Houses Ltd v*

⁶⁸ Rt Hon Lord Denning, Master of the Rolls, *What Next in the Law*, (London: Butterworths, 1982), 309 & 310.

⁶⁹ The Rt Hon Lord Denning Master of the Rolls, *The Discipline of Law*,...107.

Wednesbury Corp [1948] 1 KB 223 (CA). The second case is *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374 (HL)⁷⁰.

*Wednesbury*⁷¹ concerns a challenge against the decisions of the corporation as a public authority to attach a condition to a cinema licence whereby children under the age of 15 were not permitted to go into and watch cinema movies on Sunday. The plaintiff contended that such a condition was unreasonable and that it was thus beyond the powers of the corporation. However, the Court of Appeal decided that the condition was in fact

⁷⁰ The main functions of Government Communication Head-quarters ('GCHQ') were to ensure the security of military and official communications and to provide the Government with signals intelligence; they involved the handling of secret information vital to national security. Since 1947, staff employed at GCHQ had been permitted to belong to national trade unions, and most had done so. There was a well-established practice of consultation between the official and trade union sides about important alterations in the terms and conditions of service of the staff. On 22 December 1983, the Minister for the Civil Service gave an instruction, purportedly under article 4 of the Civil Service Order in Council 1982, for the immediate variation of the terms and conditions of service of the staff with the effect that they would no longer be permitted to belong to national trade union. There had been no consultation with the trade unions or with the staff at GCHQ prior to the issuing of that instruction. The applicants, a trade union and six individuals sought judicial review of the minister's instruction on the ground that she had been under a duty to act fairly by consulting those concerned before issuing it. In an affidavit, the Secretary of the Cabinet deposed to disruptive industrial action in support of national trade unions that had taken place at GCHQ as part of a national campaign by the unions designed to damage government agencies and that it had been considered that prior consultation about the minister's instruction would have involved a risk of precipitating further disruption and would moreover have indicated vulnerable areas of GCHQ's operations. Glidewell J in the High Court granted the applicants a declaration that the instruction was invalid and of no effect. However, the Court of Appeal allowed the minister's appeal. On this the applicants appealed to the House of Lords. The House of Lords dismissed the appeal and held, *inter alia*, that it was for the executive and not the courts to decide whether, in any particular case, the requirements of national security outweighed those of fairness; and that the evidence established that the minister had considered, with reason, that prior consultation about her instruction would have involved a risk of precipitating disruption at GCHQ and revealing vulnerable areas of operation, and accordingly, she had shown that her decision had in fact been based on considerations of national security that outweighed the applicants' legitimate expectation of prior consultation.

⁷¹ By section 1(1) of the Sunday Entertainment Act, 1932, an authority having power in any area to grant licences for cinematograph performances under the Cinematograph Act, 1909, is given power to allow a licensed place to be open and used on Sundays, "subject to such conditions as the authority think fit "to impose". In this case a local authority, the Corporation of Wednesbury as the licensing authority, granted to the plaintiffs, being the owners and licensees of the Gaumont Cinema, Wednesbury, Staffordshire, leave for Sunday performance subject to the condition that no children under fifteen years of age should be admitted to Sunday performances with or without an adult. In these circumstances the plaintiffs brought an action for a declaration that the condition was ultra vires and unreasonable. The High Court (Henn Collins J) dismissed the action. The plaintiffs appealed to the Court of Appeal. The Court of Appeal held that the local authority had not acted unreasonably or ultra vires in imposing the condition. In considering whether an authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing it has taken into account any matters that ought not to be or disregarded matters that ought to be taken into account. The court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its power.

reasonable. Lord Greene MR stressed the supervisory as opposed to the appellate nature of the jurisdiction of the court. In this case his Lordship identified a number of principles which could form the basis of a challenge to the exercise of executive discretion. These principles are as follows:

- a) the exercise of a discretion must be a real exercise of the discretion;
- b) in exercising such a discretion, the decision-maker must have regard to the relevant matters and must disregard the irrelevant matters;
- c) a discretion must not be exercised for reasons of bad faith or dishonesty; and,
- d) a discretion must be exercised for the purpose for which it was intended.

If a public authority acted unfairly and unreasonably in the exercise of the discretionary power conferred by law on them, their decision made as the result of the unreasonable exercise of the discretionary power could be quashed by the court. Unreasonable exercise of the public authority's power may emanate from the failure of the public authority to observe the above principles.

Following the above legal principles, it is submitted that the State Authority as a public authority responsible in the alienation of land for housing development must carry out it in a fair and reasonable manner. Any unreasonable decision made may result in the decision to be quashed by the court. It is opined, an instance where the power to alienate land can be considered abusive and unreasonable is when the State Authority refused to follow the views of the technical agencies and other professional views without any reasonable grounds but instead the alienation is made and motivated solely by political grounds and/or are not meritorious at all in the technical agencies' views. Because of this, the housing project may later face certain problem and can cause problems and troubles to the purchasers.

In another situation, the State Authority may also be considered as having abused their power in the alienation of land, if they do not refer for advice and views from the relevant authorities, despite there are needs, opportunities and capability of referring to them for

advices and views to help the State Authority to arrive to a responsible and well informed decisions in the alienation of land.

Further example where discretionary power of the State Authority can be said to have been abused and has been unreasonably carried out is when the State Authority appointed unqualified and incapable housing developer to undertake development of housing project on any alienated land. Due to the incapability of the appointed developer, the developer may abandon the housing project or the housing project faces certain difficulties to the detriment of the purchasers' rights and interests.

Nonetheless, in *Council of Civil Service Unions*, the House of Lords restricted certain powers exercisable by the public authority which can be subject to any scrutiny of the court and the justice itself. In this case, under article 4 of the Civil Service Order in Council 1982, made under the prerogative, the Minister for the Civil Service was empowered to make regulations or issue instructions relating to the terms of employment of the Civil Service employees. An instruction was issued banning employees at the Government Communications Headquarters from being members of a trade union since it was feared that industrial action would disrupt the sensitive intelligence work undertaken there. It was believed that this in turn would pose a threat to national security. The established practice for introducing new policies and instructions in the workplace at the Government Communications Headquarters was that employees would be consulted prior to an alteration being made to their terms of employment. Nevertheless, this was not done. Thus, the applicant sought a declaration that the instruction was invalid due to a failure of the authority to consult their fellow employees before deciding to make the instruction and policy. The House of Lords held that the instruction was reviewable either as a direct exercise of prerogative power or as the exercise of a delegated power conferred by the sovereign under its prerogative power. The court held that, although the union had a legitimate expectation to be consulted in matter involving their rights in the employment in particular respecting the said instruction, this right was defeated by the overriding interests of national security. Thus, it can be seen that the principle established in *Council of Civil Service Unions*, to the effect that the exercise of

prerogative power may be subject to review by the courts, is equivalent to the statutory discretionary powers' position, has been regarded by the court as inappropriate. It follows that the exercise of prerogative power in matters involving security of the national, need not be subject to any judicial reviews of the court.

Lord Roskill in *Council of Civil Service Unions and ors v Minister for the Civil Service* [1985] AC 374 (HL) was of an opinion that the view of Lord Denning in *Laker Airways Ltd v Department of Trade* [1977] QB 643 (CA)⁷², that the prerogative was reviewable where it had been exercised improperly or mistakenly, was far too wide. To Lord Roskill, the right to challenge was not unqualified. It dependent upon the subject matter of the prerogative power which it exercised. Accordingly, there were, as Lord Roskill opined, certain excluded categories of prerogative powers, the exercise of which would not be subject to review by the courts. These included the treaty-making power; the defence of the realm; the prerogative of mercy; the grant of honours; the dissolution of Parliament; and, the appointment of Ministers. As several powers lucidly involve the exercise of political judgment and are matters of high policy, it would be very difficult for the courts to review their exercise without transgressing the doctrine of the separation

⁷² In this case the plaintiffs, Laker Airways Ltd, being an aviation company, claimed declarations in a quia timet action against the defendants, the Department of Trade being the aviation regulatory body. The plaintiffs sought declarations 1) that the guidance and directives given to the Civil Aviation Authority by the Secretary of State for Trade in the terms of or pursuant to the White Paper, Future Civil Aviation Policy (1976) were outside the powers granted to the Secretary of State and were also contrary to the provisions of section 3(1) of the Civil Aviation Act 1971; (2) that a licence No. A 14011 granted to the plaintiffs by the Authority in respect of the air service commonly known as Skytrain to commence on January 1, 1973 and expire on December 31, 1982, was valid and not revoked and remained in full force and effect; and (3) that by reason of the terms of the Civil Aviation Act 1971 the department were not entitled to withdraw or amend the designation of the plaintiffs for operations on United Kingdom route 2 of the Annex to the Agreement relative to air services between the UK and the United States of America and that such withdrawal or amendment would be contrary to natural justice. The defendants defended that they had such a discretionary and prerogative power on the matter and that this power could not be waived or fettered. The court (Mocatta J), *inter alia*, held that although the Secretary of State was entitled to reverse the previous policy of encouraging some competition between state-owned and privately owned airlines and could have done so by legislation amending the Act of 1971, he had acted beyond his powers in formulating the new policy by the procedure of 'guidance' under section 3(2), albeit with parliamentary approval under section 3(3) for any 'guidance' under section 3(2) should as a matter of construction be consistent with the general objectives laid down in section 3(1)(a) to (d) and as paragraph 7 of the 1976 guidance and the proviso to paragraph 8(b) were inconsistent with the statutory objectives the plaintiffs were entitled to a declaration to that effect. According to Lord Denning M.R. in this case, as the exercise of the Crown's prerogative is discretionary, the courts are entitled to see that it is not exercised improperly or mistakenly; and it would be improper to cancel the designation by use of the prerogative power at a stage when all the necessary steps except the presidential signature had been completed in the United States; a *fortiori* it would be improper to use that method when the Act provided other means of stopping Skytrain.

of powers. Matters involving the exercise of political judgments are within the domain of the executive rather than the court.

In the researcher's opinion, the approach by Lord Denning is to be preferred than Lord Roskill's. The reason as to why Lord Denning's views is preferable is that to avoid unfair and unreasonable exercise of power of the public authority, be it prerogative or otherwise. The court has the power and right to inquire into any matters involving the exercise of power of the public authority in order to ensure that only just, *bona fide* and reasonable policies and decisions have been made by the public authority. Otherwise, if their power is beyond or immune from court's scrutiny, on the ground of it being a prerogative power disguised under the Lord Roskill's above listed matters, the power and its exercise may lead to anarchy and abuses to the chagrin of the stakeholders. The researcher opines that the public authority possessing powers must show to the satisfaction of the court that their powers must have been exercised fairly and reasonably. These powers also include the immune prerogative powers as mentioned by Lord Roskill *viz* treaty-making power; the defence of the realm; the prerogative of mercy; the grant of honours; the dissolution of Parliament; and, the appointment of Ministers.

Lord Denning put as follows regarding the prerogative power of public authority:

“The prerogative is a discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity for which the law has made no provision (such as the war prerogative of requisitioning property for the defence of the realm), or the treaty prerogative (of making treaties with foreign powers). **The law does not interfere with the proper exercise of the discretion by the executive in those situations; but it can set limits by defining the bounds of the activity; and it can intervene if the discretion is exercised improperly or mistakenly...**The two outstanding cases are *Padfield...* and *Secretary of State for Education and Science...* where the House of Lords have shown that when discretionary powers are entrusted to the executive by statute, **the courts can examine the exercise of those powers to see that they are used properly, and not improperly or mistakenly. By ‘mistakenly’ I mean under the influence of a misdirection in fact or in law. Likewise it seems to me that when discretionary powers are entrusted to the executive by the prerogative—in pursuance of the treaty-making power—the**

courts can examine the exercise of them so as to see that they are not used improperly or mistakenly.” (emphasis added).⁷³

It follows that, the power of the State Authority in the alienation of land for housing development must also be subject to the principles of reasonableness, justice and fairness. The State Authority must refer to the technical agencies for advices and views and be duty bound to adhere to their views. They must also select and appoint the suitable and capable developers to carry out housing development projects on the State Land. These measures it is opined can prevent or at least lessen the occurrences of problematic or abandoned housing project and losses to the purchasers and other stakeholders.

In addition to the above cases, Edgar Joseph Jr FCJ in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 (Federal Court at Kuala Lumpur)⁷⁴, said, in relation to the duty of the public

⁷³ Ibid, 103—104 & 107--108.

⁷⁴ In this case, the respondent, being a cooperative society—Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan, entered into a joint venture agreement with one Rethico Sdn Bhd (‘Rethico’), being a housing developer, to develop the respondent’s land into a low-cost housing flat project at Jalan Helen Brown, Georgetown, Penang. To proceed with the project certain documentations had to be prepared and a planning permission was required to be obtained from the appellant (Majlis Perbandaran Pulau Pinang (‘MPPP’)) being the planning authority in Penang. The agreement between the respondent and Rethico mentioned that the selling price of a two-bedroom flat shall not exceed RM 32,000.00 and a three-bedroom flat shall not exceed RM 45,000.00. Later, after the respondent lodged the application for planning permission with the appellant, but before the application was approved, the appellant required the respondent to amend its plans in accordance with the Town and Country Planning Department and other government departments’ (technical agencies) requirements. The appellant also expressed the hope that Rethico would comply with the Council’s (the appellant) Guidelines for Low Cost Flat of which item 11 specified that 30% of the low cost houses have to be built and sold at a cost not exceeding RM 25,000.00 per unit in accordance with government policy. Later the appellant approved the application for planning permission but the permission did not contain any condition that the price of the units to be built should not exceed RM 25,000.00 per unit or any other sum. The respondent and Rethico further entered into a new supplementary agreement and were of the view that the prices of the flat units needed to be increased, to RM 38,000.00 and RM 62,000.00, respectively, due to increases in the development costs. On receipt of this information the members of the respondent objected to these new price variations and price increase. Nonetheless, the respondent and Rethico managed to sell no less than 70 out of the 110 units at RM 35,000.00 and 33 out of the 83 three bedrooms units at RM 62,000.00. To aggravate the scenario, Rethico being the developer to the project could not proceed with the development as there was a caveat entered on the land lodged by one of the squatters. On the passing, the planning permission expired, warranting its renewal. Finally, an application for renewal/extension was made by the respondent. Only after 10 months of the lodgment of the application did the appellant consider and approved the application. Nonetheless with the new extended planning permission, the appellant imposed additional conditions to the permission. This was objected by the respondent. The new conditions were these: the completion of 30% low-cost to be sold at RM 25,000.00 per unit; and the sale of the units are limited to members of the respondent only. The objection of the respondent was rejected by the appellant with no reasons provided. Due to this the respondent commenced a suit against the appellant for an order of *certiorari* to quash the disputed

authority to be circumspect in exercising their discretionary power lest the decisions made may be quashed by court due to unreasonableness and unfair, as follows:

“At para 13-086 of de Smith (5th Ed) there is, if we may say so, a most helpful summary of the three distinct ways in which power may be unreasonably exercised or abused:

- (a) Where there is a defect in the decision-making process-in the way the decision was reached or the factors taken into account in reaching the decision. These include:
 - (i) decisions taken in bad faith;
 - (ii) **irrational decisions – those which are arbitrary, or inadequately justified or reasoned;**
 - (iii) **decisions where relevant consideration are manifestly inappropriately balanced.**

- (b) where there is an infringement of principles governing the exercise of power in a constitutional democracy. These include:
 - (i) **the principle of legal certainty (which requires the fulfillment of legitimate expectation);**
 - (ii) **the principle of equality (which requires decisions to be consistently applied and prohibits the making of unjustifiable distinctions between individuals).**
 - (iii) **where the impact of the decision is oppressive or an unnecessarily onerous infringement of a person’s rights or interests.”** (emphasis added).

condition as the new conditions tantamount to a breach of the rules of natural justice, *ultra vires*, Wednesbury unreasonableness, irrationality and *mala fides*. The High Court rejected the respondent’s contentions. The respondent appealed to the Supreme Court. The Supreme Court reversed the High Court’s decision allowing a leave to the respondent to appeal for *certiorari* and directed that the substantive motion be heard before another judge. However, through this new judge, the Supreme Court dismissed the respondent’s appeal. Now, the respondent appealed to the Court of Appeal, who allowed the appeal. Dissatisfied with the decision of the Court of Appeal, the appellant appealed to the Federal Court. The Federal Court partly allowed the appeal. The Federal Court, *inter alia*, held that the appellant being the planning authority should not have imposed the disputed new conditions for the extended planning permission because to do so would be to unreasonably exercised or abused its powers or be unduly oppressive, and more particularly, it would be a violation of the legitimate expectation of the respondent that it would retain or receive the benefit of extension of planning permission, free from any such condition which expectation the court will not allow to be thwarted. There is also here an estoppel by reason of the conduct of the appellant.

In another case—*Lam Eng Rubber Factory (M) Sdn. Bhd v Pengarah Alam Sekitar, Negeri Kedah and Perlis & Anor* [2005] 2 MLJ 493 (Court of Appeal at Putrajaya)⁷⁵, Gopal Sri Ram JCA said, at pages 448—499, regarding the discretionary power of the public authority as follows:

“Of course, Parliament has conferred upon this first respondent the power or, to use a more well worn expression, the discretion to decide whether to issue the licence or not. **But the law requires him to exercise this power or discretion fairly, justly and without misdirecting himself on the law or the facts**” (emphasis added).

Salleh Abas FCJ in *Savrimuthu v Public Prosecutor* [1987] 2 MLJ 173, meanwhile stated:

“Public interest, reason and sense of justice demand that any statutory power **must be exercised reasonably and with due consideration**” (emphasis added).

Likewise, Lord Denning in *Laker Airways Ltd v Department of Trade* [1977] QB 643 observed as follows:

⁷⁵ The appellant operated a rubber factory in Sungai Petani, Kedah since 1940. In November 1993, the appellant applied for an environment licence from the Department of Environment, Kedah in order to carry out their factory. The first respondent, being the director of environment for Kedah and Perlis responded in mid-February 1994, saying that the appellant’s land had not been converted from agriculture to industry and for that reason the appellant’s application for a licence could not be considered. In actual fact, an earlier court judgment of KC Vohrah J between the appellant and the state director, Kedah and the land administrator, Kuala Muda, Sungai Petani, Kedah had held that the appellant had not infringed the condition of the issue document of title to their land—thus, there was no necessity for the appellant to apply for a change of land use. After some correspondence and a reminder from the appellant, the department did not respond further. The following year, the appellant applied for the licence for 1995. Its application was refused, the reason given was that the area surrounding the factory had become a residential areas and it was unsuitable for the appellant to carry on operations there. The appellant was dissatisfied and appealed to the Appeal Board. However, its appeal was refused by the first respondent. The appellant accordingly moved to the High Court for *certiorari* to quash the first respondent’s decision. Its application failed. The High Court held that since the appellant had no licence for the year 1994 they had carried on their factory illegally and had no legitimate expectation to have a licence for 1995. The court allowed the appeal and held, *inter alia*, that even though the first respondent has been given a discretionary power under the Environmental Quality Act 1974 to decide whether to issue the licence or not, yet the law and equity require him to exercise this power or discretion fairly, justly and without misdirecting himself on the law or the facts. Any reasonable man in the appellant’s shoes would have been led by the words and conduct of the first respondent to believe that the 1994 licence would be issued once the problem about the condition in the title to the land had been resolved. As for conduct, he accepted the payment made by the appellant and also did not respond at all to the appellant’s reminder. Then at the hearing came the suggestion that the appellant was not entitled to relief because it carried out its operation in 1994 without a licence. There was a smacking of unfairness and injustice in administration.

“The underlying principle is that the Crown cannot be estopped from exercising its power, whether given in a statute or by common law, when it is doing so in the proper exercise of its duty to act for the public good, even though this may work some injustice or unfairness to a private individual: see *Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610 where the Privy Council, unfortunately, I think, reversed the Supreme Court of Canada [1945] SCR 519. **It can, however, be estopped when it is not properly exercising its power, but is misusing them, and it does misuse them if it exercises them in circumstances which work injustice or unfairness to the individual without any countervailing benefit for the public:** see *Robertson v Minister of Pensions* [1949] 1 KB 227; *Re Liverpool Taxi Owners’ Association* [1972] 2 QB 299; *HTV Ltd v Price Commission* [1976] ICR 170...The two outstanding cases are *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, and *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 769, **where the House of Lords have shown that when discretionary powers are entrusted to the executive by statute, the courts can examine the exercise of those powers, so as to see that they are used properly, and not improperly or mistakenly.** By mistakenly, I mean under the influence of a misdirection in fact or in law.” (emphasis added).⁷⁶

In *Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 MLJ, 309, at page 375-377, Abdul Malik Ishak JCA said, in relation to the duty of the public authority to act fairly and observe the principles of natural justice, as follows:

“The principles of natural justice imposed by the courts may conveniently be grouped into two categories. The first would be the *audi alteram partem* (hear both sides). The second is *nemo iudex in causa sua* (there should be an absence of bias with no person being a judge in their own cause)...Over the years, the courts have used such terms as *fairness* or a *duty to act fairly*. **These terms are sufficiently wide to embrace all manner of decisions – be it judicial or administrative. No matter how wide the powers of the State Government of Perlis...may be and how extensive the discretion which they have, it is prudent to require them to exercise their wide ranging powers in a manner that is procedurally fair.** As

⁷⁶ Note that the judgment of Lord Denning MR in *Laker Airways* has been referred to and applied by the Federal Court in *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204; *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337. Similarly the legal principle, that the public authority in the exercise of their public duties must exercise it fairly and reasonably and should not be oppressive and unreasonable, is also applicable in *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114.

governmental powers grow by leaps and bounds, there is an urgent need to apply a certain measure of procedural fairness so that it will be tolerate...**It is ideal to remember that the power to act accorded to a public authority as he thinks fit does not allow that public authority to act unreasonably or in bad faith and that public authority must always take into consideration the elementary doctrines of fair procedure....Bluntly put, a violation of natural justice makes the decision void just like in any other case of ultra vires.** It must be emphasized that the rules of natural justice operate in this way. That the non-observance would invalidate the exercise of power” (emphasis added).⁷⁷

Thus, following the above cases the conclusion is the act of State Authority for not referring or not relying the views and advices by the technical agencies in the alienation of land for housing development and appointing unsuitable housing developer to carry out certain development, but instead motivated solely by political grounds, can tantamount to a breach of natural justice and a breach the duty to act fairly and reasonably to the detriment of the aggrieved housing developers and purchasers. In this situation, the aggrieved purchasers being the victims in abandoned housing projects or problematic housing projects have a *locus standi* and cause of action against the State Authority, apart from the defaulting housing developers, for damages and compensation.

4.2.d.i.f Vicarious Liability

Apart from the breaches of the above common law doctrines – fiduciary duty, legitimate expectation and duty to act fairly and reasonably, the State Authority may be liable due to any wrongful acts, breach of duties and negligence, in the exercise of the powers conferred by the NLC, of its land officers (The State Director of Lands and Mines, Registrar of Title, Land Administrators and their respective assistants). The liability emanates from the principle of vicarious liability. The officials might have been negligent or in breach of the duties, in that they failed to provide full information or carry

⁷⁷ See also judicial statements by Jackson J, a judge of the United States Supreme Court in *Shaughnessy v United States ex rel Mezei* [1953] 345 US 206, Frankfurter, J in *Mc Nabb v United States* (1943) 318 US 332, Aldoolcader, SCJ in *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134, Harman LJ in *Ridge v Baldwin & Ors* [1963] 1 QB 539 at p 578, Lord Esher MR in *Voinet v Barrett* (1885) 55 LJ QB 39 at 41, Lord Mansfield in *Moses v Macerlan* [1558—1774] All ER 581; [1760] 2 Burr 1005 at p 1012, Lord Russell in *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 1 WLR 1255 at p 1263 and Lord Reid in *Ridge v Baldwin & Ors* [1964] AC 40, at p 80.

out adequate investigation and elicit adequate views and advices from the relevant technical agencies and the information about the capability of the developer who had been appointed by the State Authority to undertake housing development. 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.

Likewise pursuant to section 22 of the NLC it provides that no civil suit shall be commenced against land officers (Director General of Lands and Mines, the State Director of Lands and Mines, Registrar of Title, Land Administrators and all their duly appointed officers) if they have carried out all the powers prescribed under the NLC in good faith.⁷⁸ It follows that if these land officers do not carry out the powers in *mala fide* for example negligence, breach of duties and willful misconduct affronting the expressed provisions of the NLC, 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.⁷⁹ Lord Denning MR explains the meaning of vicarious liability. In *Launchbury v Morgans* [1971] 2 QB 245, 253, he said:

“What is the basis of this doctrine of vicarious liability? To answer it, I would first ask: what does ‘vicarious’ mean? I turn to the Shorter Oxford English Dictionary (35d edn, 1944) Vol II. It means one ‘that takes or supplies the place of another....’. **So vicarious liability means that one person takes the place of another so far as liability is concerned. Familiar instances are where the master shoulders the liability of his servant; or the principal shoulders the liability of his agent; and so forth....**”(emphasis added).

⁷⁸ See also section 7 of the GPA which provides:

“Notwithstanding any other provisions of this Act to the contrary **no proceedings, other than proceedings for breach of contract, shall lie against the Government on account of anything done or omitted to be done or refused to be done by the Government or any public officer in exercise of the public duties of the Government**” (emphasis added).

⁷⁹ However in respect of the powers and duties prescribed under the Street, Drainage and Building Act, any negligent, breach of duty, any liability and wrongdoing of the local authority and State Authority shall not subject them to any penalty, be it criminal nor civil. This is provided in section 95(2) of the SDBA. See *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors* [2000] 4 MLJ 255; [2000] 3 AMR 3567 (Court of Appeal) and of the Federal Court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 289. See also NH Chan, *How to Judge the Judges* (2nd ed.), 2009, Sweet & Maxwell Asia, pp. 127 & 128.

In addition, pursuant to section 5 of the Government Proceedings Act 1956 (Act 359) ('GPA'), the government of Malaysia and the states government⁸⁰ 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 5 of the GPA provides that:

“Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government”(emphasis added).

The aggrieved parties to the alienation of land, for example the aggrieved purchasers, 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 provides:

..., any claim against the Government which—

(a) is founded on the use or occupation or the right to the use or occupation of State land; or

(b)...; or

(c) arises out of any contract made by the authority of the Government which would, if such claim had arisen between subject and subject, afford ground for civil proceedings; or

(d) is a claim (other than a claim in tort) for damages or compensation not included in the preceding paragraphs which might lawfully be enforced by civil proceedings as between subject and subject,

⁸⁰ Section 2 of the GPA define the word 'government' to include the Federal Government and the Governments of the States.

shall be enforceable by proceedings against the Government...”(emphasis added).

There may be an argument that the State Government and the public officer are absolved from any liability for any omission, commission and refusal to carry out any of its public duties pursuant to section 7 of the GPA⁸¹ as a defence to any wrong or negligent acts in the exercise of alienation of land for housing development. In the opinion of the researcher, 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 NLC⁸² being a specific legislation governing land administration, the case law⁸³ and other common law doctrines⁸⁴ to the effect that the government and its officer shall be liable for the wrongdoing, default, negligence or unfair administration. 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.⁸⁵

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

⁸¹ See also section 7 of the GPA.

⁸² Duty to act in good faith in the exercise of the provisions under the NLC. According to Lord Macnaghten in *Westminster Corporation v. London and North Western Railway Company* [1950] AC 426, at page 430, where he formulated three propositions in elaboration of the requirement that a public body must not exceed or abuse its statutory powers; it must keep within the limits of the authority committed to it; it must act in good faith; and it must act reasonably. He further said, acting in good faith implied acting reasonably.

⁸³ See *Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 MLJ 309 (Court of Appeal at Putrajaya), *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 (Court of Appeal), *Dr Michael Jeyakumar Devaraj v Ketua Pengarah Unit Penyelarasan Pelaksanaan di Jabatan Perdana Menteri & Ors* [2011] 6 MLJ 824 (High Court at Kuala Lumpur), *Sipadan Dive Sdn Bhd & Ors v The State Government of the State of Sabah* [2011] 3 MLJ 357 (High Court of Borneo at Kota Kinabalu) and *Toh Huat Khay v Lim A Chang (in his capacity as the executor of the estate of Toh Hoy Khay, deceased)* [2010] 4 MLJ 312 (Federal Court at Putrajaya).

⁸⁴ These are: fiduciary duties, duty to observe rules of natural justice and legitimate expectation of the government’s subjects.

⁸⁵ See *Anismatic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208. See also Sir Rupert Cross, *Statutory Interpretation* (3rd edn. By John Bell and Sir George Engle), (Butterworths: London), 171—172.

or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof.

4.2.d.ii *The Technical Agencies Referred By The State Authority Were Not Adequate*

In the opinion of the researcher the technical agencies that have been referred by the State Authority in the instance case study are inadequate. There were no referral to the Department of Mineral and Geo-science and the Department of Environment. In the opinion of the researcher, these two departments are vital as they could provide information as to the suitability of the project location particularly as regards the soil condition. Thus, it is submitted, the failure of the State Authority to have referred to these two additional technical agencies may tantamount to the breach of its fiduciary duty, breach of legitimate expectation of the stakeholders and that the State Authority had unfairly and unreasonably exercise their discretionary power in the alienation of land.

4.2.d.iii *The State Authority Is Not Bound By The Views Of The Planning Authority*

Even though in the instance case study there is no evidence that the views of the planning authority had not been complied with, it is a trite law and practice that the State Authority have an upper hand over the planning authority in the exercise of its powers conferred by the FC and the States' statutes. For instance, this position is supported by section 108 of the NLC. Notwithstanding that the FC and the NLC provide this prerogative and absolute power to the State Authority as a public body, the State Authority must still act in accordance with the common law principles for instance the responsibilities imposed under fiduciary duties, legitimate expectation and rules governing discretionary powers.

4.2.d.iv *Inadequate Coordination And Integrated Approach Between The Decision And Policies Of The State Authority And The Technical Agencies In Dealing With Application For Alienation Of Land For Housing Development Projects*

Based on the instant case study, there was no consideration made on the purported land's suitability for housing development, either by the State Authority or the planning

authority, before alienation took place. In the researcher's observation, even though certain technical agencies had provided comments, views and advices to the State Authority, yet the comments, views and advices were based on visual inspection over the land concerned. In other words, the inspections undertaken by the technical agencies had not been thoroughly done which could able to identify as much as they could the true information of suitability of the project location for housing development. It is submitted that seemingly that the State Authority approved the application by PKB for alienation of the land on an *ad hoc* basis, i.e without a full study and report. Further they (the State Authority) did not refer to any spatial multi-criteria evaluation method⁸⁶ which could emphasize and identify the factors affecting housing development,⁸⁷ on the overall suitability of the land and the applicant developer. True, there were views made by the planning authority (JPBD), JKR Kuala Muda/Sik, Majlis Perbandaran Sungai Petani and Keretapi Tanah Melayu Berhad (KTMB) over the purported application.⁸⁸ However, the views did not relate to the physical suitability--soil condition (for example slime soils and hard granite) of the land and the capability of the applicant developer to carry out the housing development projects. In other words, the views were still inadequate.

The State Authority did not seek views from MUWHG, as the regulatory body and authority in housing development, regarding the capability of the applicant developer who would be carrying out the purported housing development project. In fact, from the

⁸⁶ See also Kamalruddin Shamsudin, Sustainable Land Use Development in the Klang Valley: An Elusive Dream, in *Land Use Planning and Environmental Sustainability in Malaysia: Policies and Trends*, ed. by Hunud Abia Kadouf and Sharifah Zubaidah Aljunid, (Kuala Lumpur: Research Centre, International Islamic University Malaysia, 2006), 306 and 312. The situation is further worsened by the decisions of the courts to the effect of marginalizing the importance of Development Plans in *Chong Co Sdn. Bhd v. Majlis Perbandaran Pulau Pinang* [2000] 5 MLJ 132 (Appeal Board Penang) and *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 (HC). The Federal Town and Country Planning Department is currently working on institutionalizing the Spatial Multi-Criteria Evaluation (SMCE) methods for plan generation and evaluation into the development-planning process. Such decision-science methodology is currently being coupled with the Geographical Information System (GIS) technology to aid in the evaluation process for better decision-making. More importantly, through SMCE, participatory processes could be realistically leveraged in the decision-making context, thereby moving closer to transparency in the decision-making processes in plan-making. See Kamalruddin Shamsudin, Sustainable Land Use Development in the Klang Valley, in *Land Use Planning and Environmental Sustainability in Malaysia: Policies and Trends*, 306 and 312.

⁸⁷ See also Foziah bt Johar, Environmental Sustainability in Selected Local Plans in Malaysia, in *ibid*, 269.

⁸⁸ In practice, among the conditions for the application of alienation of land is that--the State Authority has to consider views of certain government departments. See *Manual Kamun Tanah Negara*, (Kuala Lumpur: Koperasi Pegawai Pentadbiran dan Pengurusan Tanah Malaysia Berhad, 2003), 10 & 19.

researcher's observation, the appointment to undertake the purported housing development project through joint venture between PKB and Setara was made through a political arrangement with the MB at that time. Based on the file review too, there was no proof that Setara had prior and adequate experience in housing development projects.⁸⁹

Thus, in the future it is incumbent on the State Authority before approving any application for alienation of land, to consider the views of other relevant government agencies such as the Department of Minerals and Geo-science,⁹⁰ JAS, MUWHG and other relevant agencies ('the technical agencies'). On request of the State Authority, the technical agencies should undertake certain investigations into the land and on the applicant developer to ascertain its suitability and obtain the updated information. This is to ensure that the purported land and the applicant developer are suitable and fit to undertake housing development projects.

The above scenario, it is submitted, happened because of the constitutional legal framework that is enshrined under the FC. Pursuant to List II of the Ninth Schedule to the FC, land matters shall be under the jurisdiction of the states, not the federal government. It follows that the federal government through the Ministry of Land and Natural Resources, in particular through the Director General of Lands and Mines may find a stumbling block to regulate, coordinate and govern the conducts of the State Authority in the exercise of alienation of lands as they have no power and jurisdiction over the exclusive states' matters. Likewise, it is opined, the position of the National Land Council (NLCL). The establishment of PEMUDAH or a taskforce committee formed by the federal government, consisting of representatives from the government and

⁸⁹ Ibid. This can be seen that after, the applicant developer obtained the project, they appointed a main contractor by name of Messrs Green Mountain Holdings (M) Sdn. Bhd to undertake the construction works with a full power to carry out the purported project, subject to certain terms of an agreement entered into.

⁹⁰ However according to the latest guidelines on OSC issued by MUWHG, one of the technical agencies, is the Department of Minerals and Geo-science. See Kementerian Perumahan dan Kerajaan Tempatan, *Buku Panduan Pelaksanaan Pusat Setempat Bagi Cadangan Pemajuan* (Kuala Lumpur: Author, n.d), 11, 84. However, as these guidelines are not mandatory, the State Authority and the local authority may not refer to this department for views, comments and suggestions.

the private sector to expedite the land development process and approval,⁹¹ including alienation of land, it is submitted, may not also be effective as it cannot bind the State Authority of its policies, directives and procedures.

However, there is nothing whatsoever in the NLC's provisions relating to the duty of the State Authority to refer to and be bound by the above technical agencies

The absolute power possessed by the State Authority, may lead to abuse of powers. The meaning of State Authority, in the practical sense, are the members of the State Executive Council (Majlis Mesyuarat Negeri or EXCO). EXCO's decisions may be highly influenced by the Menteri Besar. Usually, a large number of the members in the EXCO are from the same political party.⁹² Further, a problem may arise as section 8 of the Delegation of Powers Act, 1956 (Revised 1988) confers on the Menteri Besar certain delegated powers⁹³ without having to be subject to the professional officers' approvals,

⁹¹“Pasukan Petugas Khas Pemudahcara Perniagaan” or The Special Task Force To Facilitate Business) or its short-form known as PEMUDAH. It consists of Secretary General of the relevant ministries, government agencies and representatives from the private sectors and the employees. It is headed by Yang Berbahagia Tan Sri Mohd. Sidek Haji Hassan (now Dato' Seri Dr. Ali Hamsa), Chief Secretary to the Government of Malaysia and having its co-chair Yang Berbahagia Tan Sri Datuk Yong Poh Kon, President of the Federation of Malaysian Manufacturers (FMM). It has completed five years of work in February 7, 2012. The Special Task Force to Facilitate Business (PEMUDAH) was formed by former Prime Minister, Yang Amat Berbahagia Tun Abdullah Ahmad Badawi on 7 February 2007, out of an obvious need for closer collaboration between the public and private sector to enhance the public service delivery and improve Malaysia's business environment. No longer confined to the public service, the task force has expanded its work scope to include tackling private sector inefficiencies. PEMUDAH also leads the effort in improving Malaysia's ranking in the annual World Bank Doing Business Report. As a result of all these efforts, Malaysia's ranking improved from 23rd to 18th for the Doing Business 2012 Report. Two working groups under PEMUDAH were set up to look into the efficiency of the public service delivery system and businesses that Government policy has an impact on. PEMUDAH strongly believes that reforms can be implemented successfully if the relevant stakeholders are engaged to provide the necessary input. Toward this end, many ministries have adopted an open policy and have encouraged feedback from the private or public sector. Issues discussed at PEMUDAH meetings are in the presence of the relevant ministries and agencies with the authority to make decisions to resolve these issues. PEMUDAH strongly feels that both the public sector and private sector machinery must run efficiently and in tandem if Malaysia is to remain an attractive business hub. See PEMUDAH Annual Report 2011, “About PEMUDAH,” <http://www.pemudah.gov.my/c/document_library/get_file?uuid=f3a4588b-3300-46d9-8ec8-1e58221129b4&groupId=10124>, (accessed on 3 May, 2012).

⁹² See the composition of the EXCO-Majlis Mesyuarat Negeri Kedah Darul Aman, Portal Rasmi, Pejabat Dewan Undangan Negeri dan Majlis Mesyuarat Kerajaan Negeri, “Ahli Majlis Mesyuarat,” <<http://mmk.kedah.gov.my/index.php/kerajaan/ahli-yang-behormat/ahli-mesyuarat-kerajaan>> (viewed on 9 October, 2012).

⁹³ The powers are on matters, *inter alia*, pertaining to the approval of dealings on land subjected to restrictions in interest, approval of variation of express conditions for certain document of titles, approval

thus reducing the functions of certain professionals conferred by sections 12 and 13 of the NLC⁹⁴. Indirectly, all decisions made in EXCO meetings can be monopolized and manipulated for their⁹⁵ self-interests, which may not, in fact, be practical and suitable from the view of certain relevant professionals. Thus, it is timely to have a re-look at the definition of State Authority in the NLC and its composition as well as the powers granted under the Delegation of Powers Act 1956,⁹⁶ for possible legal revamp to ensure that the decisions made are not driven purely by political self-interest and considerations but are made subject to valid professional considerations.⁹⁷

The a new section--section 5D⁹⁸ and the Sixteenth Schedule [section 5D]-Electronic Land Administration System,⁹⁹ whereby all information regarding lands shall be recorded into a land database by an electronic technology containing land titles, images, documents or spatial and textual data, known as 'digital data',¹⁰⁰ it is opined, would not improve the above problem. This is because, unless all relevant technical agencies and the planning authority have conducted a comprehensive and updated study of the affected land being the subject to the land database in question, the existence of the land database in the digital data would still be ineffective insofar as the problems in problematic and

of amalgamation of land and to consider and approve the application for variation of conditions, restrictions and categories of land, where the approval has lapsed. See SI P.U. 72/1987.

⁹⁴ Section 13 NLC mentions the persons whom can be delegated the power of the State Authority in respect of land matters, subject to the proviso of section 13(1). They are the State Director of Lands and Mines, the Registrar of Titles, the Land Administrators, the Director of Survey and Mapping etc. (section 13(1) and section 12(1) of the NLC).

⁹⁵ The State EXCO members and the Menteri Besar.

⁹⁶ Sharifah Zubaidah Aljunid, Power to Decide on Development Applications Under the National Land Code 1965: The Position of Selangor [2004] 12 IJMLJ, 85, 86, 91 & 92.

⁹⁷ Ibid.

⁹⁸ Section 5D is purported to be amended by section 4 of the NLC 2007 Bill. The purpose of introducing the land database, or e-tanah, is to improve, streamline and expedite the administrative machinery of land administration. See website for Kementerian Sumber Asli dan Alam Sekitar, on e-tanah <<http://www.etanah.gov.my/etanah/articledetails.php?menuid=3&subid=1>>, Tuan Haji Mohd. Ibrahim bin Abu Bakar, "The Customer-centric e-Tanah," Gis Development Magazine, vol. 1, issue 3, July-September (2006):1, <<http://www.gisdevelopment.net/magazine/malaysia/2006/july-sep/26.htm>> and at <[http://www.kptg.gov.my/Artikel/2006-\(07-09\)=The%20Customer-Centric%20E-Tanah.pdf](http://www.kptg.gov.my/Artikel/2006-(07-09)=The%20Customer-Centric%20E-Tanah.pdf)>, (viewed on 25 December, 2007). However, it is evident from the pilot project for the application of e-tanah in Penang in 2007, the result is still unsatisfactory. See the Dewan Rakyat Debate on the NLC 2007 Bill on 17 Disember, 2007, DR 17.12.2007, <<http://www.parlimen.gov.my/hindex/pdf/DR-17122007.pdf>>, (viewed on 30 December, 2007).

⁹⁹ This new schedule is inserted by section 29 of the NLC 2007 Bill.

¹⁰⁰ The purported definition of 'digital data' is inserted in the Sixteenth Schedule to the NLC 2007 Bill.

abandoned housing projects are concerned. To be effective, the above problems regarding alienation should first be addressed.

The current establishment of One Stop Centre (OSC) at the State Authority level and the local authority level to coordinate and to expedite the approval process of land development applications including alienation of land at the land offices,¹⁰¹ in the opinion of the researcher, is still insufficient to solve the coordination and jurisdiction problems as highlighted above. This is because, the guidelines provided for the administration and operation of the OSC issued by MUWHG, shall not bind the State Authority in approving applications for land development, including alienation of land. Thus, it is opined, the prevailing practices such as insufficient coordination and inefficient administration and practices of the State Authorities in dealing with the applications for land development in their respective states would still continue.

Further, based on the latest guidelines issued by MUWHG, it is not a requirement for the OSC to refer to MUWHG as one of the relevant technical agencies for providing views, suggestions and comments over any land development project involving housing development.¹⁰² This lacuna, it is opined, may become a factor which could render the OSC ineffective to deal with the possible problems of abandoned housing projects and other problematic housing projects.

The researcher also found that the application for alienation of lands, conversion of land use, change of conditions and restrictions in interests on land as well as the application for planning permission and building plans were made separately and cannot be made concurrent. In other words, these application must be made in sequence, firstly there

¹⁰¹ Kementerian Perumahan dan Kerajaan Tempatan, *Buku Panduan Pelaksanaan Pusat Setempat Bagi Cadangan Pemajuan*, 2, 6. The remaining objectives of OSC are: to shorten the period and to facilitate the approval process for application for planning permission, plans' approval and to certify applications for land development involving projects applying the concept of 'build then sell' system, high impact projects and foreign investments as well as government projects, within four (4) months and under the concept of 'build then sell' system within six (6) months; and to coordinate the procedures and approval of the application process for planning permission, plans' approval and application for land development by taking into account of the provisions under the NLC, TCPA and SDBA. See Kementerian Perumahan dan Kerajaan Tempatan, *Buku Panduan Pelaksanaan Pusat Setempat Bagi Cadangan Pemajuan*, 6.

¹⁰² *Ibid*, 49—86.

should application for alienation of land, then followed by application to convert the land use and change of conditions and restrictions in interest of the land. Only if all these have been approved, will the applications for planning permission and building plan follow suit. It is submitted, due to this separated, non-coordination/inadequate coordination and not concurrent applications, the housing development works flow may be delayed and higher costs to the developers. It is submitted, if all these application for development matters could be made at once and for all this would help the developer, expedite the development process and workflow and reduce the costs of the development. This bureaucracy may lead to inefficient administration of land, planning and development in Malaysia.

4.2.d.v *The Application For Alienation Of Land Took About 3.5 Years To Finalize And This Had Caused Unnecessary Waiting Costs Of The Developer*

In the observation of the researcher, the application and approval of alienation of land in the instant case study took about 3.5 years to complete. This had caused unnecessary waiting costs of the developer. In the researcher's opinion, this delay was caused by inefficient administration, inadequate professional staff in the land office that can provide full and expedited works for consideration by the State Authority.

Further, in respect of the land office in Kedah (the Land Administrator, the Registrar of Titles and the Director of Lands and Mines), there is no implementation of the International Standard Organization (ISO) procedure in the Kedah Land offices. The lack of this internal control administration mechanism will mar the efficiency of the land related works by the land offices in Kedah. Even though there is an internal Key Performance Index ('KPI') set by the State Authority and the Kedah State Secretary office to regulate internally the works flow, the work procedure and the performance of the land offices' staff, the researcher is still skeptical whether this internal governance can be an effective tool to measure and govern the land administrative process. This is again due to the existence of the separate constitutional jurisdictions that the Federal Government and State Government/State Authority possess. In this respect the Federal

Government has no say and control over the conducts of all the State government machinery.

Other problems that are being faced by the land offices and State Authority in Kedah are shortage of professional staff (such as land tracers and settlement officers), inadequate technical and legal knowledge of the land office staff, staff negligent and breach of duty and over burdened daily works that cannot be adequately executed by the staff.¹⁰³ These are among the prevailing problems that plague the land offices and State Authority in Kedah, which can undermine their functions and responsibility towards the stakeholders especially in the housing development.

4.3 RECOMMENDATIONS

The researcher is of the view that in the alienation of land for housing development, if proven that the land location is not suitable for housing development project or that the appointed housing developer is not a fit person to carry out housing development and that due to these reasons the purported housing development project is problematic or abandoned, the aggrieved developer and the purchasers, as the case may be, have a cause of action and *locus standi* against the State Authority if the latter had acted unfairly, unreasonably and not in good faith. In this regard the aggrieved parties may claim for compensation and damages for all the calamities that have occurred due to the wrong decision made by the State Authority in the alienation of land.

On part of the Federal Government it is submitted that an amendment should be made to the NLC to the effect of imposing obligation on the State Authority to be bound by the views of the professional parties (the technical agencies, appropriate authorities, the NLCL and the planning authority) in the decision making process involving alienation of land. Further the State Authority should also be responsible with all the decisions made and no immunity be given to them if proven they have unfairly and without good faith in carrying out their public duties.

¹⁰³ Zulfatul Husna Zakaria, interview by author, 18 July 2012, Kedah Registrar of Land Titles (Pendaftar Hakmilik Tanah, Kedah), Director of Lands and Mines, Alor Setar Kedah, note writing.

In addition to the above, the Federal Government may legislate law and procedure relating to the alienation of land for housing development project which contain certain obligation on the State Authority to refer and be bound by the decisions and views of the appropriate authorities and the technical agencies, as the case may be, pursuant to article 76(1)(b) of the FC. This article empowers the Federal Government to legislate laws that can ensure uniformity of laws between states in Malaysia. Once this law has come into effect and enforced, all State Governments being subjects to this law are duty bound to comply with the said law (Article 81 of the FC) and thus this law can ensure uniformity of law in all the states in Malaysia relating to the procedure in dispensing with all applications for alienation of land for housing development.

Apart from the above, it is submitted that, it is a high time for the Federal Government and the State Government to formulate better composition of the State Authority in order to eliminate any political and self motivated policies and decisions by the State Authority in dispensing works involving alienation of land for housing development.

In addition to the above suggestions, the aggrieved parties for instance the housing developers and the aggrieved purchasers in any problematic housing projects caused by the unreasonable and unfair decision made by the State Authority in alienation of land, have a cause of action to commence civil suit against the State Authority for damages, compensation and other legal and equitable remedies.

Apart from the legislative proposals above, it is the hope of the researcher, there will be, in the near future, problematic and abandoned housing projects' purchasers or housing developers who may realize and with proof that their miserable plights are partly due to the failure of the State Authority to observe duty to act fairly and reasonably and not in good faith in the exercise of alienation of lands to take certain legal actions against the defaulting State Authority for some judicial remedies. Thus, the legal perimeter on the responsibility and liability in implementing public duties by the public bodies in Malaysia can be further defined and expounded by the guardian of the law itself.

Last but not least, in exercising alienation of land for housing development projects, the State Authority should coordinate and comply with the views and recommendations of the technical agencies and committee unless there are special circumstances that may not reasonably warranting the State Authority to follow.

4.4 SUMMARY

The case study that this chapter deals with concerns an alienation of land for a proposed housing development at Kampung Kilang Ketapan, Gurun, Kedah. The alienation took place following an instruction from the Menteri Besar of Kedah to PKB. Instead of acquiring the land by itself alone, PKB had entered into a joint venture agreement with one Setara Damai Sdn Bhd. Setara acts as the contractor/developer, while PKB as an agency who applied for alienation of land. The application for alienation was granted by the State Authority. However the problem in the development of the land is the existence of illegal squatters who are occupying the said land. The illegal squatters refused to vacate the land. The developer is in the course of taking legal actions against the illegal squatters. This case study also reveals certain issues in the exercise of alienation of land. These issues may mar the smooth running of alienation of land and may affect the future development progress undertaken by the developer. One of the major issue is the separate jurisdiction that the Federal Government and the State Government enjoy as prescribed under the FC. The existence of the separation of power and jurisdiction that these two governments have may affect the systematic and standardized process in the alienation of lands and may also affect the future smooth running of the land development. As the federal government has no say and power to bind the State Government machinery in the alienation lands, the process of alienation of land for land development may not be smoothly executed to the detriment of the developer and the purchasers. These includes delay on part of the State Authority to process the application for alienation of land, the superiority of the land authority over other technical agencies, possible abuses of power of the Menteri Besar and the State Authority and the inadequacy coordination between the State Government machinery and the Federal Government agencies and departments. From this chapter also, it is found that the State Authority may have failed to execute statutory duties fairly and reasonably to the detriment of the housing developer and

purchasers. To overcome these problems, the researcher recommends certain approaches. These approaches include amendments to the NLC to prevent the occurrences of the above mentioned problems and call on the aggrieved developers and purchasers to commence legal actions in court against the defaulting State Authority for judicial redresses and relief.



Picture 4.1: The Gurun Forest Ranger Office (Front Gate)



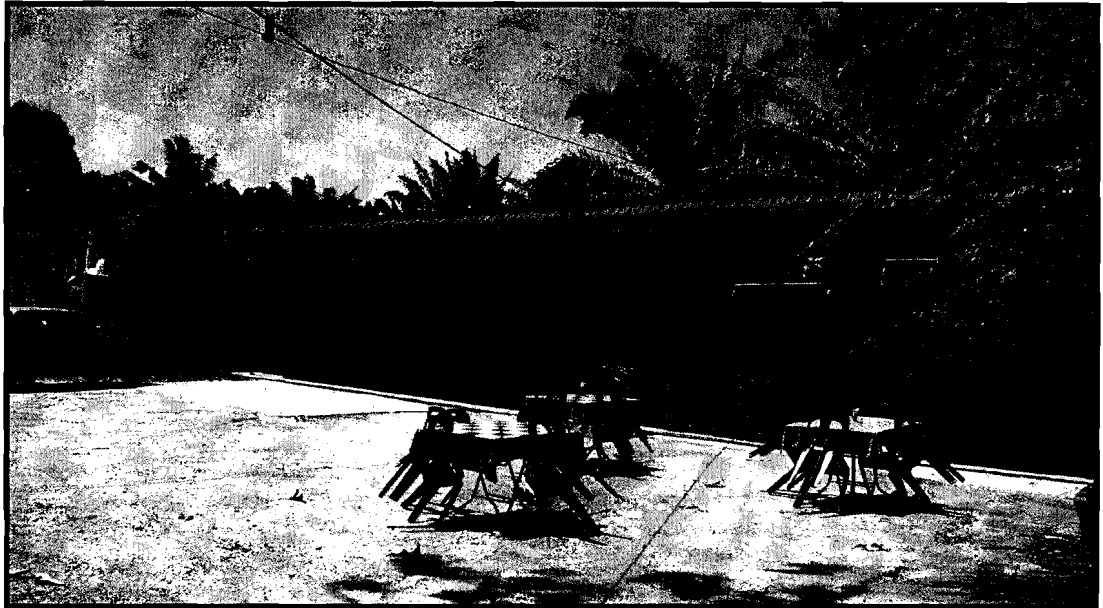
Picture 4.2: The Gurun Forest Ranger Office (Signboard)



Picture 4.3: The Gurun Forest Ranger Frontage Compound



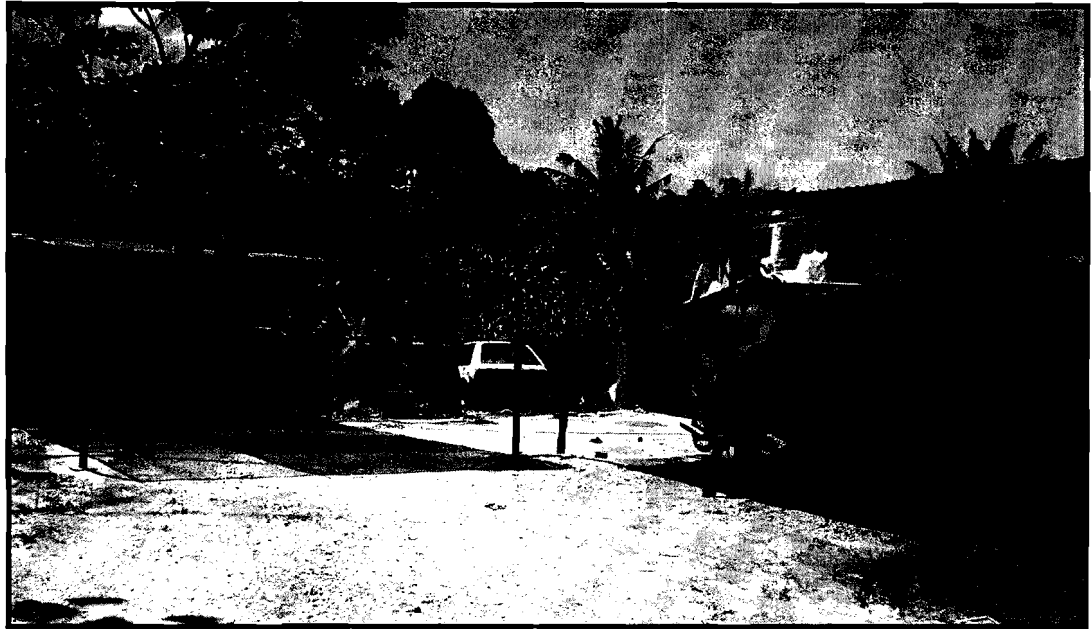
**Picture 4.4: Government Signboard on side of a Road Entering Kampung
Kilang Ketapan**



Picture 4.5: Restaurant and Shops at Entrance of Kampung Kilang Ketapan



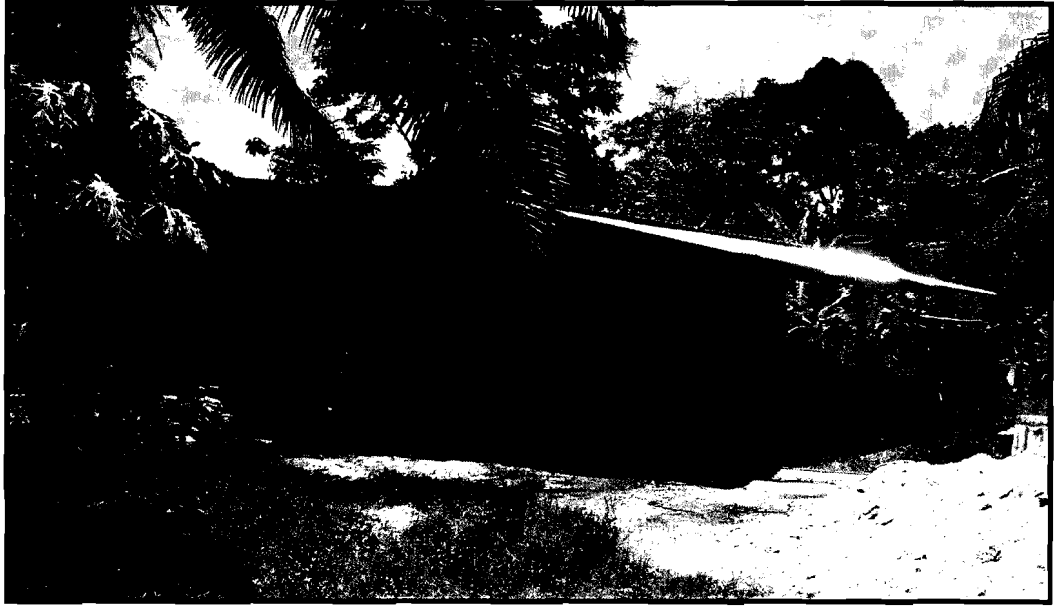
Picture 4.6: A Restaurant at the Entrance of Kampung Kilang Ketapan



Picture 4.7: A Car Wash and Automobile Workshop at the Entrance of Kampung Kilang Ketapan



Picture 4.8: Palm Oil Trees Planted at Kampung Kilang Ketapan



Picture 4.9: An Illegal House Squatter at Kampung Kilang Ketapan



Picture 4.10: An Illegal House Squatter at Kampung Kilang Ketapan



Picture 4.11: An Illegal Bungalow House Squatter at Kampung Kilang Ketapan



Picture 4.12: An Illegal House Squatter Operating A Sundry Shop at Kampung Kilang Ketapan



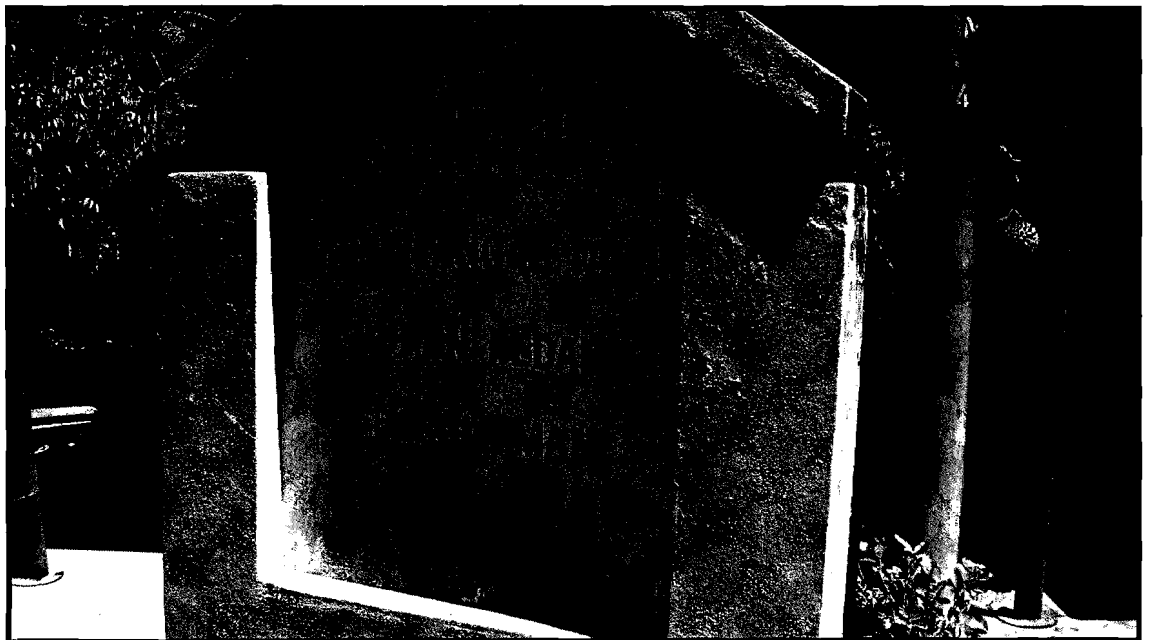
Picture 4.13: An Ad-hoc Self-made Football Field at Kampung Kilang Ketapan



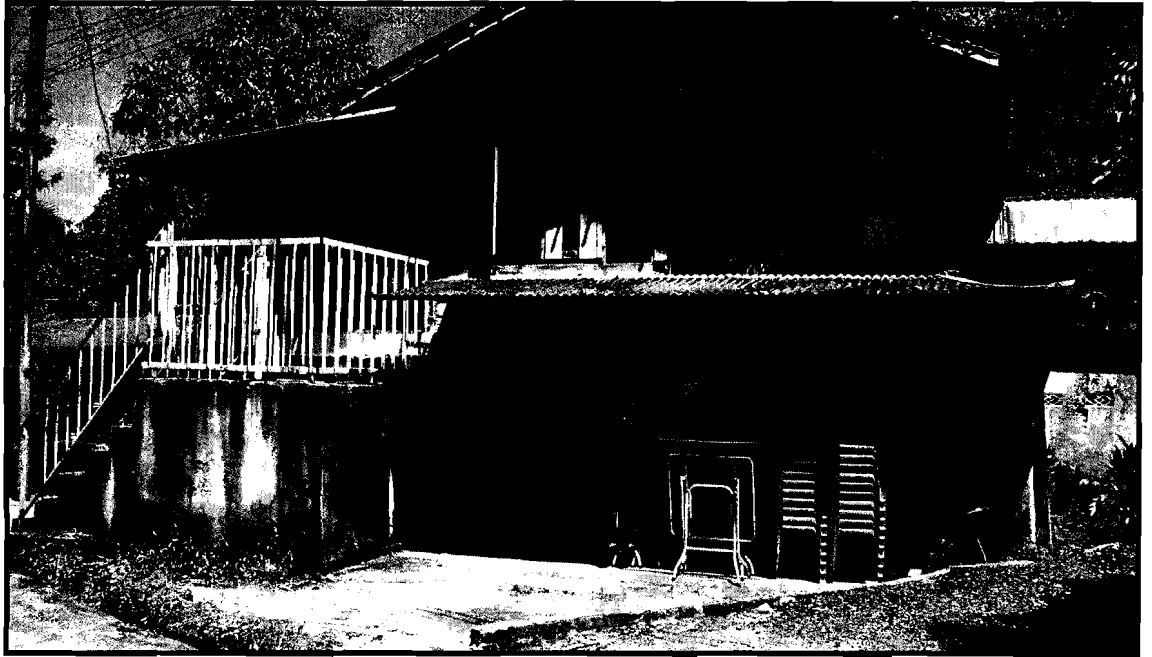
Picture 4.14: A Mosque at Kampung Kilang Ketapan



Picture 4.15: An Illegal Bungalow House Squatter at Kampung Kilang Ketapan



Picture 4.16: Signboard of An Old and Abandoned Prayer House at Kampung Kilang Ketapan



Picture 4.17: An Old and Abandoned Prayer House at Kampung Kilang Ketapan



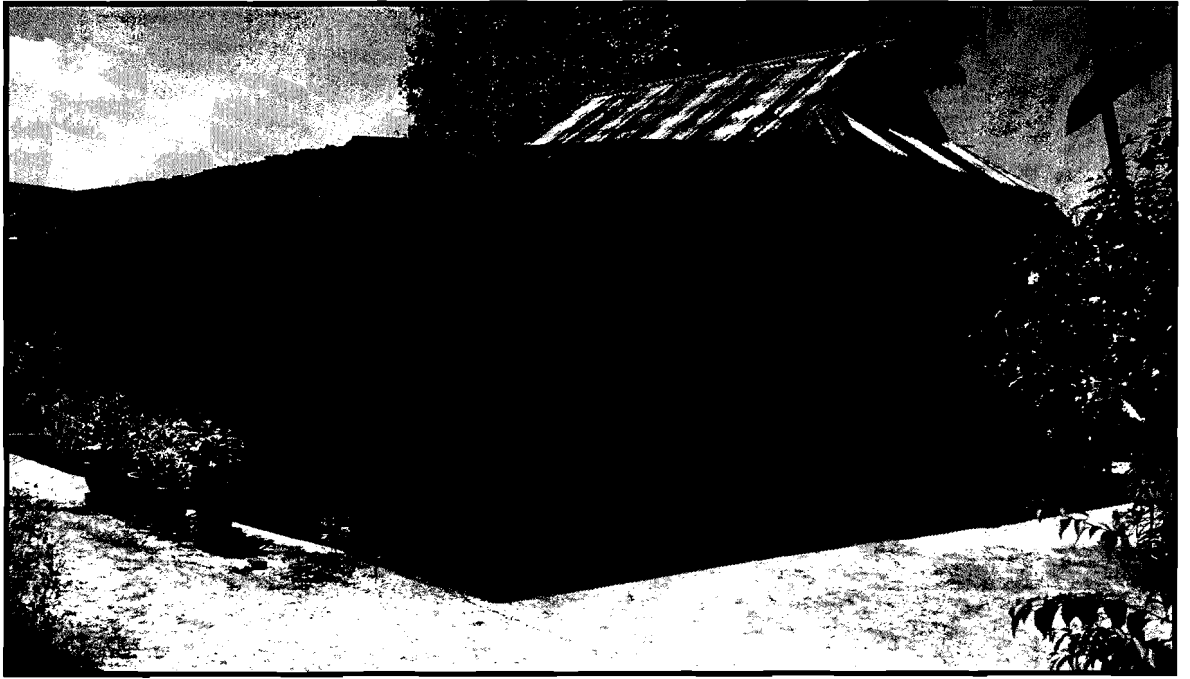
Picture 4.18: A Hindu Temple at Kampung Kilang Ketapan



Picture 4.19: An Illegal Bungalow House Squatter at Kampung Kilang Ketapan



Picture 4.20: An Illegal Bungalow House Squatter at Kampung Kilang Ketapan



**Picture 4.21: An Illegal Bungalow House Squatter at Kampung Kilang
Ketapan**

CHAPTER FIVE

CASE STUDY TWO

THE PROPOSED DEVELOPMENT OF BANDAR TUNKU PUTERI IN THE DISTRICT OF POKOK SENA, KEDAH AS A SATELLITE TOWN FOR ALOR SETAR ON GOVERNMENT LAND LOT NO. 164, 3202, 3204, 1853 AND 2324 MUKIM OF GAJAH MATI, DISTRICT OF POKOK SENA, KEDAH DARUL AMAN

5.1 INTRODUCTION

The proposed housing development under this chapter is located at Lot Numbers 164, 3202, 3204, 1853 and 2324, Mukim of Gajah Mati, District of Pokok Sena, Kedah Darul Aman. The proposed development is called Bandar Tunku Puteri. The lands are government lands. Currently, before any development is carried out on the land, the land is occupied by several government departments and agencies. These departments are Department of Agriculture, Department of Veterinary Services and Institut Penyelidikan dan Kemajuan Pertanian Malaysia (MARDI)¹ and a gazetted area as Taman Kekal Pengeluaran Makanan – Permanent Food Production Park. The width of the land is 440 acres. The location of the land is 2 kilometer from Bandar Pokok Sena, 15 km from Kuala Nerang town, 10 km from Naka town and 20 km away from Alor Setar city. The topography of the land is flat and substantially the land is used for agriculture purposes. Substantial part of the land is flat and low except a portion in the south of the land which are quite high and steep. (see pictures 6.1 – 6.5).

Pokok Sena-Naka road is the main connection between the proposed development location to Pokok Sena and Naka townships. The land status of this proposed location is also a Malay reservation land under the category of town land and located within the

¹ in English is called Malaysian Agricultural Research and Development Institute (MARDI).

jurisdiction of the Alor Setar Municipal Council. The southern part of this land was proposed to be made as a Muslim cemetery with a width of 4 acres. A part of the proposed development land is used as a special access road to the prison complex. It was thought that the proposed development has no restriction for the intended land use purposes.

Similar to Chapter Four, the discussion of this chapter will deal with the application for alienation of land for housing development project by the applicant developer (Darul Aman Realty Sdn Bhd) and its approval process. By utilizing the case study method to research into the application and process of approving the alienation application for above proposed housing development project, the questions of 'how' and 'why' relating to such application and its approval process can be answered. Legal analyses will follow suit.

The investigation and discussion, the sources of data and information, and the application for alienation of land and its approval process are summarized and illustrated by **Figure 5.1**.

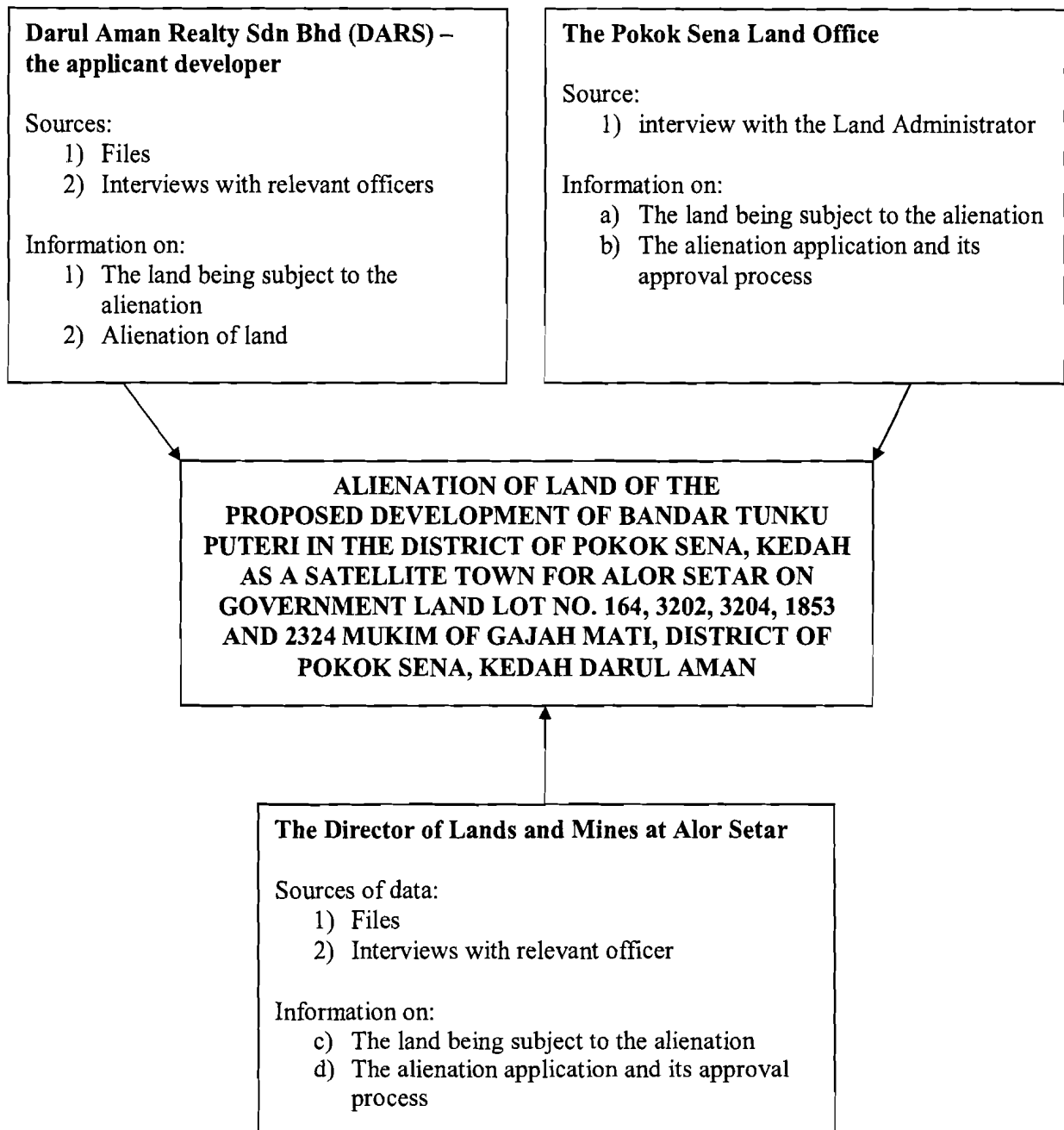


Figure 5.1: Summary of the Sources of Data and Information at the Proposed Development Of Bandar Tunku Puteri In The District Of Pokok Sena, Kedah As A Satellite Town For Alor Setar on Government Land Lot No. 164, 3202, 3204, 1853 and 2324 Mukim of Gajah Mati, District of Pokok Sena, Kedah Darul Aman

5.2 APPLICATION PROCESS FOR ALIENATION OF THE LAND

In November 2008, Bina Darulaman Berhad the holding company to Darul Aman Realty Sdn Bhd ('DARS') received an instruction from the Kedah government requesting DARS to apply a government land at Pokok Sena district to be developed it into a new government administrative centre and residential area.² On 13 November 2008, DARS submitted the application to the then Menteri Besar of Kedah for alienation of land – Lot Number 164, 3202, 1853 and 2423, Mukim Gajah Mati, District of Pokok Sena, Kedah in order to get a support from him. Presentation of the application was made to the then Menteri Besar. The Menteri Besar then instructed DARS to submit official application to the Department of Lands and Mines Kedah at Alor Setar.

DARS lodged the application to alienate the land to the Pokok Sena Land Office on 8 January 2009.³

The Kedah State Executive Council on 16 September 2009 approved the application of DARS to develop the land into a mixed housing and commercial development to be known as Bandar Tunku Puteri.⁴ The EXCO also agreed to appoint DARS⁵ to carry out the purported development on the said land. DARS will also be responsible to apply for planning permission to the local authority (Majlis Bandaraya Alor Star – MBAS), once land approval is obtained from the EXCO. Some consultants have been identified for the development of the project. These include architect⁶, town planner⁷ and licensed quantity surveyor⁸.

² Ruhaina Ibrahim, DARS's Planner, interview by author, 6 September 2012 and 24 July 2012, Jitra, Kedah, note writing.

³ Ringkasan peristiwa dalam Cadangan Permohonan Tanah Kerajaan Lot No. 164, 3202, 3204, 1853 and 2423 bagi cadangan Bandar Baru Pokok Sena sebagai Bandar satelit Alor Star, Mukim Gajah Mati, Daerah Pokok Sena, Kedah in file Bandar Tunku Puteri vol. 1.

⁴ See also letter from Kerajaan Negeri Kedah Darul Aman, Pejabat Setiausaha Kerajaan, Wisma Darul Aman, 05503 Alor Star, Kedah with reference UPEN(K) 883(12) dated 7 October 2009 to the General Manager, DRSB, Lot 1, Bandar Darulaman, P.O.Box 12, 06007 Jitra, Kedah. This letter was also addressed to the Director of Lands and Mines, Kedah, District Officer of Pokok Sena, Land Administrator of Pokok Sena, in file Bandar Tunku Puteri vol. 1.

⁵ At Lot 1, Bandar Darulaman, P.O.Box 12, 06007 Jitra, Kedah Darul Aman.

⁶ The architect is RMS Architect, No. 107, First Floor, Kompleks Perniagaan Sultan Abdul Halim, Persiaran Sultan Abdul Halim, 05050 Alor Setar.

As reciprocal conditions for the above approval, the State Authority imposed certain conditions on DARS, among them were:

- a) that the Director of Lands And Mines, Kedah to identify the replacement land for government lots that place Department of Agriculture, Department of Veterinary Services and MARDI including area that has been issued with reserve certificate and area which has been gazetted as permanent food production park (Taman Kekal Pengeluaran Makanan).⁹
- b) that the Pokok Sena Land and District Office is required to manage the approval of land development for the project site to DARS.
- c) that DARS shall provide new infrastructure at the newly identified replacement areas for placing and relocating the relevant government department to new areas.
- d) DARS should provide the site plan for provisions of some lands to the state's government officers comprising of its supporting employees;¹⁰
- e) DARS should provide development layout plan for the Kedah State's Football players;¹¹
- f) DARS should provide land provisions with the proposed lots for the Kedah State's Football players and nominate names (all are 27 persons) who brought double successes in the recent 2006/2007 and 2007/2008 TM Malaysia League.¹²
- g) DARS should submit plan which shows the area and net width for the development of affordable housing area.¹³

⁷ The town planner is Cerana Design Associates Sdn. Bhd, No. 15, Tingkat 2, Jalan Shahab 2, Shahab Perdana, 05150 Alor Setar, Kedah.

⁸ Jurukur Teras, No. 3, Tingkat Bawah, Bangunan Medan Bendahara, Jalan Langgar, 05460 Alor Setar, Kedah.

⁹ Letter from Kedah State Government to the Mayor of Alor Setar city, Alor Setar Municipal Council, Kedah Department of Lands and Mines, Pokok Sena Land Office, Director of State Town and Country Planning, Pokok Sena Land Administrator and Head of the Secretarial Assistance (housing) at Wisma Darul Aman, dated 28 July 2009 in file Bandar Tunku Puteri vol. 1.

¹⁰ Kedah State's Government and the Office of the Director of Lands and Mines letter to Darulaman Realty Sdn. Bhd. dated 23rd May, 2011 with reference Bil.(21)d/m. PTG/Ked/K/066/2009 in file in file Bandar Tunku Puteri vol. 1.

¹¹ Ibid.

¹² Ibid, also according to the resolution in the State's Executive Council Meeting paper No. 6(F) 66/2011 dated 16th March 2011 – PSU(K)/MSNK(A)001/81 and letter from Director of Lands and Mines office to Darulaman Realty Sdn. Bhd, dated 23 May, 2011 in file...volume 1. Whether the council agreed to give to Kedah State's Football players a land lot on the development location as residential lots in the area of 6000 square feet.

5.2.a References to Government and Private Agencies

Since November 2008, DARS has conducted numerous meetings and discussions with relevant agencies and government departments to smoothen the approval process for the alienation of land. These government and private agencies were among others:

- 1) Government Agencies
 - a) The office of the Menteri Besar of Kedah¹⁴;
 - b) An adjacent project's developer known as Bandar Pokok Sena Development Sdn. Bhd¹⁵;
 - c) Technical committee meeting¹⁶;
 - d) Pokok Sena Land Office¹⁷;
 - e) Economic Planning Committee;
 - f) State's Economic Planning (UPEN)¹⁸;
 - g) Pokok Sena District Office.
 - h) Department of Irrigation and Drainage (JPS)¹⁹;
 - i) Lands and Mines office²⁰;
 - j) Pokok Sena Land and District office²¹;

¹³ Letter from the Pokok Sena's District and Land to Darulaman Realty Sdn Bhd dated 18th May, 2011 in file Cadangan Pembangunan Bandar Tunku Puteri di Daerah Pokok Sena, Kedah in file Bandar Tunku Puteri vol. 1.

¹⁴ On 21 December 2008, the Menteri Besar office submitted a supporting letter to the State Director of Lands and Mines. Ringkasan peristiwa dalam Cadangan Permohonan Tanah Kerajaan Lot No. 164, 3202, 3204, 1853 and 2423 bagi cadangan Bandar Baru Pokok Sena sebagai Bandar satelit Alor Star, Mukim Gajah Mati, Daerah Pokok Sena, Kedah in file Bandar Tunku Puteri vol. 1. on 2 August 2009 also there was a presentation of the proposed development project in the economic planning committee meeting presided by the Menteri Besar.

¹⁵ This housing developer company is a joint venture company between YIKED Holdings Sdn. Bhd and Tuan Haji Karaf and KLK Construction Sdn Bhd. According to this developer they obtained an approval from the Kedah State Government in 2003 to develop a part of the proposed Tunku Puteri land development into a government administrative centre. The width of the land is 200 acres.

¹⁶ This meeting was presided by the Deputy Director of Lands and Mines 1, Hajjah Sepiah bt. Isa at the Pokok Sena Land Office.

¹⁷ Pokok Sena Land Office submitted the land report and DRSB's application to Office of Lands and Mines for further action.

¹⁸ A meeting at UPEN was conducted on the proposed project presided by Yang Berbahagia Dato' Haji Bashiruddin Hj. Abdul Hamid on 5 January 2010.

¹⁹ On 1 July 2010, a meeting was held with JPS on matters pertaining to the irrigation in the proposed development.

²⁰ On 22 November 2009 the lands and mines office and the Pokok Sena Land Office conducted an investigation to cancel the Reserved Certificate issued to the Veterinary Department and Agriculture Department. The investigation was also attended by the Deputy Director of Lands and Mines 1.

²¹ Ibid. On 14 April 2010 a meeting discussing the proposed development was convened at the Pokok Sena Land Office. The meeting discussed the necessity for providing basic needs of office facilities for all the

- k) State Planning Committee²²;
- l) Kedah State's Government;

2) Private Agencies

- a) Syarikat Air Darul Aman Sdn Bhd (SADA).²³
- b) Cerana Design Associates Sdn. Bhd as the town planner consultant to undertake certain duties including to carry out initial investigation on the project site and to provide detailed layout plan and to obtain planning permission from local authority.²⁴
- c) Appointment of Messrs YES Enviro Sdn Bhd as the environmental consultant to prepare EIA report for the proposed development project.²⁵
- d) Appointment of Messrs Rushdanmdsalleh Architect as the consultant architect for undertaking certain works such as building plans, submitting building plans for approval to local authority and to provide presentation report for presenting it to the local authority.²⁶

relevant government departments. On 26 April 2010, DRSB had submitted to the Pokok Sena Land Office the details of all the floor area needed by the government departments for further submission to UPEN. Similar meeting had also been held on 1 June 2010 and had been attended by consultants – architect, town planner and district officer.

²² Through a meeting with the committee, the developer was required to comply with the following conditions:

- a) The developer was required to provide houses with designs that do not show any sign of lower or upper classes of people.
- b) The development for Phase 1, with an area of 87.93 hectares, would commence in 2011 and will be followed by the second Phase development involving an area of 82.73 hectares in 2015. Nonetheless the whole basic infrastructure should be provided in Phase 1. To achieve this, a master plan drainage system and retention pond should be provided.
- c) EIA report should be submitted to the state's Director of the Department of Environment for his consideration.

All these are provided in the extract of the meeting's minutes of the State's Planning Committee dated 21 November 2010 at its 114th meeting (5/2010). The working paper is known as Kertas No. JPN 5/2020(3.3). agenda 3.3: Pembentangan Cadangan Bandar Tunku Puteri sebagai Bandar Satelit Alor Setar oleh Darul Aman Realty Sdn. Bhd.

²³ Letter from Darulaman Realty Sdn Bhd to UPEN, Aras 3, Blok B, Wisma Darulaman, 05503 Alor Setar, Kedah dated 17th January 2011 in Cadangan Pembangunan Bandar Tunku Puteri di Daerah Pokok Sena, Kedah...file volume 1.

²⁴ Letter of appointment from Darulaman Realty Sdn. Bhd to Cerana Design Associates Sdn. Bhd dated 12 July, 2011 in file..... volume 1.

²⁵ Darulaman Realty Sdn Bhd letter dated 18 July 2011 to YES Enviro Sdn. Bhd of 4936, Jalan Siram, Desa Siram, 12100 Butterworth, Penang, in file.... Volume 1.

²⁶ Darulalam Realty Sdn Bhd's letter to Messrs Rushdanmadsalleh Architect of No. 107, 1st Floor, Kompleks Perniagaan Sultan Abdul Hali, Persiaran Sultan Abdul Hamdi, 05050 Alor Setar, Kedah in file ...volume 1.

- e) Appointment of Messrs NAS Consult as a consultant to carry out the Traffic Impact Assessment and Road Safety Audit Study.²⁷

5.2.b Purpose of Alienation

The objective of the proposed development is to develop and establish a new township at Pokok Sena serving as an administrative point for Pokok Sena. It will also serve as a satellite town for Alor Setar. To realize this objective the State Government shouldered it on DARS. This new township will be provided with systematic infrastructure and state of the art amenities. The housing and commercial development on the land will be a backbone for the creation of a new modern city. The purported development will also serve as a catalyst to economic activities surrounding district of Pokok Sena.²⁸

Parts of the development concept that this proposed development will include:

- a) A Linear Park as the main planning element that gathers all development phases and new township element as a single entity. The linear park will also be developed to include residential zone as a conducive place of abode supported by recreational amenities in its vicinity.
- b) Administrative city image will be emphasized as the 'focal point' of the development located at the main road and connected with the linear part. The development of the administrative township will also feature Islamic architecture based on geometry principle and an emphasis between buildings, life and its environment.
- c) Employment opportunities in respect of business and administration to ensure the town planning succeeds. Commercial zone is also planned along the main road.
- d) Development component will consist the following planning:
 - i) An institutional zone – 20 acres (5%) will house government administrative centre, public facilities including mosque, multipurpose hall and health centre.

²⁷ Darulaman Realty Sdn Bhd's letter to NAS Consult dated 11 August, 2011, in file.....volume 1.

²⁸ Laporan Ringkas Projek – Cadangan Permohonan Tanah Kerajaan di Atas Lot No. 164, 3202, 1853 dan 2423 bagi cadangan Bandar Tunku Puteri Pokok Sena sebagai bandar satelit Alor Setar, Mukim Gajah Mati, Daerah Pokok Sena Kedah Darul Aman, in file volume 1.

- ii) A residential zone – 278 acres equivalent to 66% of the whole land. Mixed development may also be carried out.
- iii) A commercial zone – 25 acres equivalent to 6% of the mixed commercial development that will take into account shop lot concept, bazaar and open plaza.
- iv) A Linear Park which will use 62 acres of the land and representing 15% of the total land. In the Linear Park there will be provided with public part and open spaces.
- v) Service facilities which will occupy 25 acres or 5% of the total land use. Examples of these facilities are Sewage Treatment Plant (STP), retention ponds and public infrastructure sub-station.

5.2.c Issues In Alienation Of The Land

The issues in the case study under this chapter are:

- 1) The current zoning for the land use planning of the said land is for institutions. Nonetheless, despite the zone is for institutions, the State Authority still adamantly wanted the land to be developed with mixed development – residential, commercial and administrative development. Thus, to actualize this, the State Authority instructed that certain amendments should be made to the proposed local, structure and development plans of the Kota Setar District 2020 to accommodate its *ad hoc* needs.
- 2) Syarikat Air Darul Aman Sdn Bhd (SADA) being the Kedah Water Authority needed bigger water supply lines to meet the Population Equivalent's (PE) need at Bandar Pokok Sena. Thus, DARS have to provide this facility for otherwise planning permission would not be granted. This costed substantial fund to DARS.²⁹
- 3) Issue of overlapping procedures in obtaining views and comments from the technical agencies. State Authority needs to get views from the planning authority and other relevant technical committees during the course of approving alienation

²⁹ Ruhaina Ibrahim, DARS's Planner, interview by author, 6 September 2012 and 24 July 2012, Jitra, Kedah, note writing.

- of land. However, at the stage of planning permission application, the same agencies and committees need to be consulted. These two references are overlapping and time consuming. This has caused delay to DARS in carrying out and expediting the purported development.³⁰
- 4) DARS was imposed with an exorbitant premium for the alienation of land amounting to RM 46,476,406.00 by the Pokok Sena Land Administrator.³¹ However, after numerous applications, the Pokok Sena Land Administrator agreed to reduce it to RM 22 million.³²
 - 5) Delay in the land approval process by the land authority and the EXCO involving alienation, subdivision, conversion of land etc. Usually the alienation process and its approval take about 3-5 years to complete. This burdens the developer financially in that the developer has to incur waiting cost before they can get profits from the project.³³
 - 6) There is an inadequate uniformity and coordination in land approval process between all states in Malaysia. This problem emanates from the division of powers and jurisdiction between the Federal Government and States as prescribed under List II of the FC.
 - 7) The land offices lack skillful staff which can execute the land approval process smoothly and professionally. In addition, the land office is not subject to the directions or any prescribed service quality standard such as ISO of the Federal Government (for instance the Director General of Lands and Mines in Putrajaya). In reality the land administration is only subjected to the directions and orders of the State Authority. The State Authority have full prerogative powers to supervise and govern the due administration and policies of the land authority. The Federal

³⁰ Ruhaina Ibrahim, DARS's Planner, interview by author, 6 September 2012 and 24 July 2012, Jitra, Kedah, note writing.

³¹ Letter from DARS to the Pokok Sena Land Administrator dated 25 April 2011. Among the reasons to have a reduction of premium are the said development land will be a new area for development and the price for houses and shop-lots need to be low to attract prospective purchasers. DARS's high preliminary costs that DARS need to bear are not commensurate with the low prices of the units to be built. Secondly, DARS needs to upgrade the existing water supply system along 3 km in length at the project site.

³² Sharifah Rihana Syed Salim, Pokok Sena Land Administrator, interview by author, 11 and 12 September, 2013, Pokok Sena, Kedah, note writing. Check tarikh di portal.

³³ Ahmad Bohar, DARS's General Executive and Ruhaina Ibrahim, DARS's Planner, interviews by author, 6 September 2012 and 24 July 2012, Jitra, Kedah, note writing.

guidelines and policies on land administration are not mandatory for the State Authority to follow. The land office also is in need of additional qualified staff. Thus, it is common phenomenon that the approval process is done by the chief clerk, supporting officers, Assistant Administrator and general workers who lack the required academic and professional qualifications in land law, technical knowledge and administration. In addition, insufficient perks given to the staff may also affect their quality and quantity of works in the land offices. At times, the land office staff also face heavy load works. The land officers/supporting staff were also found not to be knowledgeable in land rules and law and relevant technical knowledge. They were also found not to be adequately cooperative, being unfriendly and evidently unprofessional.³⁴ These are among the constraints and weaknesses of the land offices throughout Malaysia, particularly in Kedah, which may have contributed to the delay and inefficient administration in the land approval process.³⁵

- 8) The issue of un-professional conduct of the land officers/supporting staff who had added several new names to get the allocated land portions on the said land in the State Authority's working papers without the consent of DARS. Unfortunately, this advertence exercise had been approved by the State Authority. On knowing this, DARS had to request the State Authority to forthwith correct and rectify this unapproved land allocations. Otherwise, DARS would suffer losses.³⁶ The rectification process may take some time and is a time-consuming. This also may cause further delay to DARS in its pursuit of developing the said land into a vibrant housing development project.

Apart from the above, similar issues and problems as happened in the case study No. One (Chapter Four) are also applicable under the instant case study, *viz*:

³⁴ Ruhaina Ibrahim, DARS's Planner, interview by author, 6 September 2012 and 24 July 2012, Jitra, Kedah, note writing.

³⁵ Zulfatul Husna Zakaria, interview by author, 18 July 2012, Kedah Registrar of Land Titles (Pendaftar Hakmilik Tanah, Kedah), Director of Lands and Mines, Alor Setar Kedah, note writing.

³⁶ Ruhaina Ibrahim, DARS's Planner, interview by author, 6 September 2012 and 24 July 2012, Jitra, Kedah, note writing.

- 1) The State Authority is not bound by any directives, guidelines and procedures adopted by the federal government agencies such as the director general of lands and mines and the technical agencies in dealing with the application for alienation of land;
- 2) The technical agencies referred by the State Authority were not adequate. For instance there was no soil test and investigation had been carried out or that the relevant government agencies responsible over the same had not been consulted to carry out this duty. Neither was there any feasibility and viability study undertaken before embarking on the said project. DARS only followed the instruction of the State Authority and is not in a position to reject it as DARS is the State Government Linked Company ('GLC');³⁷
- 3) The State Authority is not bound by the views of the planning authority; and,
- 4) Inadequate coordination and integrated approach between the decision and policies of the State Authority and the technical agencies in dealing with application for alienation of land for housing development projects.³⁸

5.2.d Analysis

For the purpose of this instant case study No. Two (Chapter Five), the researcher repeats the analysis and the recommendations as explained in Chapter Four (Case Study No. One) in order to face the issues and problems in the alienation of lands for housing development projects. This is because the issues and problems as happened in the Case Study No. One (Chapter Four) are quite similar to the situations in the instant case study (Chapter Five). The recommendations as spelt out in Chapter Four are herein repeated, as follows:

- 1) If proven that the housing development project location is not suitable for housing development or that the appointed housing developer is not a fit person to carry out housing development and that due to these reasons the purported housing development project is problematic or abandoned, the aggrieved developer and the purchasers, as the case may be, have a cause of action and *locus standi* against

³⁷ Ruhaina Ibrahim, DARS's Planner, interview by author, 6 September 2012 and 24 July 2012, Jitra, Kedah, note writing.

³⁸ Ibid.

the State Authority if the latter had acted unfairly, unreasonably and not in good faith. In this regard the aggrieved parties may claim for damages and/or other legal and equitable relief for all the calamities that have occurred due to the wrong decision made by the State Authority in the alienation of land;

- 2) An amendment should be made to the NLC to the effect of imposing obligation on the State Authority to be bound by the views of the professional parties (the technical agencies, appropriate authorities, the NLCL and the planning authority) in the decision making process involving alienation of land;
- 3) The State Authority should also be responsible with all the decisions made and no immunity be given to them if proven they have unfairly and without good faith in carrying out their public duties;
- 4) The Federal Government may legislate law and procedure relating to the alienation of land for housing development project which contain certain obligation on the State Authority to refer and be bound by the decisions and views of the appropriate authorities and the technical agencies, as the case may be, pursuant to article 76(1)(b) of the FC. This article empowers the Federal Government to legislate laws that can ensure uniformity of laws between states in Malaysia;
- 5) The Federal Government and the State Government should formulate better composition of the State Authority in order to eliminate any political and self motivated policies and decisions by the State Authority in dispensing works involving alienation of land for housing development;
- 6) The aggrieved parties for instance the housing developers and the aggrieved purchasers in any problematic housing projects caused by the unreasonable and unfair decision made by the State Authority in alienation of land, have a cause of action to commence civil suit against the State Authority for damages, compensation and other legal and equitable remedies; and,
- 7) In exercising alienation of land for housing development projects, the State Authority should coordinate and comply with the views and recommendations of the technical agencies and committee unless there are a special circumstances that may not be reasonable and warrantable for the State Authority to follow.

It is emphasized and submitted that the crux of the above issues lies in the different and separate jurisdiction and power on land matters that is enjoyed by the State Authority pursuant to the provisions under the FC. For otherwise, if the land administration falls under the Federal Authority, the policies and administration of the land offices can be standardized, coordinated and systematic thus can ensure smooth running of the land administration throughout Malaysia. These also include the principles of legitimate expectation, substantive and procedural natural justice, discretionary power of the State Authority and fiduciary duties as against the State Authority in the land administration involving alienation of land for housing development projects.

5.3 SUMMARY

The project under study in this chapter concerns a mixed development project that would be carried out at Pokok Sena, Kedah. The purpose of this development is to spur the economic and social development around the District of Pokok Sena. This development also will serve as a satellite town to Alor Setar in the future. The Kedah state government entrusted DARS to carry out the development of this project, including applying alienation of land in Pokok Sena. To date the project has yet commenced. The alienation of the land, however, succeeds. Currently, DARS is in the course of developing the land by hiring consultant and others to do the preliminary development works. Some of the issues that the project faces are the exorbitant premium fees that DARS should pay the Pokok Sena Land and District Office in the alienation of the lands and the delay in obtaining the final approval for alienation of the lands.

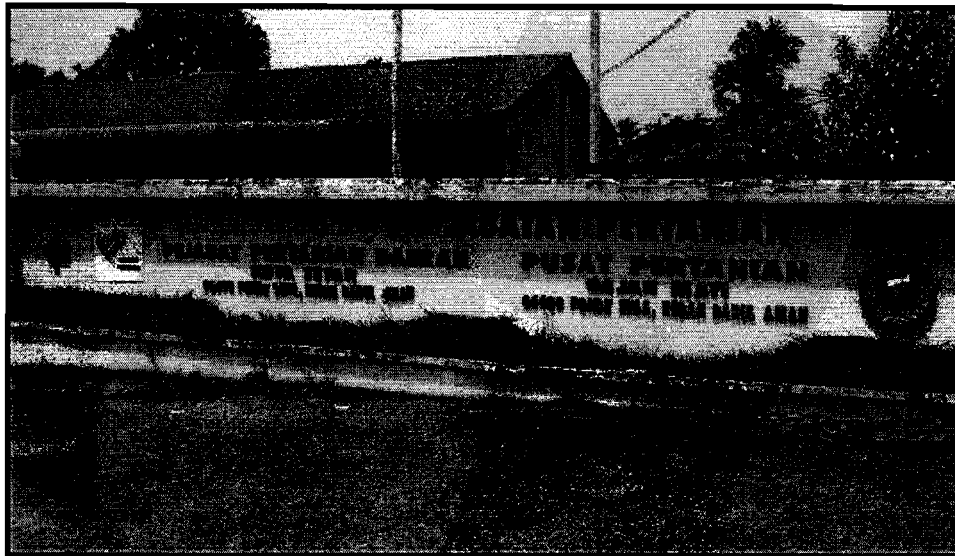
Among the issues that the case study under this chapter shows is the lack of integrated and coordinated policies between the State Government and the Federal Government in the alienation of lands. Due to this issue, the issue of delay and inefficient administration happen in the land offices. Thus, it is suggested similar proposals to face this problem as mentioned in Chapter Four should be considered and adopted by the Federal and State Government.



Picture 5.1: Entrance of The Department of Veterinary Services Pokok Sena



Picture 5.2: Signboard Showing the Location of the Department of Veterinary Services Pokok Sena



Picture 5.3: Entrance and Signboard of the Department of Agriculture, Pokok Sena



Picture 5.4: Signboard of the Male Rehabilitation Hostel, Pokok Sena And Signboard Showing That The Pokok Sena Jail Is 1 Km From The Location Project



Picture 5.5: Signboard and Entrance of the Male Rehabilitation Hostel, Pokok Sena

CHAPTER SIX

FINDING AND SUGGESTIONS

6.1 INTRODUCTION

Following the elaboration and analyses of the previous chapters, this chapter will highlight the findings. Apart from highlighting the findings, this chapter will also examine and unveil the laws and practices in two foreign jurisdictions on alienation of lands. These foreign jurisdictions are New South Wales, Australia and the Republic of Singapore. These jurisdictions are selected because of their similarity in term of Torrens System that applicable in these jurisdictions with the Malaysian counterpart. Secondly the purpose of this comparative analysis is to identify and find out any advantages that these jurisdictions have on the laws, practices and policies of alienation of land in their respective jurisdictions. The advantages that these jurisdictions have, can be learned and adopted in Malaysia (particularly in Kedah) for the betterment of the Malaysian law, practices and policies on alienation of land for housing development projects.

6.2 FINDINGS

The followings are the findings of this research:

- 1) There are inadequate coordination and insufficient integrated policies and practices (legal and administrative), between the Kedah State Authority, the Kedah Planning Authority, the Kedah Building Authority, the technical agencies and the housing authority (MUWHLG) in the alienation of land for housing development projects;
- 2) There is no legal provision in the NLC, requiring the Kedah State Authority to refer to and to be bound by the views of the technical agencies and the Kedah planning authority for exercising alienation of lands in housing development project;

- 3) There is a problem arising from the existence of section 108 of the NLC which undermines the function of the planning authority in the exercise of alienation of land by the Kedah State Authority;
- 4) There may be possible abuse of power by the 'Kedah State Authority', which usually consists of substantially members from the same political party which can be detrimental to the interests of the stakeholders particularly the purchasers;
- 5) There can be a possible abuse of power by the Kedah Menteri Besar/Chief Minister exercised through powers conferred by the Delegation of Powers Act, 1956 (Revised 1988) in the exercise of alienation of lands for housing development projects;
- 6) There is still inadequacy of the new provision relating to the land digital data;
- 7) There is an absence of multi-criteria evaluation and multi-criteria decision making (MCDM) development plans,¹ absence of comprehensive criteria or multi factors affecting housing development projects² during the process of approval for alienation of the land for housing development projects in Kedah;
- 8) It is clear that there is a spilled over effect in the separation of federal government and Kedah state government's powers and which has caused divergent of policies and practices and may hinder uniformity of law, policies

¹ For example, even in the current Selangor Structure Plan and the Cheras Local Plan (for the locations of both projects-- Taman Harmoni and Taman Lingkaran Nur) do not envisage the problems of abandoned housing projects and do not provide any expedient counter-measures. See the current Cheras Local Plan and the Selangor Structure Plan. The Cheras Local Plan 1997-2010 (Gazette No. 1544) [JPBD.Sel./B.1/7514 Vol 3; PU. Sel. Am 0027/07] and the Selangor Structure Plan (Gazette No. 1541) [JPBD.Sel./B.1/7514 Vol 3; PU. Sel. Am 0027/07] have only been respectively enforced since their gazettes on 14 June, 2007. Before this date, there was no local plan and structure plan for Cheras, where the projects under study of this thesis are located (Phase II Taman Harmoni, Balakong and Phase 1A Taman Lingkaran Nur, Kajang). See Majlis Perbandaran Kajang, Jabatan Perancangan Bandar dan Desa Semenanjung Malaysia & Jabatan Perancangan Bandar dan Desa Negeri Selangor, *Rancangan Tempatan Cheras 1997-2010, Peta Cadangan dan Pernyataan Bertulis* (Shah Alam: Researchers, n.d), Majlis Perbandaran Kajang, Jabatan Perancangan Bandar dan Desa Semenanjung Malaysia & Jabatan Perancangan Bandar dan Desa Negeri Selangor, *Rancangan Tempatan Cheras 1997-2010, Garis panduan Pelaksanaan* (Shah Alam: Researchers, n.d) and Jabatan Perancangan Bandar dan Desa Negeri Selangor, *Rancangan Struktur Negeri Selangor 2020, Perancangan Mampan Selangor Sejahtera* (Shah Alam: Researcher, n.d). These structure plan and local plan are gazetted vide the Government of Selangor Gazette, Jil. 60, 14th June 2007, No. 12, TAMBAHAN No. 3.

² For example factors leading to abandonment of housing project and its counter measures for facing and settling the problems ensued.

- and practices in the alienation of land for housing development projects throughout the nation;
- 9) There are inefficient, shortage of skilled staff and inadequate professionalism among the staff in the Kedah land offices to process the alienation of lands which have caused hiccups and other unnecessary problems in order to ensure due administration and process of land approval including alienation of lands for housing development projects;
 - 10) There are evidently delays in the process of alienation of land and its approval which may cause unnecessary waiting costs to the developers due to the shortage of staff, professional staff and insufficient work professionalism shown by the Kedah land offices' staff such as the tracers and the settlement officers;
 - 11) The aggrieved parties, for instances the developers and the purchasers, 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;
 - 12) The State Authority may be liable due to any wrongful acts, breach of duties and negligence, in the exercise of the powers conferred by the NLC, of its land officers (The State Director of Lands and Mines, Registrar of Land Title, Land Administrators and their respective assistants). The liability emanates from the principle of vicarious liability. The officials might have been negligent or in 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 and the information about the capability of lands and developers who had been appointed by the State Authority to undertake housing development. 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;

- 13) Pursuant to section 22 of the NLC it provides that no civil suit shall be commenced against land officers (Director General of Lands and Mines, the State Director of Lands and Mines, Registrar of Land Title, Land Administrators and all their duly appointed officers) if they have carried out all the powers prescribed under the NLC in good faith.³ It follows that if these land officers do not *bona fide* carry out the powers for example they have committed negligence, breach of duties and willful misconduct affronting the expressed provisions of the NLC, 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;⁴
- 14) In addition, pursuant to section 5 of the Government Proceedings Act 1956 (Act 359) ('GPA'), the government of Malaysia and the states government⁵ 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;
- 15) The aggrieved parties to the alienation of land, for example the aggrieved purchasers, can commence a civil action against the State Government and the State Authority for the wrong decision in alienating land for housing

³ See also section 7 of the Government Proceedings Act 1956 (Act 359) which provides:
"Notwithstanding any other provisions of this Act to the contrary **no proceedings, other than proceedings for breach of contract, shall lie against the Government on account of anything done or omitted to be done or refused to be done by the Government or any public officer in exercise of the public duties of the Government**"(emphasis added).

⁴ However in respect of the powers and duties prescribed under the Street, Drainage and Building Act 1974 (Act 133) ('SDBA'), any negligent, breach of duty, any liability and wrongdoing of the local Authority and State Authority shall not subject them to any penalty, be it criminal nor civil. This is provided in section 95(2) of the SDBA. See *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors* [2000] 4 MLJ 255; [2000] 3 AMR 3567 (Court of Appeal) and of the Federal Court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 289. See also NH Chan, *How to Judge the Judges* (2nd ed.), 2009, Sweet & Maxwell Asia, pp. 127 & 128.

⁵ Section 2 of the GPA defines the word 'government' to include the Federal Government and the Governments of the States.

development. Pursuant to section 4 (Claims enforceable by proceedings against Government) of the GPA;

- 16) There may be an argument that the State Government and the public officer are absolved from any liability for any omission, commission and refusal to carry out any of its public duties pursuant to section 7 of the GPA⁶ as a defence to any wrong or negligent acts in the exercise of alienation of land for housing development. In the opinion of the researcher, 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 NLC⁷ being a specific legislation governing land administration, the case law⁸ and other common law doctrines⁹ to the effect that the government and its officer shall be liable for the wrongdoing, default, negligence or unfair administration. 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;¹⁰ and,
- 17) 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 proceedings shall not lie or

⁶ See also section 7 of the GPA.

⁷ Duty to act in good faith in the exercise of the provisions under the NLC. According to Lord Macnaghten in *Westminster Corporation v. London and North Western Railway Company* [1950] AC 426, at page 430, where he formulated three propositions in elaboration of the requirement that a public body must not exceed or abuse its statutory powers; it must keep within the limits of the Authority committed to it; it must act in good faith; and it must act reasonably. He further said, acting in good faith implied acting reasonably.

⁸ See *Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 MLJ 309 (Court of Appeal at Putrajaya), *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 (Court of Appeal), *Dr Michael Jeyakumar Devaraj v Ketua Pengarah Unit Penyelarasan Pelaksanaan di Jabatan Perdana Menteri & Ors* [2011] 6 MLJ 824 (High Court at Kuala Lumpur), *Sipadan Dive Sdn Bhd & Ors v The State Government of the State of Sabah* [2011] 3 MLJ 357 (High Court of Borneo at Kota Kinabalu) and *Toh Huat Khay v Lim A Chang (in his capacity as the executor of the estate of Toh Hoy Khay, deceased)* [2010] 4 MLJ 312 (Federal Court at Putrajaya).

⁹ These are: fiduciary duties, duty to observe rules of natural justice and legitimate expectation of the government's subjects.

¹⁰ See *Anismatic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208. See also Sir Rupert Cross, *Statutory Interpretation* (3rd edn. By John Bell and Sir George Engle), (Butterworths: London), 171—172.

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.

6.3 NEW SOUTH WALES, AUSTRALIA (NSW)

In Australia, public lands are considered to belong to the Crown. This includes land for nature conservation and various other governmental purposes, as well as vacant land. Public lands comprise around 23% of Australian land, of which the largest single category is vacant land belonging to the Crown, comprising 12.5% of the land.¹¹

Crown land is held in the 'right of the Crown' of either an individual State or the Commonwealth of Australia; there is not a single 'Crown' (as a legal governmental entity) in Australia. Various states in Australian have adopted differing policies towards the sale and use of their Crown lands; for instance, New South Wales passed a controversial reform in 2005 requiring Crown lands to be rated at market value. Crown land is used for such things as airports (Commonwealth) and public utilities (usually State).¹²

6.3.a Crown Land In New South Wales

Crown land comprises approximately half of all lands in New South Wales. Some of this land is allocated to public uses such as national parks, state forests, schools, hospitals, sporting, camping and recreation areas, as well as lands which are managed and protected for their environmental importance.¹³

Crown land is owned and managed by NSW State Government. It accounts for over half of all land in New South Wales and includes:

- a) Crown lands held under lease, licence or permit
- b) community managed reserves
- c) lands retained in public ownership for environmental purposes

¹¹ Wikipedia, "Crown Land," accessed 2 September 2013: available from http://en.wikipedia.org/wiki/Crown_land: internet.

¹² Ibid.

¹³ NSW Government, Trade & Investment, "Crown Land," accessed 2 September 2013: available from http://www.lpma.nsw.gov.au/crown_land/about_crown_land: internet.

- d) lands within the Crown public roads network
- e) other unallocated lands.¹⁴

6.3.a.i *Crown Land Management*

The Crown Lands Division (CLD) is responsible for the sustainable and commercial management of Crown land. CLD also manages the development, marketing and sales of Crown lands not required for public purposes. CLD administers an area of approximately 36 million hectares of Crown land (this includes the 3 nautical mile zone and Western Crown land). It is responsible for the professional management of some 72,600 licences and permits state wide, along with 14,800 leases. Various land uses are researched by CLD including: waterfront occupations; commercial; grazing and agriculture; residential; sporting; community purposes; tourism; and industrial. It manages these Crown lands through a variety of methods such as licensing, leasing, sale and disposal of surplus Crown and other State-owned lands. CLD also provides land information/status and land accounts services as well as a map and products sale centre.¹⁵

6.3.a.ii *Crown Reserves*

The Crown reserve system is NSW's oldest and most diverse system of natural, cultural and open space, providing many of the states town squares and local parks, state heritage sites, buildings, community halls, nature reserves, coastal lands, waterway corridors, sport grounds, racetracks, showgrounds, caravan parks, camping areas, travelling stock routes, rest areas, walking tracks, commons, community and government infrastructure and facilities. Through CLD network of regional offices, CLD ensures that Crown reserves are responsibly managed and that natural resources such as water, flora and fauna and scenic beauty are conserved, while still encouraging public use and enjoyment of the land. Crown reserves are generally managed by either reserve trust boards, CLD, local councils or State government departments. More than 6000 volunteers help to care for Crown reserves as members of community trust boards.¹⁶

¹⁴ NSW Government, Trade & Investment, "Crown Land," accessed 2 September 2013: available from http://www.lpi.nsw.gov.au/land_titles/land_ownership/crown_land: internet.

¹⁵ Ibid.

¹⁶ Ibid.

6.3.a.iii *Tenured Land*

Tenured land is Crown land that is directly leased, licensed or allowed to be used under an enclosure permit by the State for a wide range of public, private and community uses, including commercial or agricultural purposes.

6.3.a.iv *Submerged Land*

Submerged land is generally classified as a type of Crown land. Bordering the coast of New South Wales (NSW), it lies below the mean high water mark. Submerged land includes most coastal estuaries, many large riverbeds, many wetlands and the State's territorial waters, which extend 3 nautical miles (5.5 km) out to sea. Submerged Crown lands of the coastal estuaries and riverbeds are generally Crown lands reserved from sale and lease. These submerged lands may be:

- a) leased (subject to reserve revocation) or licensed under the Crown Lands Act 1989;
- b) leased and/or licensed for aquaculture and fishing purposes by NSW Fisheries; or
- c) licensed by the NSW Maritime.¹⁷

6.3.b *Legal Administration of Crown Lands In New South Wales*

In NSW, 'Crown Land'¹⁸ is subjected to an assessment programme by the Minister of Lands, for its suitability and capabilities, where an inventory (section 31 of the Crown Lands Act 1989) is conducted under the Crown Lands Act 1989 (section 30 of the Crown Lands Act 1989--Programme for land assessment). The Crown land is subjected to an assessment of its capabilities and suitability or where practicable, the preferred uses for the land are then identified, including for allocation of residential projects (sections 32(1)(2) and 33(1)(a)(b) of the Crown Lands Act 1989). The assessment programme is for the benefit of the people in NSW to have proper management and development

¹⁷ Ibid.

¹⁸ According to section 3 of the Crown Lands Act 1989--Crown Land means land that is vested in the Crown or was acquired under the Closer Settlement Acts as in force before their repeal, not in either case being: (a) land dedicated for a public purpose, or (b) land that has been sold or lawfully contracted to be sold and in respect of which the purchase price or other consideration for the sale has been received by the Crown.

control of the land (section 10 of the Crown Lands Act 1989). Nonetheless the land assessment does not apply to Crown Lands administered under other Acts or the leasing of Crown Lands under the Mines Act 1993, the Fisheries Management Act 1994 or the Maritime Services Act 1935.¹⁹

Land assessment is pivotal to decisions concerning the use and management of Crown land, and is one of the key mechanisms for identifying land management issues. It was intended to be:

- a) the basis of a broad scale allocation of land use consistent with the principles of Crown land management; and
- b) a safeguard against the inappropriate alienation of Crown land.²⁰

The Crown Lands Act 1989 ('CLA') requires that:

- a) the Minister of Lands institutes a programme of land assessment; and
- b) land assessment is carried out before reservation, dedication, exchange, vesting, lease, licence or sale of Crown land (except in very limited circumstances or where land assessment is waived).²¹

Part 3 of the CLA establishes the land assessment process and criteria for identifying suitable uses, including the principles of Crown land management and any current policies relating to the land approved by the Minister of Lands (Section 33(1)(c) of the CLA). The Crown Lands Regulation 2006 ('CLR') sets out detailed land evaluation criteria and notification processes. The process for land assessment includes:

- a) inventory of the physical characteristics of the land;
- b) assessment of the capability of the land, including criteria to be used;

¹⁹ Department of Lands, "Assessment of Crown Land at Bloomfield, Orange, Parish of Orange, County of Bathurst, Department of Lands," prepared by Louise Harcombe, Senior Environmental Officer, Orange Office, Central Region, Department of Lands, July 2007, page 7, at http://www.lpma.nsw.gov.au/_data/assets/pdf_file/0004/57307/Final-Land-assessment-Bloomfield_2_.pdf (accessed September 3 2013).

²⁰ NSW Government, Trade & Investment, Crown Lands, http://www.lpma.nsw.gov.au/crown_lands/assessments.

²¹ NSW Government, Trade & Investment, "Crown Land," accessed 2 September 2013: available from http://www.lpi.nsw.gov.au/land_titles/land_ownership/crown_land: internet.

- c) identification of suitable uses and, where practical, the preferred use or uses for the land; and
- d) public exhibition period of at least 28 days (regulation 20 of the CLR)²²

On the receipt of all the land's particulars through the inventory²³, the Department of Lands (Land and Property Management Authority) shall determine the land's capabilities²⁴, having regard to prescribed land evaluation criteria (section 32(1) of the CLA). Assessment of the capabilities of land includes assessment of the land's use for community or public purposes, environmental protection, nature conservation, water conservation, forestry, recreation, tourism, grazing, agriculture, residential purposes, commerce, industry or mining (section 32(2) of the CLA).

In identifying suitable uses for land and, where practicable, the preferred use or uses, the Department of Lands shall observe (a) the particulars relating to the land as contained in the inventory; (b) the assessment of the land's capabilities; (c) the principles of Crown land management and any current policies relating to the land approved by the Minister, and (d) the views of any government department, administrative office or public authority which has expressed an interest in the land (section 33(1) of the CLA).

In addition to carrying out the inventory and land capability assessment, pursuant to regulation 20(2) of the CLR 2006, the Minister of Lands is required to cause notice of the preparation of any draft land assessment to be published in (a) the Gazette, and (b) a newspaper circulating in the locality in which the land concerned is situated or in a newspaper circulating generally in the State. The notice must:

²² Ibid.

²³ The inventory must detail the physical characteristics of the land and other matters that affect the land to enable the capabilities of the land to be properly assessed. Section 31 of the Crown Lands Act, 1989 provides that the inventory contains particulars of such physical characteristics of the land and such other matters affecting the land and the Minister considers necessary to assess the capabilities of the land.

²⁴ Land capability is a measure of the physical capability of an area to sustain specific land uses. The legislation prescribes a two stage process for assessing the capabilities of the land. The first is the consideration of the prescribed evaluation criteria in clause 20 of the Crown Lands Regulation 2000. This deals with the physical characteristics of the land in determining the physical constraints and opportunities for the use of the land. The prescribed evaluation criteria include the susceptibility of land to hazards and any catchment of which the land forms part to degradation etc.

- a) invite representations from the public concerning the draft land assessment;
- b) specify the place and time at which the draft land assessment may be inspected by the public; and,
- c) specify the period (being not less than 28 days) within which any representations may be made and the person to whom they are to be sent.²⁵

Thus, the assessment for alienation land for residential projects will also involve views of the public resulting in the assessment to be holistic and inclusive. This will achieve effective decision making process and be more compatible with the wishes and needs of the general public particularly from those who live within the vicinity of the intended areas being subject to the assessment.²⁶ On the expiry of 28 days exhibition to the public, any public comments and suggestions that are suitable for benefit of the affected areas being the subjects of the assessment will be taken into consideration and be incorporated into the final assessment report. This final assessment report will include all the conditions and requirements that can respond to the comments that have been accumulated before alienation, allocation and dedication of lands can be carried out.

²⁵ Ibid.

²⁶ An example of the land assessment that has been exhibited for public comment is Berrygill Creek Draft Land Assessment. The Department of Lands has prepared a draft Crown land assessment for Crown land at Berrygill Creek to determine future use and management options. The study area is located approximately 50km north east of Narrabri, adjacent to the Narrabri - Berrygill Creek Road, in north-west New South Wales. The land comprises part of Travelling Stock and Camping Reserve which has frontage to Berrygill Creek and the former Berrygill State Forest. The aim of the draft assessment is to provide the basis for sound land use allocation and management decisions for Crown lands. Consultation has a fundamental role to play in facilitating effective decision making. The draft assessment report is available for inspection during normal business hours at the counter at the Moree Department of Lands office, Cnr Heber and Frome Streets, Moree. NSW Government, Trade & Investment, Crown Lands, "Berrygill Creek Draft Land," accessed 2 September 2013: available from Assessment http://www.lpma.nsw.gov.au/crown_land/assessments/berrygill_creek_draft_land_assessment: internet.

The prescribed land evaluation criteria are spelt out in regulation 19 of the Crown Lands Regulations 2006 (Land Evaluation Criteria) read together with section 32 of the CLA (Assessment of The Capabilities Of Land). The prescribed land evaluation criteria are as follows:

- a) the susceptibility of the land to hazards, including fire, flood, landslip, subsidence, coastline and riverine hazards,
- b) the susceptibility of the land and any catchment of which the land forms part to degradation, including soil erosion, salinity, waterlogging, soil structure decline, soil acidity, tree decline and weed invasion,
- c) the significance of inherent natural, catchment, cultural and heritage values, including scenic, habitat, native vegetation, scientific and water body features,
- d) the significance of ecological values, including the presence of threatened species, populations or ecological communities, communities of flora or fauna or wildlife corridors,
- e) the significance of natural resources, including minerals, extractive materials, timber resources, surface waters and ground waters,
- f) the ecological sustainability of potential land uses of the land and any catchment of which the land forms part.

Although the CLA requires that a land assessment be undertaken before a number of actions are taken over Crown land (for instances, allocation, dedication and alienation of land for residential projects), there is no statutory link between the land assessment process and:

- 1) environmental studies and plans under Part 3 of the Environmental Planning and Assessment Act 1979 (EPAA)²⁷;
- 2) owners consent to lodgement of a development application under Part 4 of the EPAA Act²⁸; or

²⁷ Part 3 of the EPAA explains about Environmental Planning Assessment, regarding environmental laws, policies and measures in dealing with environmental issues and standards.

- 3) environmental assessment of an activity, not subject to lodgement of a development application, under Part 5 of the EPAA.²⁹

This assessment is also required for the purpose of dedication of land to others (section 85 of the Crown Lands Act 1989) and identification of uses (section 31 of the Crown Lands Act 1989), including alienating lands for purposes of development of housing projects (residential projects). Pursuant to the Crown Lands Act 1989 the Minister of Lands may publish a notice in the Government Gazette to:

- a) dedicate Crown land for a public purpose (section 80 of the Crown Lands Act 1989);
- b) add Crown land to any land dedicated under the Act (section 81 of the Crown Lands Act 1989);
- c) reserve Crown land for a public purpose (section 87 of Crown Lands Act 1989);
- d) add Crown land to any land reserved under the Act (section 88 of Crown Lands Act 1989);
- e) establish a Reserve Trust;
- f) appoint a manager to preside over the Reserve Trust; and,
- g) revoke a dedication or reservation of land.³⁰

Although there is no express provision for land use to be subjected to planning considerations and provisions under the EPAA, the identification of suitable uses is made subject to current policies relating to land approved by the Minister of Lands (section 33(1)(c) of the Crown Lands Act 1989). Views from related government departments, administrative office or public authorities may also bind the intended use of the land (section 33(1)(d) of the Crown Lands Act 1989). These approval and views may thus include planning policies. The views of the community and relevant authorities as a result

²⁸ Part 4 of the EPAA deals with the development consents and assessments.

²⁹ Part 5 of the EPAA deals with environmental assessments.

³⁰ NSW Government, Land & Property Information, "Dedicated land and reserves," accessed 2 September 2013: available from http://rgdirections.lpi.nsw.gov.au/land_dealings/dealings_involving/crown_land/dedicated_land_and_reserves; internet.

of the public exhibition of the draft land assessment will also guide the land department in the identification of preferred uses for the study area in the best interests of the people of New South Wales. Thus, by having this mechanism and the application/approval for alienation of land process for housing development projects/residential projects will be more effective and will not cause problem at the later stage of development either caused by the developer or due to non-suitability of land.

6.4 THE REPUBLIC OF SINGAPORE

In 2001, for the purpose of due administration, coordination and management of land, the Singapore Land Authority (SLA) was established and incorporated under section 3 to the Singapore Land Authority Act (Cap. 301) 2001('Act 301').³¹ The functions and authority of SLA originate from section 6 of Act 301, among others, to administer and manage all state lands in accordance with the laws and to optimize land resources (section 6 of Act 301). SLA is a statutory board under the Ministry of Law with the main focus of optimizing land resources.³²

In carrying out its functions, SLA shall have due regard to the coordination and facilitation with the other policies relating to land planning, land development, economic growth and the needs and social considerations in Singapore (section 6(1)(2) of Act 301). Further, the composition of members of this authority must comprise persons who are experienced and qualified with knowledge of public administration; commerce; economics; law; survey; real estate development; consumer affairs; and town planning. (First Schedule--Section 5(2) to Act 301).³³ Thus, all policies and practices regarding

³¹ Singapore Land Authority is a statutory board under the Ministry of Law and was established in Singapore under the Singapore Land Authority Act 2001 (No. 17 of 2001) on 1 June 2001. The Authority's registered office is at 8 Shenton Way, #26-01, Temasek Tower, Singapore 06881. See Singapore Land Authority's (SLA) Annual Report for 2005/06, page 74 in the SLA's website at <http://www.sla.gov.sg/doc/new/SLA_full.pdf> (accessed 17 August, 2007), <http://www.sla.gov.sg/htm/abo/abo01.htm> (accessed 4 September, 2013) and SLA Annual Report for 2011/2012 at http://www.sla.gov.sg/htm/new/SLA_AR_2011-12/PDF/annual-report.pdf (accessed 4 September, 2013).

³² SLA, Annual Report 2012/2011, "Corporate Profile," http://www.sla.gov.sg/htm/new/SLA_AR_2011-12/creating_space/corporate-profile.html (accessed 4 September, 2013).

³³ The current members of SLA, Annual Report 2012/2011, "members of Authority," http://www.sla.gov.sg/htm/new/SLA_AR_2011-12/creating_space/members-of-the-Authority.html &

alienation of land involving housing development projects in Singapore are thoroughly subject to, *inter alia*, planning considerations. For instance, section 12(1) of the Planning Act, (Cap. 232) 1998 ('Act 232') provides - in 'the making of any material change in the use of the building or land' by any person, such person shall also be subject to the planning control and the development plans prepared by the planning authority. This is because, pursuant to section 3 of Act 232, 'the making of any material change in the use of any building or land falls within the definition of 'development'.³⁴

Thus, from the above provisions, there is an inter-relation between land law and planning law in respect of alienation of land in Singapore. In consequence, there exists a strong link between the two in practice as evidenced by the pattern of land alienation by the Singapore Land Authority ('SLA') who is in charge of the land management and Urban Redevelopment Authority ('URA'), established under Urban Redevelopment Authority Act (Cap. 340) 1989 ('Act 340'), being the 'competent authority' approving application for planning permission under Act 232.³⁵

Alienation of lands in Singapore is subject to the State Lands Act (Chapter 314)(Revised Edition 1996). Pursuant to section 3A of the State Lands Act, state lands may be alienated...

- a) as a parcel of the surface earth, all substances thereunder and so much of the column of airspace above the surface as is reasonably necessary for the use and enjoyment thereof;
- b) as a parcel of airspace or subterranean space, whether or not held apart from the surface of the earth; or

http://www.sla.gov.sg/htm/new/SLA_AR_2011-12/creating_space/corporate-governance.html (accessed 4 September, 2013).

³⁴ See also Sharifah Zubaidah Syed Abdul Kader, *Legal Control of Commercial Land Development in Kuala Lumpur and Petaling Jaya*, (SJD Dissertation, Bond University, 2001), 213--215 and also at wikipedia website, <http://en.wikipedia.org/wiki/Development_Guide_Plan> (accessed 4 September, 2013). One of the multi-planning-criteria and comprehensive development plans in Singapore was the Master Plan 2003. In 2008, a new revised and updated development plan replaced this Master Plan. Interview by researcher, Miss Tan Poey Choo, Deputy Housing Controller, Urban Redevelopment Authority (URA), Maxwell Road, Singapore, 3 September, 2007 and Urban Redevelopment Authority Website at <http://www.ura.gov.sg/> (accessed 4 September 2013).

³⁵ Ibid. See also at wikipedia website, <http://en.wikipedia.org/wiki/Urban_Redevelopment_Authority> (accessed 4 September, 2013).

- c) only down to such depth below the surface earth as the President may by order direct.

Alienation of lands can be made by way of an application to the Collector of Land Revenue³⁶ pursuant to rule 3 of the State Lands Rules. Only the President of Singapore can approve applications for alienation of land. However, if the alienation involves state reserve lands, only the Commissioners of Lands can approve (rule 4(2) of the State Lands Rules). Upon alienation of lands in Singapore, the Collector of Land Revenue shall furnish to the Registrar of Titles such particulars of the alienation as required by the latter to enable the latter to create folio for that land (section 8(1) of the Land Titles Act (Chapter 157). The alienated lands once have been given folios, shall be subject to such exceptions, reservations, covenants and conditions expressed or implied by law in the relevant State title (section 8(2) of the Land Titles Act (Chapter 157).

6.5 SUGGESTIONS

It is suggested that the Kedah State Authority and Kedah planning authority become one body or at least the policies on alienation be coordinated and are in uniformity.³⁷ Insofar as the situation in Kedah is concerned, these authorities exist separately and thus there may be situations where their decisions and policies might be in conflict with each other. This is due to the separation of powers, jurisdictions and authorities of the federal government and the Kedah state government as enshrined in the Federal Constitution.

³⁶ Collector of Land Revenue pursuant to section 2 of the Land Revenue Collection Act (CHAPTER 155) means:

- a) any officer of the Authority (Singapore Land Authority); or
- b) any public officer or officer of any other public Authority constituted under any written law for a public purpose, appointed by the Minister to be a Collector of Land Revenue, and includes any Deputy Collector of Land Revenue appointed before the date of commencement of the Singapore Land Authority Act 2001.

³⁷ See Kamalruddin Shamsudin, Sustainable Land Use Development in the Klang Valley: An Elusive Dream, in *Land Use Planning and Environmental Sustainability in Malaysia: Policies and Trends*, ed. Hunud Abia Kadouf & Sharifah Zubaidah Aljunid, (Kuala Lumpur: International Islamic University, 2006), 313, Sharifah Zubaidah Aljunid, Controlling Changes of Use of Land in Malaysia: Dual Authorities and The Dilemma of Certainty vs. Flexibility, in *Land Use Planning and Environmental Sustainability in Malaysia: Policies and Trends*, 251 & 252 and Sharifah Zubaidah Syed Abdul Kader, "Legal Control of Commercial Land Development in Kuala Lumpur and Petaling Jaya", 224 & 225.

Alternatively, even though these parties exist separately, the practices relating to and decisions over alienation of lands for development of housing projects can statutorily be regulated, coordinated and streamlined for the purpose of ensuring legal uniformity of practices between them. Thus, it is suggested that in dealing with the process and approval of alienation of land the Kedah State Authority shall consider and be subject to the views and directions of the Kedah planning authority, the relevant technical agencies³⁸ and the appropriate authorities³⁹. The reason for including the appropriate authorities and the technical agencies, apart from the planning authority, is so as to obtain the up-dated conditions and views about any land which has become subject of alienation for housing development projects. Thus, any causes which can lead to housing abandonment such as slime soil, erosion, problematic construction progress, financial and management capability of the developer, and the stipulated units and pricing of the units can reasonably be identified and ascertained before approval of any application for alienation of land, can be made.

The planning authority, the relevant technical agencies and the appropriate authorities shall be consulted by the Kedah State Authority and be added to sections 79(2) of the National Land Code 1965 (Act No. 56) ('NLC') (for alienation of land) as part of the approving authority. It is suggested that in these provisions, the Kedah State Authority shall have to be bound by the conditions of the planning authority, the technical agencies and the appropriate authorities. This is to ensure that all the requirements of the technical agencies, the appropriate authorities and the planning authority are considered before any approval by the Kedah State Authority in alienation of land for ensuring the future smooth running of the intended housing development project. Indirectly, this suggestion can minimize any possible abuse through detrimental and unreasonable political interference by the Kedah State Authority and to ensure the success of any alienation of land for undertaking housing development projects.

³⁸ For instance, Department of Geoscience, JPS, Economic Planning Unit of the Prime Minister Department, Ministry of Finance (MOF), Bank Negara Malaysia, property experts and TM Berhad. The suggested statutory definition for 'technical agency' is provided in the following pages.

³⁹ 'Appropriate Authority' is defined by section 5 of the NLC to mean 'when used in relation to any consent or approval, means the Authority having power under any written law to grant such consent or approval, as the case may be'. Instances of the appropriate Authorities are the Department of Sewerage Services (JPP), Tenaga Nasional Berhad (TNB), MUWHLG and the Department of Environment (JAS).

Thus, it is suggested that additional supplementary provisions and amendments should be made to section 79(2) of the NLC. It is of the researcher's view that the practice and law applicable in New South Wales, Australia should be adopted in respect of allowing public participation before certain proposal to alienate land can be processed and approved. This public participation is in the form of exhibiting the proposed alienation of land for housing development projects to the people within the vicinity or area of the land being subject to the alienation. The purpose of this participation is to allow views and suggestions from the stakeholders who reside and/or who have interest in the land. The views and suggestions from these stakeholders are crucial to the development of the land through the alienation, so that the intended development on the land will be in accordance with the wishes, needs and necessities of these stakeholders and thus indirectly benefiting them. For instance, if the location of the housing development is not suitable for development, the interested person within the vicinity of the project can provide views or object to the purported alienation. This will avoid any possibility of occurrences of problematic housing development projects including abandoned housing projects. Thus, it is submitted that apart from internal data collected by the Land Authority and obtaining views from the technical agencies and appropriate authority, the Land Authority (land office) is required to call for public participation by way of exhibiting the purported proposal for alienation of land for housing development projects to the stakeholders and other interested parties living or having any legitimate interests in the land in question.

To actualize the above proposal the following additional provision should be introduced in the NLC. Thus, the following new section 79(2)(h) should be incorporated into section 79(2):

“The State Authority shall assess and determine the land's capabilities, having regard to prescribed land evaluation criteria. The assessment of the capabilities of land includes assessment of the land's use for community or public purposes, environmental protection, nature conservation, water conservation, forestry, recreation, tourism, grazing, agriculture, residential purposes, commerce, industry or mining.”

To define land evaluation criteria and suitability assessment, the following additional provisions should be incorporated into section 72 of the NLC:

“Section 79(2)(h)(i):

For the purposes of this subsection, the prescribed land evaluation criteria are as follows:

(a) the susceptibility of:

- (i) the land to hazards, including fire, flood, landslip, subsidence and coastline hazards, and*
- (ii) the land and any catchment of which the land forms part to degradation, including soil erosion, salinity, waterlogging, soil structure decline, soil acidity, tree decline and weed invasion,*

(b) the significance of:

- (i) inherent natural, catchment, cultural and heritage values, including scenic, habitat, native vegetation, scientific and water body features, and*
- (ii) ecological values, including the presence of representative, rare or endangered species or communities of flora or fauna and wildlife corridors, and*
- (iii) natural resources, including minerals, extractive materials, timber resources, surfacewaters and groundwaters,*

(c) the ecological sustainability of potential land uses of the land and any catchment of which the land forms part.”

“Section 79(2)(h)(ii):

1) In identifying suitable uses for land and, where practicable, the preferred use or uses for alienation of land, regard shall be had to:

- a) the particulars relating to the land as required under subsection (2)(h) to section 79 above;*
- b) the assessment of the land’s capabilities,*
- c) the principles of state land management and any current policies relating to the land approved by the State Authority, and*
- d) any necessary approval of planning authority, appropriate authority and the technical agencies.*

(2) The State Authority may from time to time cause an identified preferred use to be reviewed and either confirmed or varied having regard to any changes in the particulars contained in the inventory or the capabilities of or policies relating to the land.”

Once suitable uses have been identified, the draft land assessment is placed on public display for a minimum of 30 days. Notification of the display is made in local

newspapers and the Government Gazette. The following is the proposed provision for public review – section 79(3), viz:

“Section 79(3):

(a) The State Authority is required to cause notice of the preparation of any draft land assessment to be published in:

- (i) the Gazette; and,*
- (ii) newspaper circulating in the locality in which the land concerned is situated or in a newspaper circulating generally in the State.*

(b) Any such notice must:

- (i) invite representations from the public concerning the draft land assessment;*
- (ii) specify the place and time at which the draft land assessment may be inspected by the public; and,*
- (iii) specify the period (being not less than 30 days) within which any representations may be made and the person to whom they are to be sent.”*

In addition to the above, section 108 of the NLC which appears to undermine the powers and functions of the planning authority, needs to be repealed.⁴⁰

The definition of the ‘technical agency’ shall also be provided under section 5 of the NLC. It is suggested that the following definition be adopted:

Addition to section 5 of the NLC

“Technical agency” mean any relevant authority other than appropriate authority which, shall be consulted for necessary views, insofar as the State Authority deems expedient, for the purpose of approval of any application by the State Authority.

It has also been suggested that the definition of ‘State Authority’ as defined in the NLC be reviewed and replaced by ‘State Land Authority’.⁴¹ This ‘State Land Authority’⁴² must

⁴⁰ See also Sharifah Zubaidah Aljunid, *Controlling Changes of Use of Land in Malaysia: Dual Authorities and The Dilemma of Certainty vs. Flexibility*, 252.

⁴¹ Sharifah Zubaidah Syed Abdul Kader, “Legal Control of Commercial Land Development in Kuala Lumpur and Petaling Jaya”, 81.

also consist of mostly professionals from the appropriate authorities and technical agencies (such as the JPBD, JAS, MUWHLG, Department of Minerals and Geoscience etc). It has been suggested that the composition of this authority should consist of the following persons:⁴³

- 1) The Menteri Besar, representing the Rulers in Council;
- 2) The State Executive Councillor who heads the Housing and Local Government portfolio;
- 3) The State Director of Town and Country Planning (JPBD);
- 4) The State Director of Lands and Mines;
- 5) The State Secretary; and,
- 6) The State Treasurer.

In addition to the above list, it is proposed that there should be additional parties from the appropriate authorities and technical agencies such as MUWHLG, JAS, and Department of Minerals and Geoscience or others insofar as they are necessary, to be added to list number '7'--'other relevant appropriate authorities and technical agencies if necessary'. This is to ensure, the decision made by the Kedah State Land Authority is done by professionals and to avoid any decisions made due to political self-interest. Thus, in considering the decision to alienate insofar as housing development projects are concerned, the Kedah State Land Authority should be made subject to the approvals and views of these additional authorities as well.

Likewise, the delegation of power by the Kedah State Authority to the Menteri Besar of Kedah or others pursuant to section 8 of the Delegation of Powers Act, 1956 (Act 358) (Revised 1988) vide SI .U 17/1984 over, for example, the power to alienate lands (section 79 of the NLC) should be repealed and replaced except with the concurrence of those persons as listed under section 12(1) of the NLC pursuant to section 13 of the NLC. This proposal is to avoid any decision over the above matter solely being decided by one

⁴² Sharifah Zubaidah Syed Abdul Kader proposed that the definition of 'State Authority' means the State Land Authority established under section 11A. There should then be inserted a new section 11A in the list of the above members of the State Land Authority. See also in *ibid*, 81 & 82.

⁴³ *Id*, 81.

individual politician or may be influenced by political considerations but instead made by professional on meritorious grounds.

Finally regarding the purported land digital data, as proposed under section 5D and the Sixteenth Schedule--Electronic Land Administration System of the NLC, it is opined that, the said data would be ineffective. This is so, unless all the relevant appropriate authorities, technical agencies and the planning authorities have conducted comprehensive and updated study over the affected land being the subject to the land database in question, insofar as the problematic housing development projects are concerned. To be effective, it is opined, the above problems regarding alienation of land should first be addressed.

CHAPTER SEVEN

CONCLUSION

It is evident that the issue of unsuitability of locations of land and incapable developer appointment to carry out housing development are two pertinent reasons that have caused problematic and abandoned housing projects in Malaysia. Through alienation of land by the State Authority, housing development can be carried out. Nonetheless, what this research concerns is the decision making process of the State Authority in alienation of land for housing development. This research aims to study the process with the intention of finding out the grounds and weaknesses that can lead to the occurrences of problematic and abandoned housing projects in Malaysia. Further, once the reasons have been found, this research proceeds to find out the plausible legal mechanism to eliminate the weaknesses. By this way, the decision making process of the State Authority can be improved for the benefits of the housing development stakeholders. This research focuses on the law and practices in the State of Kedah Darul Aman.

Chapter One of this research elaborates the problems and issues plaguing alienation of lands in Malaysia. Even though, the main reason of problematic and abandoned housing projects is the faults of the developers, it is still relevant to bear in mind that, there are external factors that may contribute to the problem. One of the external factors is the roles and duties of the State Authority in alienation of land for housing development. There are evidences to show that State Authority is negligent and fails to carry out its duty fairly and reasonably to the detriment of the stakeholders. Following this, what is the reason that has caused the State Authority to have acted in such a way? If there are weaknesses in the law, then what aspects of the law that need to be addressed to? This research attempts to find out the purported weaknesses and provides proposals to overcome it through the objectives of research, the research questions, hypotheses and using the aforementioned research methodology.

In so far as the literature review is concerned, there is still a dearth of legal literature dealing with the issues involving alienation of land for housing development projects. Insofar as the knowledge of the researcher's is concerned there is no writing and literature that specifically discusses the legal issues in alienation of land by the Kedah State Authority. Many of the writings concern the case scenarios in Selangor. Thus, this research and its outcomes contributed to the development of the corpus of knowledge on legal aspects of alienation of land for housing development in Malaysia. The literature review has been adequately elaborated in Chapter Two to this research. The gap of the current writings and researches on issues of alienation of lands for housing development has been filled with this research and its outcomes.

The research methodology for this research has been elaborated in Chapter Three. Basically, this research applies two types of research methodology. The first is legal research methodology. The second type is social research methodology. The second type used qualitative case study research methodology. The subjects of this research are the proposed mixed development at Gurun Kedah and the proposed development of Bandar Tunku Puteri in Pokok Sena, Kedah.

The first case study has been researched into and highlighted in Chapter Four. This case study revealed that there are clear issues in the alienation of land carried out by the Kedah State Authority. The issues involve the non-binding effects of all the federal government directives and orders concerning land on the State Authority, the State Authority is not bound by the views of the technical agencies, there is inadequate coordination between the federal government and the state's agencies in land administration and there is delay in the land alienation approval process which has affected the due process of land alienation. Chapter Four also discusses the issues of failure of the State Authority to act fairly and reasonably in the alienation of land for housing development. This liability emanates from the principles of administrative law – fiduciary duty, discretionary power, vicarious liability and legitimate expectation.

The second case study, even though, through a legal analysis repeats the same issues as stated in the first case study, it has disclosed a few new fresh issues. The new issues are: the State Authority has a full power to vary the proposed zones contained in the local, structure and development plans in order to accommodate its wishes to carry out housing development at Pokok Sena, exorbitant fee and premium charged by the Kedah Water Authority and Pokok Sena Land Office, the issues of redundant procedures in obtaining views from the technical agencies during the application for alienation and application for planning permission, and the issue of un-professionalism at work and poor work ethics of the land officers and supporting staff. These grounds have affected the smooth running of housing development project of the developer. All these have been discussed in Chapter Five.

Chapter Six provides the findings and suggestions. Legal analyses have been done on the laws and practices in alienation of land for housing development in the Republic of Singapore and New South Wales Australia. The researcher compared the legal issues that have been identified through the two case studies with the position in Singapore and New South Wales. The comparative approach is vital in order to find out the laws and practices in both jurisdictions that can be used in Malaysia to face the legal issues in alienation of land for housing development. As for Singapore, there is nothing that Malaysia can learn from. However, it is otherwise in respect of New South Wales. In New South Wales, apart from inventory and assessment on the capability of lands for housing development, it is an additional procedure for the land office to exhibit the proposed alienation of land for public scrutiny for a certain period of time. This public exhibition serves as an avenue for the public to express their views on the suitability of the proposed alienation of land. There are occasions where the proposed alienation of land are subject to reviews or may be disapproved due to overwhelming objections of the public against the purported lands' alienation. This is the law and practice that Malaysia can adopt to improve the procedure and machinery of the government in alienation of land for housing development for the benefit of the stakeholders.

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