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026-022

LAND LAW PERSPECTIVE ON SOIL EROSIONS AT HOUSING AREAS IN MALAYSIA

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ABSTRACT

Many landslides occurring in housing areas in Malaysia have intrigued and shocked the Malaysian public. These disasters have caused colossal damage to property and losses of life. It is a trite fact that, in Malaysia, soil problems have negatively impacted the residents' life and property. The most significant soil problem disaster in Malaysia was the collapse of Highland Towers in 1993. This disaster caused pecuniary and non-pecuniary losses to the residents of the buildings. The question is, what can be learnt so far from these land-related catastrophes? The main objective of this paper is to analyse the legal provisions in land law that bear on soil problems in housing areas. This writing aims to explore the weaknesses in the land law and its implementation to provide preventive and curative legal measures against soil problems and their consequences in housing development areas. This writing proposes a new perspective on land legal ideas for governing soil fitness. The author researchers used qualitative social and legal research methodologies to study the facts and issues. The subjects of this research involve many housing development areas that face soil problems in Malaysia. It follows that the outcomes of this paper and its analysis relating to flood disasters in housing areas can enrich the knowledge and ideas on how to face the issue and protect the rights of the house residents.

Keywords: Soil Erosion; Soil Problem; Soil Settlement; Housing Areas; Land Law.

INTRODUCTION

Since Malaysia Independence in 1957, the Malaysian Government has embarked on developing the nation by providing housing to the citizen. Various means and efforts have been made to actualise this noble agenda. This can be seen in various Malaysian Plans since independence. The objective of the Malaysian Government is to provide sufficient housing to the citizens which are affordable, quality, and sufficient (Prime Minister's Office, 2021). The blueprint of housing policy in Malaysia is evident in the Housing Policy 2018-2025. The policy states, "The goal of the DRN (2018- 2025) is to guide the country's housing sector by emphasising the systematic, quality, inclusive, efficient and affordable housing planning, development and management of the people in order to generate sustainable and empowered housings" (National Housing Department, 2018). One of the challenges in the Malaysian housing industry is soil erosion and landslide that have caused damage and losses to the



victim residents in the housing areas. The problem can be due to flood, geographical location, inadequate planning, and the act of God. This includes the failure of the State Authority ('SA') to alienate and provide suitable lands for housing areas, failure of the Local Authority ('LA') and Local Planning Authority ('LPA') to identify the suitability of geographical locations suitable for housing development and the lack of competent professional agencies for dealing with soil erosion.

OBJECTIVES

This writing aims to study the land law that governs soil fitness in housing areas in Malaysia. Secondly, the aim is to study the land legal issues on soil fitness in the areas. The third objective of this writing is to suggest certain ideas and approaches in dealing with the problem of soil fitness in housing areas.

RESEARCH QUESTIONS

The research questions of this writing are as follows:

- 1) What are Malaysian land laws that govern soil fitness in housing areas?
- 2) What are the land legal issues in the above respect?
- 3) What are the weaknesses of the Malaysian land law in facing soil fitness issues areas?
- 4) How and why the weaknesses and problems occurred?
- 5) What are the new legal suggestions for dealing with weaknesses and problems?

DISCUSSION

The SA in Malaysia has an absolute power to dispose land and land matters within the territorial area of the states. The power is enshrined in the Federal Constitution ('FC') and National Land Code 2020 ('NLC'). The subject matters that are within the power of the SA in the disposal of land include alienation of land below state land, temporary occupation licence ('ToL'), issuance of permit to use air space above State land or reserved land; land reservation for public purpose, issuance of permit to extract and remove rock material from any land.

In exercising the above powers relating to land, there are conditions that the SA must abide by to ensure that the decision-making process in disposal of lands and the related land matters is made in accordance with the law, equity and comply with the policies of the SA, particularly to ensure welfare and justice of the subjects and spur the economic growth through land development within the state. However, the power to dispose lands is the prerogative of the SA. To ensure that the decision-making process of the SA and its governance are correct and reasonable, the SA may refer to for comments of the relevant technical agencies, planning authority and federal authority (Koperasi Pegawai Pentadbiran dan Pengurusan Tanah Malaysia Berhad, 2003; Md Dahlan, 2012, 2014a, 2016). Examples of technical agencies that the SA may refer to for comments and advice are the Department of Minerals and Geoscience ('JMGS'), Department of Irrigation and Drainage ('JPS'), Department of Environment ('JAS'), Department of Public Works ('JKR'), and Department of Lands and Mines ('JTG'). The objective of referring to these technical agencies is to ensure that the SA obtains professional views and advice of certain geographical locations within the state for the purpose of alienation of land and other land matters. This would ensure that the soil and location of the lands are suitable for housing development projects, free and safe from any possible soil harm, soil erosions, soil degradation and soil problems in the future.



ISSUES

As a repetition to the above, to ensure the decision-making process relating to the implementation of the above powers is carried out effectively, just, and equitable for the benefits of the public and the state, the SA in practice may refer to and follow the planning authority, and technical agencies for comments and advice. However, there are some issues arising from this practice, *viz*:

- 1) In the disposals of lands and land matters that are under the absolute and prerogative power of the SA, the SA is not duty-bound or under an obligation to refer or follow the comments and advice of the planning authority, and the technical agencies, as the case may be.
- 2) Section 108 of the NLC undermines the role and function of the planning authority and technical agencies.
- 3) Whether the SA as a public authority is under a legal responsibility and liability in the alienation of suitable and fit lands, disposal of land and other relevant land matters for housing development projects that can ensure public welfare, public benefit and well-being of their stakeholders (the housing developers and the purchasers at large)?

Issue 1

In the disposals of lands and land matters that are under the absolute and prerogative power of the SA, the SA is not duty-bound or under an obligation to refer or follow the comments and advice of the planning authority, and the technical agencies, as the case may be.

The FC provides certain powers to the SA on certain subject matters and carries out their execution. These powers are specifically spelt out in List II (State List) and List III (Concurrent List) to the Ninth Schedule of the FC and read together with [articles 74](#) and [80](#) of the FC.

To ensure coordinated, informed decisions and good governance in dealing with the relevant land matters, the SA **may** refer to certain good and best practices or federal directives/policies issued by the National Land Council ('NLCL'), National Physical Council ('NPC'), technical agencies, planning authority and the standard procedures prescribed by the Federal Director-General of Lands and Mines and Director General of Town and Country Department (PlanMalaysia) such as the federal land administration and planning circulars and guidelines issued from time to time and the NLC land manual and PlanMalaysia, as the case may be. This good practice includes the need to refer to and consult with relevant authorities, for example, the JPBD, JPS, JAS, JMGS, and JKR, and seriously consider these professionals' views before the disposal of lands and other land matters can take place. These referral authorities may consist of the appropriate authorities and/or technical agencies (Koperasi Pegawai Pentadbiran dan Pengurusan Tanah Malaysia Berhad, 2003).

As the power of disposal of land and other land administration subject matters are an absolute power of the SA and the SA is not under an obligation to refer to and complies with the comments, opinions, advice and conditions of the technical agencies, planning authority (LPA, State Planning Council ('SPC') and the National Physical Planning Council ('NPPC')) and the federal authority. It follows that the disposed of lands may not fit and are unsuitable for land development. It can cause soil erosion, soil settlement, and soil problems in housing



development areas detrimental to the public, particularly the house residents and their families. This issue is evident in Taman Villa Fettes, Lots 141 and 3622, Mukim 18, North East District ('NED'), Pulau Pinang. In this project, it was found that the project had to be abandoned because the developer had incurred substantial expenditure to extract and remove hidden hard rocks/granite in the soil of the project site. These additional costs and problems were unforeseen and not within the developer's earlier anticipation.

Similarly, this was also the case for Taman Harmoni, Lot 82, Mukim of Cheras, District of Hulu Langat, Selangor, where the developer had to incur additional costs of removing slime soils and replacing them with suitable soils and had to carry out substantial piling works to stabilise the soil structure of the project land. Similar too was the case for Taman Dayang, Mukim Kuah Langkawi (developed by INI Holding Sdn. Bhd.) and Taman Perwira, Jerantut, Fasa II, developed by Yee Hoong Loong Corporation Sdn. Bhd. where the purported housing development project could not be proceeded, as beneath the project land, there was hard granite and geotechnical soil problems resulting in impossibility of carrying out the piling works, earthworks, excavation, foundation works and erection of the purported house buildings (Md Dahlan, 2009).

As the decision-making process is an absolute power of the SA in the land administration, the authors contend that the process might be abused, wrong and inappropriate for development of the state, nation, and economy. This may lead to unwarranted and unsuitable administration of lands, which may later cause soil settlements, soil erosions, landslides, flood disasters, land problems and housing abandonment (Md Dahlan, 2012, 2014a, 2016).

Issue 2

Section 108 of the NLC undermines the role and function of the planning authority and technical agencies.

Notably, section 108 of the NLC undermines the function of the planning authority and the technical agencies if the restrictions made by the planning authority conflict with the conditions imposed by the SA.

This provision has directly given an absolute power to the SA **not to be bound** by any restrictions, by-laws, or views of the LA and planning authority, let alone by the other technical agencies, which have not been stated in the NLC. It follows that if certain matters fall under the state's jurisdiction, for instance, land, river, water, forest and others, the SA, and its state's agencies, for example, land office, LPA, and SPC, which govern these matters are **not duty-bound** to follow the views and advice of the planning authority and the technical agencies. These technical agencies include JMGS, JKR, LA and JAS (Norazizi Adinan, Personal Communication, January 31, 2021). This, again, may lead to the approval of disposal of lands application made and other land administration subject matters in an unprofessional manner, being made on an *ad hoc* basis and unsuitable from the planning perspective, including the development plans, National Physical Council and National Land Council's policies.

Thus, even though under the NLC, some disposal of lands and other land matters require the SA to be subject to the views of the planning authority, section 108 still provides the SA with the upper hand over the views and restrictions of the planning authority. What more is the position of the technical agencies? Instances of this disposal of lands and land matters include



simultaneous application for subdivision and variation of conditions, restriction of interest and category of land under sections 124(1) and 124A NLC, application for subdivision of land under sections 137 NLC, application to partition of any land under section 142 NLC, application for amalgamation of land under section 148 NLC, and land acquisition under sections 3(1) and 3A(1)(d) of the Land Acquisition Act 1960 (Act 486).

As references to the planning authority and technical agencies are not mandatory, this can lead the SA to approve application, on an *ad hoc* basis or politically motivated grounds, for exercising alienation, sub-division, and land use control without referring to the views of the planning authority and the technical agencies.

The absolute power in the disposal of lands possessed by the SA may lead to power abuse. In the practical sense, the meaning of SA is the members of the State Executive Council (Majlis Mesyuarat Negeri or EXCO). The Menteri Besar (Chief Minister) may highly influence EXCO's decisions. Usually, a large number of the members in the EXCO are from the same political party.

Furthermore, a problem may arise as section 8 of the Delegation of Powers Act 1956 (Revised 1988) (Act 358) confers on the Menteri Besar/Ketua Menteri/Chief Minister certain delegated powers without having to be subject to the professional officers' approvals, thus reducing the functions of certain professionals conferred by sections 12–13 of the NLC (State Director and other State Officers and Delegation of Powers of SA to State Director, etc.). Indirectly, all decisions made in the EXCO meetings can be monopolised and manipulated for their self-interests and political interests, which may not be practical and suitable from the view of certain relevant professionals. Thus, it is timely to have a re-look at the definition of SA in the NLC, and its composition as well as the powers granted under the Delegation of Powers Act 1956 (Revised 1988) (Act 358), 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.

The authors also opine that the new section—section 5D (coming into operation of the Electronic Land Administration System in any land Registry) and the 16th Schedule (section 5D) (Electronic Land Administration System) of the NLC— 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', would not improve the above problematic situation. This is because unless all relevant technical agencies and the planning authority have conducted a comprehensive and updated study on the affected land being subject to the land database in question, the existence of the land database in the digital data would still be ineffective insofar as the soil problems in housing projects are concerned. To be effective, the above problems regarding subdivision, land alienation, land disposal, and land use control should first be addressed.

The current establishment of One Stop Centre ('OSC') at the SA level and the LA level to coordinate and expedite the approval process of land development applications at the land offices and the LA offices, including the applications for planning permission and plans' approval (for building, infrastructure, etc.) in the opinion of the authors, is still insufficient to solve the soil problems. This is because the guidelines provided for the administration and operation of the OSC issued by the KPKT **shall not bind** the SA, LPA, and LA in approving applications for land development, including applications for planning permission and approved plans. Thus, it is opined that the prevailing shortcomings, such as insufficient



coordination and inefficient administration, and practices of the SA, SPC and LPA in dealing with the applications for land development in their respective states would continue. There are inadequate curative measures on part of the LPA to deal with the problems of soil problems. It is a fact that the measures in dealing with soil problems implemented by the respective planning authority in Malaysia vary, and their expertise also differs. Some consider the development plans complete and adequate to meet soil problems, but some say they are insufficient. This depends on the respective locations of the LPA. For example, the geographical land in Alor Setar and its vicinity is flat, while Georgetown, Kulim and Ampang Jaya's geographical situations are hilly and have many slopes; thus, the challenges are more compared to Alor Setar and Kangar. Thus, for LPA in Alor Setar and Kangar, they can say that the provisions in the Development Plans are adequate, while for LPA in Georgetown, Kulim, and Ampang Jaya may say otherwise. Further, there is a contention that the information and data provided by the technical agencies, consultants and data sources are inadequate. Thus, the Development Plans, be they Structure nor Local Plans, evidently failed to respond and face the contemporary needs, issues, and challenges that the public face (Norazizi Adinan, Personal Communication, January 31, 2021; Ahmad Sujairi Md Hassan and Ramziah Abd. Rahman, Personal Communication, February 15, 2021); (Awang, 2008; Md Dahlan, 2022).

It is evident that there is still inadequate coordination and insufficient integrated policies and practices (legal and administrative) between the SA, LPA, LA and the Ministry of Local Government Development ('KPKT') on housing development policies, legal regime, and practices, including soil fitness and location suitability guidelines, which has, by and large, contributed to soil problems in housing projects. This is illustrated in the absence of comprehensive development criteria for the implementation of housing development projects, even during the approval for alienation of the land, other land disposals and land matters (Md Dahlan, 2009); (Norazizi Adinan, Personal Communication, January 31, 2021; Dhinesh Bhaskaran, Personal Communication, November 18, 2019).

As mentioned above, the SA has the upper hand over the planning authority pursuant to section 108 of the NLC whenever there is any conflict between land and planning legal provisions. Due to this, the purported alienation and land disposals by the SA might have been implemented without considering the views, suggestions or recommendations of the planning authority and the technical agencies. Likewise, there is a possibility of direct intervention of the SA either through unreasonable political interference or through the exercise of their prerogative power by way of alienation of the land and disposal of land relating to housing areas. This can cause a housing development project to be erected on an unsuitable soil location (Md Dahlan, 2016).

Nonetheless, in *Perbadanan Pengurusan Sunrise Garden Condominium v Sunway City (Penang) Sdn Bhd & Ors and another appeal* [2023] MLJU 98 (Federal Court at Putrajaya) and *Majlis Perbandaran Subang Jaya v. Visamaya Sdn Bhd & Anor* [2015] 5 MLJ 554 (Court of Appeal at Putrajaya), the Federal Court and the Court of Appeal decided that where there is an inconsistency between the category of land use under the NLC and planning control under the TCPA, the TCPA would prevail. This is because, according to both apex courts, TCPA is the later legislation and that being a later legislation, TCPA will prevail over the NLC. Further, the NLC provided, in general terms for land use for agriculture, building and industry. Conditions in individual titles are too cumbersome a means to plan development. Before the NLC, a large number of land titles had been issued. There were other laws and by-laws. It is to these that section 108 was directed. Section 108, however,



cannot apply to laws passed subsequently by Parliament and regulations authorised thereunder. In addition, Nallini Pathmanathan FCJ in *Perbadanan Pengurusan Sunrise Garden Condominium* said the TCPA explicitly provided the proper control and regulation of town and country planning in Peninsular Malaysia. While the NLC addresses land use in individual titles, the TCPA addresses planning by land use zones. By the time the TCPA was promulgated, large numbers of land titles had been issued, with conditions of use as often as not that differs from the zoning. For planned development to succeed, if the condition of use in the title is in conflict with the zoning, the condition is almost routinely amended to the use authorised by the zoning. Thus, the Federal Court held that the submission that section 108 renders the TCPA and zoning thereunder inconsistent with land use under the NLC titles null and void holds no merit.

Hence, following the reasonings of the apex courts in the above case law, the provisions under the TCPA would prevail over the provisions under the NLC. It follows that the SA would be subject to the approval and restrictions of the planning authority in the land administration in Peninsular Malaysia.

Despite the above fact and laws, the SA will normally refer to and comply with the views of the planning authority and technical agencies. Mr Azmin Zainul Abidin, a land officer of the Kota Setar Land Office, said that the situation where SA is **not following** the views of the planning authority and technical agencies is minimal, and this probability is slim in Kedah, Malaysia. Nonetheless, this issue (the issue of superiority of the land authority and SA undermining the function and role of the planning authority) may also happen, leading to soil problems. He said that in respect of Kedah if the planning authority and technical agencies do not support any development application by housing developers, the SA will not approve the purported application. This contention is supported by Norazizi Adinan, being the JAS Kedah State Director (Norazizi Adinan, Personal Communication, January 31, 2021).

In Kedah, if there is any application to develop states' land, the development application to develop land through alienation must first be examined by the State Economic Development Division (Bahagian Pembangunan Ekonomi Negeri ('BPEN')). BPEN will form a technical committee to examine the proposal and the viability and feasibility of the proposed project. They will assess the viability of the proposed project. This will lessen any problem later that may befall the purported projects. If BPEN does not approve the application, it means the applicant developers cannot proceed with the intended development. After BPEN has approved the project, the proposed project will further be subject to the State Executive Council approval. The applicant developer will commence the proposed project only after the State Executive Council approval (Azmin Zainul Abidin, Personal Communication, August 3, 2017).

Nonetheless, to ensure that the applicant developer is serious about the proposed project, the applicant developer must deposit a certain refundable amount of money in proportionate to the estimated cost of the proposed project to the SA. In other cases (private development), according to Azmin Zainul Abidin, the State Executive Council (SA) must approve all land development applications and further comments from technical agencies are required before approval. These technical agencies include JKR, JPS and JPBD. Apart from these technical agencies, the applications must be examined by the Mineral and Land Office ('PTG') and the State Secretary's Office ('SUK') (Azmin Zainul Abidin, Personal Communication, August 3, 2017).



It is hoped that the National Land Council ('NLCL') formed pursuant to Article 91 of the FC and mentioned in section 9 NLC can be fully functional in that the federal policies and measures can be made applicable to all states to ensure orderly housing development manner to prevent the occurrences of soil problems, soil erosion, landslides, and soil settlement in housing development projects. Notably, the NLCL members consist of the Prime Minister and the representative of each state in Malaysia. Thus, any misunderstanding and non-acceptability of the federal policies implementation can be potentially lessened.

Similarly, the establishment of the NPPC under section 2A of the TCPA can play its role in ensuring best practices in town and country planning matters and sustainable development concepts and principles issued by the Federal Government can be implemented by the states in housing development, including policies measures and best practices for ensuring soil fitness in housing development projects are carried out in all states. This is because the composition of NPPC includes the Prime Minister and Chief Minister of each state in Malaysia. Hopefully, this platform can reduce the gaps between the Federal Government policies and the states' policies.

It is evident that in the relevant land matters for housing development, the SA fails to get sufficient and appropriate advice and views, inadvertently or otherwise, from the relevant authorities (planning authority and technical agencies) or that the decision of the SA is not grounded on good information and professional considerations. For instance, the SA has failed to alienate land to suitable housing developers to carry out a particular development on the alienated land, or the alienated land is not suitable for housing areas. These may result in the purported housing development failing to the detriment of the stakeholders (for example, the purchaser residents). This problem is evident in the occurrences of problematic housing projects, floods, soil erosions, land problems, soil settlements and landslides, which have resulted in severe injuries, damage and considerable losses to the interested parties and stakeholders, especially the purchaser residents and the developers.

On a dismal note, housing developers with no adequate experience and expertise in handling housing development projects have been given lands by the SA through alienation. Later, it was found that the developers had abandoned the housing development projects, leaving purchasers without any remedies due to their inexperience and incapability to carry out the housing projects. The projects are left abandoned. This problem happens at Taman Harmoni, Cheras, Kuala Lumpur and Taman Lingkaran Nur, Kajang, Selangor (Md Dahlan, 2009).

In another respect, in the authors' observation, some cases show that the process for approving applications for alienation of land and other relevant land matters is too slow to be finalised by the SA. For example, in an application involving a housing development project in a state in Malaysia, the process took about 3.5 years to complete. This can cause unnecessary waiting costs for the developer. In the authors' opinion, this delay is caused by inefficient administration and inadequate professional staff (for instance, shortage of land tracers and settlement officers) in the land office that can expedite the relevant application for consideration by the SA (Md Dahlan, 2011).

Further, regarding the practice of some land offices in Malaysia (the Land Administrator, the Registrar of Land Titles and the Director of Lands and Mines), there is no compulsory implementation of the International Standard Organisation ('ISO') procedure in their offices. The lack of this internal control and self-regulated administration mechanism will mar the land offices' efficiency in processing land-related applications. Even though there is an



internal Key Performance Index ('KPI') set by the SA and the State Secretary's office to regulate the works flow and the work procedure internally, the authors are still sceptical on whether this internal governance can be an impartial and independent effective measure that is capable of fully governing the land administrative process. The issue of non-uniformity in the procedure and workflow of disposal of lands and other relevant land matters between the federal agencies and the state agencies is again due to the existence of the separate constitutional jurisdictions of the Federal Government and state government/SA over land matters. Regarding the power of the SA listed under List II, the Federal Government has no say and control over the conduct of all the state government machinery (Md Dahlan, 2014b).

The establishment of PEMUDAH or a taskforce committee by the federal government, consisting of representatives from the government and the private sector to expedite the land development process and approval, including land alienation and other relevant land matters, it is submitted, may not also be effective as it cannot bind the SA in respect of its policies, directives and procedures (Md Dahlan, 2014a).

It is worth mentioning that other problems faced by the land offices and state authorities in some states in Malaysia are shortage of professional staff, inadequate technical and legal knowledge of the land office staff, inadequate funding and infrastructure, staff negligence, breach of duty, and overburdened daily works that the staff cannot adequately and efficiently execute. These are among the prevailing problems plaguing land offices and SAs, undermining their functions and responsibility towards the stakeholders, especially in housing development (Md Dahlan, 2014a)

Issue 3

Whether the SA as a public authority is under a legal responsibility and liability in the alienation of suitable and fit lands, disposal of land and other relevant land matters for housing development projects to ensure public welfare, public benefit, and well-being of their customers/stakeholders (the housing developers and the purchaser residents at large)?

In the authors' view, the SA has absolute power and is not bound by anybody in the alienation of land and other relevant land matters, not even the NLCL, NPPC, the federal government and federal agencies, unless prescribed by the FC and NLC. The NLCL is a body established under the FC consisting of representatives from the federal and state governments ([Article 91\(1\)](#) of the FC). It has to formulate from time to time in consultation with the Federal Government, the state governments and the National Finance Council ('NFC') a national policy for the promotion and control of the utilisation of land throughout the Federation for mining, agriculture, forestry or any other purpose, and the administration of any laws relating thereto ([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 SA. Further, the NLCL is also obligated to advise the federal and state governments on matters pertaining to the utilisation of land or in respect of any proposed legislation dealing with land or of the administration of any such law if there is a consultation request by the federal or the state government ([Article 91\(6\)](#) of the FC).



Thus pursuant to [Article 91](#) of the FC, the NLCL is conferred with certain constitutional functions, and it comprises state representatives with a Federal Minister as the 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 SA to abide by the policy and guidelines formulated by the NLCL? Until now, the NLCL has formulated broad-based policies on squatters, land matters, land speculation, and land use 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 grounds for the diversity in land use policy amongst the states in Malaysia (Awang, 1997; Kusin, Akhir, Mohamat-Yusuff, & Awang, 2015).

Thus, even if the NLCL has issued directives to the SA to exercise due diligence and care in the land alienations and other relevant land matters, the directives **do not bind** the SA. For example, even today, many National Land Policies are issued by the NLCL; first was the National Land Policy over alienation of land issued by the NLCL through the directive issued by the Federal Director General of Land and Mines. However, their position is a mere directory, not mandatory for the SA to follow (Jabatan Ketua Pengarah Tanah dan Galian Persekutuan, Kementerian Sumber Asli, 2023).

The “National Land Policy” over alienation of land issued by the NLCL concerns alienation of land in special circumstances for freehold lands under [section 76\(aa\)\(iii\)](#) of the NLC. However, this 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 SA to duly exercise alienation of lands for housing development projects for the benefit and welfare of the stakeholders (housing developers and purchaser residents). For example, this directive policy does not prescribe specific procedures that the SA should comply with in the exercise of alienation of land for housing development projects, for instance, imposing obligation on the SA only to alienate lands to capable developers or be subject to the views of the planning and environmental authorities or that the SA must ensure that the location of the land is suitable for housing development purposes not prone to soil erosion. Equally, there is no responsibility for the SA to be bound by all the views and advice of other technical agencies and appropriate authorities in exercising their decision-making process on relevant land matters 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's policies in the form of the directive policies issued by the NLCL could be achieved if the state government and the federal are from the same political party. 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 actualise. 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 (Awang, 2008; Prema-Chandra Athukorala; Suresh Narayanan, 2018); Norazizi Adinan, Personal Communication, January 31, 2021).

To Adibah Awang, the governance problems relating to the land development process, including the alienation of land and other relevant land matters, are 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. Thus, there may exist non-coordination and non-uniformity



between the practices and policies of the federal government and the state governments in land administration, including on matters pertaining to alienation of lands for housing development and other relevant land matters in housing development (Awang, 1997; Premachandra Athukorala; Suresh Narayanan, 2018); Norazizi Adinan, Personal Communication, January 31, 2021).

Further, according to Sharifah Zubaidah Syed Abdul Kader Aljunid, to this day, there is yet one “National Land Use Policy” in place. However, the NLCL has issued many circulars relating to amendments of the NLC. As a result, the function of NLCL, it is opined, could be deemed irrelevant in practice by the SA (Awang, 1997; Syed Abdul Kader Aljunid, 2006).

LIABILITY AND RESPONSIBILITY OF THE SA IN THE LAND ADMINISTRATION

First and foremost, insofar as the knowledge of the authors is concerned, no case law as yet has dealt with the issue of liability and responsibility of the SA to act fairly and reasonably in the alienation of land, disposal of lands and other relevant land matters for housing development projects, particularly involving soil problems, landslides, soil erosions and soil settlement in housing development projects. Likewise, no action has commenced so far by aggrieved housing developers or purchaser residents in the problematic housing development projects due to the wrong-doings, *mala fide* acts and negligent decisions of the SA in alienating lands, disposing lands and other relevant land matters. Be that as it may, certain legal theories may be generated in respect of the issue of liability and responsibility of the SA in alienating lands and other relevant land matters for housing development projects for public benefits and well-being of the stakeholders based on the available legal resources and reported case law.

In the opinion of the authors, despite the absolute power that the SA has in the alienation of land and other relevant land matters and its superiority over the planning, technical agencies and other authorities, it is submitted that the SA is still subject to a legal and equitable duty to act fairly and reasonably in the exercise of alienation of land, disposal of lands and other relevant land matters for housing development purposes and to ensure the soils are fit for housing development. In other words, if it is proven that the SA fails to execute its statutory, legal, and equitable duties fairly and reasonably to the detriment of the housing developers and the purchaser residents, the stakeholders have a cause of action and *locus standi* against the SA. The aggrieved victim parties are entitled to certain legal and equitable remedies pursuant to section 22 NLC. In other words, the SA should not act in such a way as to cause public misfeasance. This contention is made on the following grounds:

- a) There exists a **fiduciary duty** on part of the SA towards the public in dispensing their public duties. In respect of housing development, the public is the housing developers and the purchaser residents.
- b) There exists a **legitimate expectation** on part of the housing developers and the purchaser residents against the SA in that the SA should exercise its statutory and/or prerogative powers conferred by the FC fairly and reasonably in the alienation of suitable and fit lands, disposal of suitable and fit lands and other relevant land matters for housing development projects and appoint suitable and fit housing developers to carry out housing development for the benefit of its subject (the housing developers and the purchaser residents). The SA could also be liable for misfeasance in public office (Spencer, Paul; O’Brien, 2016).



- c) Even though the SA has a wide discretionary and statutory power to alienate land, dispose lands and other relevant land matters, including appointing developers to carry out housing development projects, this statutory and prerogative power is not unfettered. This power is still subject to **rules of natural justice, equity, good faith, good conscience, and fairness.**

Despite the above 3 contentions that the SA must still comply with and subject to the law and equity in alienation of lands, disposal of lands and carrying out other relevant land administration subject matters, the decided cases show inconsistency of this position. In other words, some cases held that the SA has an absolute power, without any legal and equitable liability, to alienate and dispose lands and carry out other relevant land administration subject matters even though the execution of the power is tainted by elements affronting the law and equity. In contrast, other cases decided otherwise, in that the SA is still subject to the scrutiny of the courts and the law, principles of justice and equity. The following cases illustrate these 2 positions, viz:

- 1) *North East Plantations Sdn Bhd v. Pentadbir Tanah Daerah Dungun & Anor* [2011] 2 CLJ 392 (Court of Appeal at Putrajaya).
- 2) *North East Plantations Sdn Bhd Lwn Pentadbir Tanah Daerah Dungun Dan Satu Lagi* [2011] 4 CLJ 729 (Federal Court at Putrajaya).
- 3) *Piagamas Maju Sdn Bhd v Pengarah Tanah dan Galian Negeri Selangor & Anor* [2016] 2 CLJ 824 (High Court of Malaya at Shah Alam).
- 4) *Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian, Selangor & Anor* [2013] 10 CLJ 570 (High Court of Malaya at Shah Alam).
- 5) *Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian, Selangor & Anor* [2016] 2 MLJ 1495 (Court Appeal at Putrajaya).

FINDINGS

The followings are the findings from the above elaboration and discussion.

- 1) The SA in Malaysia has absolute power in land administration and land matters as enshrined in the FC, as this fall under the jurisdiction and power of the SA.
- 2) The SA is **not duty bound** and under an obligation to follow the directive and circulars, advice and opinions of the federal authority, including the planning authority and technical agencies, in dispensing their power in the administration of land. This is enshrined under section 108 NLC.
- 3) Following the above, the SA might have negligently and made a wrong decision in the state's land administration, for example, the alienation of land for housing development projects. Due to the negligence and wrong decisions, the land that has been subject to the disposal by the SA might be subject to soil erosion, soil problems and soil settlements at the housing development project locations. Thus, the purchaser residents and their families will suffer losses and grievances.
- 4) However, the provision under section 108 NLC that the SA is not bound by the conditions and restrictions of the planning authority **is negated** following the recent decisions of the Federal Court and Court of Appeal in *Perbadanan Pengurusan Sunrise Garden Kondominium* (Federal Court at Putrajaya) and in *Visamaya Sdn Bhd* (Court of Appeal at Putrajaya).



- 5) Despite the above absolute power, the SA is still subject to the principles of justice, equity, and law. This means that if the SA is proven to have failed to refer for professional advice and opinions of the planning authority and the technical agencies or they have failed to comply with the advice or opinions, the SA **would be liable** in law and at equity. This is premised on the cases such as *Pembinaan Batu Jaya* and *Piagamas Maju*, as discussed above. Further, section 22 NLC states that there is no immunity given to the land officers if they have acted in *mala fide* manner. Section 434(3) NLC states that the SA will pay the compensation to the aggrieved victims due to the negligence, wrong decisions and *mala fide* manner of the land officers and the SA in carrying out their duties in the land administration.

CONCLUSION

The SA is given a broad and prerogative power and jurisdiction over land within the state territory. This is spelt out in the FC. In the exercise of the power and jurisdiction over land, the SA must emphasise the welfare and justice of the people, economic and social development of the public and ensure the development sustainability. The above discussion highlights that there are *lacunae* in the law, particularly the NLC, in the exercise of the SA's power and jurisdiction over land, which might have been tainted with wrongdoings, unreasonable, negligence, and other *mala fide* acts of the SA. This may cause the decision-making process and its outcomes detrimental to the public. For example, the SA alienates lands unsuitable for housing development and evidently has caused soil erosions, soil problems and soil settlements. The victims would be purchaser residents of the housing areas. Recent case law have to some extent, defined and restricted the limit of the broad power and jurisdiction and emphasised the liability of the SA in the land administration. These include the requirement that the SA must comply with the planning authority restrictions and conditions and that any wrongdoings, unreasonableness, negligence, and *mala fide* acts of the SA in exercising their power and jurisdictions shall still be subject to the court's scrutiny. They could be liable at law and in equity if there is proof.

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