

Land Conversion, Subdivision and Amalgamation

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Abstract

The paper focus on the role played by the NLC in the planning and development process i.e. in controlling land use and condition via the system of conditional land title and providing methods towards land development i.e conversion, subdivision, partition, amalgamation and surrender and realienation. In achieving the objective, the writer hereby seeks to deal with the following matters :

- (a) An outline and review of the control of land use and development procedures under the NLC, i.e. categories, conditions, restrictions in interest, conversion, subdivision, partition, amalgamation, surrender, and surrender and realienation of land.
- (b) Why the need for "categories", "condition", "restriction in interest", "conversion", "subdivision", "partition", "amalgamation", "surrender", and "surrender and realienation of land"?
- (c) Legal implication for non-compliance with the land use planning and development procedures.

1.0 INTRODUCTION

In Malaysia, the planning and control of development of land uses is exercised primarily by the local and state authorities. Before the advent of planning law and law relating to land utilization, the right to develop land was limited only by common law rights of neighbours, by restrictions originating in contract and legislation of specialized application such as public health, nuisance etc. This has led to the haphazard development at the whims and fancies of each individual landowner which have left the present generation with a legacy in the form of problem of squatters, traffic congestion etc.

With the country rapid economic development from an agrarian economy to that of an industrialised country, it has necessitates the need for a proper and effective system of land use planning and development control. Land use planning policy in this country is reflective from the various land and planning legislations, the major laws being :

- (a) the National Land Code 1965 (hereinafter referred to as the NLC) which provides for a system of control through the conditional land title.
- (b) the Town and Country Planning Act 1976 which controls land use planning within local authority areas through the structure plan system,
- (c) the Environmental Quality Act 1974 in which control takes the form of Environmental Impact Assessments on developments. and

- (d) the Street Drainage and Building Act 1974 which empowers Local Authorities to control building operations, construction of roads and management of sewerage and drainage.

The NLC came into force in 1966 with the main objective of ensuring uniformity of law and policy relating to land administration among the states in Peninsular Malaysia. This legislation controls changes in the use of land and its conditions of titles and provides method towards land development i.e. commonly referred to as conversion, sub-division, partition, amalgamation and surrender and re-alienation of land. Thus, any person who wants to develop land would have to conform to the conditions prescribed by the land title issued to the landowner as evidenced of ownership. As land administration and town planning is carried out by the Land Office and the Local Authority respectively, conflict over land use planning may arise. However, s. 108 of the NLC provides that conditions attached to the land title shall prevail over planning restrictions.

2.0 LAND USE POLICY AND LAND DEVELOPMENT

Land use policy begins when the State Authority alienates land. It is therefore necessary for the State Authority to have a long term land use planning to enable the State to alienate land and imposed control on land development systematically and not on an ad hoc basis. By categorising land i.e. into agriculture, building and industry, and the imposition of condition and restriction in interest under the NLC, land development could be control so as to bring the use of land into conformity with the country's broad development policy for eg. the National Development Policy and the New Economic Policy. There are however, no proper documented national land use planning policy. This is perhaps due to the fact that since land is a state matter, each state has the prerogative of drawing up its own land policy.

However, the Federal Constitution by virtue of Article 91 (5) confers powers to the National Land Council to formulate a national policy for the promotion and control of the utilisation of land in the country for mining, agriculture, forestry or any other purpose in consultation with the Federal and State governments and the National Finance Council. This body conferred with legislative functions, comprised of State representatives with a Federal Minister as Chairman. This mean that while the states have a voice in this body, the control lies with the federal government. The question that arise is, since land is a "state matter", whether it is mandatory for the State Authority to abide to the policy formulated by the National Land Council. The Council 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. Thus, the reason for the diversity in land use policy amongst the states in Malaysia.

As seen later in the paper, legislative development procedures are very simple and convenient as it is based on well documented and easily digestible legislation i.e. the NLC and the State Land Rules. The root of the problem, therefore, lies not in the land legislative procedures i.e. conversion, subdivision amalgamation etc., but on the inconsistencies of criteria/condition/ consideration/policy for approval of development application. The changing rules in land use policy mid-stream based merely on political and socio-economic consideration prevalent at the time of the respective states, have resulted in uncertainty and confusion to developers, legal practitioners and entrepreneurs and thus viewed as a hindrance to property development. Thus, a well documented national land use policy should be introduced to enable proper and effective system of land use planning and development process in the country.

3.0 CATEGORIES, CONDITIONS AND RESTRICTIONS IN INTEREST

Under the system of control through the conditional land title, which is in essence, a method of defining the landowner's proprietary rights, the landowner merely have a limited right of ownership evidenced via the categories, conditions and restrictions in interest attached to the land title issued to the landowner by the State Authority. In other words, the landowner is not free to dispose or deal or use his land as he likes as this rights are subject to the various condition and restriction in interest imposed on the land by the State.

When State land is alienated, whether before or after the commencement of the NLC, the land in question must fall under one of the three recognised categories - agricultural land, building land or industrial land. Land alienated prior to the commencement of the NLC i.e. before 1 January 1966, has no category but is restricted to the type of use for eg. "padi", "dusun", jetty, factory or nothing - "nil". All country, town or village land held under Land Office Title under the previous land law, are subjected to implied condition for agricultural purposes only. However, land registered under Registry titles shall neither be agriculture nor industrial land (refer to the Privy Council case of Garden City Development Bhd. v. Collector of Land Revenue, Federal Territory (1982) 2 MLJ 98). In practice, the "category" imposed on a piece of land will not tell the owner everything. This shortcoming is made good by the mechanism of endorsing express conditions on the title, as well as the automatic application of "implied conditions" as set out in three important provisions of the Code - namely s. 115 (for agricultural land), s. 116 (for building land) and s. 117 (for industrial land). By endorsing "express conditions" on the title, the owner is then told that his agricultural land can only be cultivated for the purpose of growing a specific crop for eg. oil palm, pineapple, cocoa or whatever. Thus express condition and categories of land exists to complement and strengthen the other.

Whilst the law and practice relating to "categories of land" and "express conditions" are applied uniformly by the authorities in all the States, the law relating to restrictions in interest gives more room for each State to manoeuvre within the range of its discretionary limits. It is free to decide what specific terms are to be endorsed on the title to meet the special or peculiar needs or interests of that State. For eg. the restriction in interest endorsed on land titles that it could not be transferred to non-Bumiputra unless prior approval is obtained from the Johor State Authority, considered essential here, might not be resorted by the other state authorities.

The general power of the State Authority to impose express conditions and restrictions in interest is provided under section 120 of the Code. The term "condition" and "restriction in interest" which usually appear together in the NLC, however, bear different meaning and have different legal implications. The term "restriction in interest" is defined in section 5 of the Code as meaning :

"...any limitation imposed by the State Authority on any of the powers conferred on a proprietor by Part Nine, or on any of his powers of dealing under Division IV, and any like limitation imposed under any previous land law".

The term "condition" does not include any restriction in interest (s. 5 NLC) or any express or implied condition in any agreement in which the State Authority is not a party (s. 103 (c) NLC). Therefore, a restriction in interest refers to any limitation imposed by the State Authority on the powers of the registered land proprietor on his land to subdivide, partition or amalgamate it, as well as the limitation on his powers to deal with it by way of transfer or the creation of a lease, charge, easement, tenancy, statutory lien, whereas, condition relates to the manner to which the land is to be utilised for example the State Authority may impose express condition on agricultural land requiring the cultivation of a particular crop.

These conditions and restrictions in interest are determined by the State Authority at the time when the land is approved for alienation and must be endorsed on or referred to in the document of title of the land. Where both conditions and restrictions are so imposed, the State Authority must distinguish between the two (s.120 (3) NLC).

The discretion of the State Authority to impose express condition and restrictions in interest in respect of alienated land is not fettered or controlled with regard to

initial alienation. The power is curbed only by political or socio-economic consideration. Section 120 (1) of the NLC provides that :

"...the State Authority may alienate land under this Act subject to such express conditions and restrictions in interest conformable to law as it may think fit".

As has been pointed earlier, the State Authority have wide discretionary powers to impose any condition and restriction in interest which it thinks fit on the land to be alienated. However, the conditions and restrictions imposed must be "conformable" to any written law in force. Thus, when a State Authority, acting in accordance with its discretion, chooses to impose restrictions in interest (when approving the conversion and sub-division of a housing project) that 30% of the houses to be developed must be low cost units and can only be sold to citizens born in that State, and the remaining 70% must be sold to Malaysian citizens, half to Bumiputra and the other half to non-Bumiputra, then question arise as to whether this "restriction in interest" run foul of the law, assuming that the law does not restrict or is silent with regard to the sale of units to non-Bumiputra. Would this restriction in interest be upheld by the court, if someone were to challenge them.

In Kin Nam Development Sdn. Bhd. v. Chau Daw Yau (1984) 1 MLJ 256, the developer had applied for conversion and subdivision approval to the Pahang State Authority in respect of a proposed housing development. Before approval was obtained, the developer had proceeded to sell some of the lots to individual purchasers, who were non-Malays. When the authorities finally granted their approval, the developer discovered, to his dismay, that some of the lots which he had pre-sold to the non-Bumiputra purchasers have reserved for "Bumiputra purchasers". The developer did not appeal against the terms of approval granted by the authorities.. Citing frustration as his defence, the developer then told the affected non Bumiputra purchasers that he had to abort the sale and purchase agreements with them. The court held that the developer was liable in damages and that the terms of approval imposed by the authorities could not, in law, be deemed to frustrate the contract between the developer and the affected Bumiputra purchasers. Despite opinion to the contrary, it is doubtful whether the conditions of approval imposed by the State in the instant case could be regarded as being unconstitutional (see Visu Sinnadurai 1984 at p. 46).

Section 301 (c) of the NLC provides that :

"An instrument shall be fit for registration under this Part if, but only if, the following conditions are satisfied -

(a) ...

(b) ...

- (c) *that the dealing which it effects is not contrary to any prohibition or limitation imposed by this Act or any other written law for the time being in force, or to any restriction in interest to which the land in question is for the time being subject*".
(emphasis added by the writer).

Thus the effect of non-compliance with the restriction in interest imposed on the land, for eg., where land endorsed with the restriction in interest to the effect that it could not be transferred to a non-Bumiputra unless prior approval is obtained from the State, but the owner nevertheless, sells the land to a non-Bumiputra without approval from the State Authority, then the transfer cannot be registered as it is not fit for registration. In other words, the effect of non-compliance with the restriction in interest will render the transaction null and void as it is incapable of registration. However, failure to fulfill any of the conditions imposed on the land shall constitute a breach of condition and the land will become liable to forfeiture to the State Authority (s. 127 (1) (a) of the NLC) or the proprietor liable to a penalty in the form of a fine (s. 127 (1A)). Therefore failure to fulfill any of the condition imposed and non-compliance of the restriction in interest gave rise to different legal implication.

4.0 CONVERSION OF CATEGORY OF LAND USE

The term "conversion" is not used in the NLC but this form of land development process is known instead as "Variation of conditions, restrictions and categories" as provided under section 124 to 124A of the Code A landowner may apply to the State Authority for alteration or imposition of category of land use, removal from the land title expression to which the land is subject or the rescission or amendment of any express condition or restriction in interest to enable the landowner to use or develop his land accordingly and for purposes other than that allowed at present (s. 124 NLC).

The success or failure of each applications depend on whether or not the State Authority will grant its approval. No such application shall be processed unless the State Authority is satisfied that

- (a) the written consent of any existing encumbrancer or any tenant in occupation under a tenancy exempt from registration has been obtained, and
- (b) the quit rent for the current year has been paid (see proviso to s. 124(1) NLC).

Where the State Authority approves any application for the alteration of a category of land use under s. 124(1)(a), the State Authority shall direct that the category of land use applied for shall be endorsed on the document of title to the land and that the existing category (if any) shall be deleted. Furthermore, the State Authority may at its discretion impose such conditions as it thinks fit in addition to the payment of a further premium and the reservation of a new rent (s. 124 (5) NLC). The Federal Court in Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd. (1979) 1 MLJ 135, held that such discretion of the State Authority is not unfettered and that the conditions imposed must be fair, reasonable and related to the permitted development of the land in question. In this instant, the State Authority has no power to direct that approval of applications for conversion of category of land use and subdivision is conditional upon the registered proprietor surrendering his title in perpetuity in exchange for a 99 year State lease.

Section 124A allows applications for conversion and subdivision to be made simultaneously. This is aimed at speeding up the development of housing projects as upon land being converted for eg. from agricultural

to building, it needs to be subdivided into individual smaller separate title suitable for housing and for purposes of selling it to purchaser. The application must be forwarded in accordance with the following:

- the relevant application forms
- registration fees
- official search
- letters of consent from co-proprietors, chargees, caveat holders, lessees etc only if these parties exist
- a copy of quit rent receipt
- copy of the land title
- Memorandum of Articles of Association

Applications can also be made for surrender and realienations under s. 204A of the NLC. Here the proprietor of any land may surrender any lot or any two or more contiguous lots held by the same proprietor on the terms that certain portions of land comprised therein be immediately realienated to the proprietor in different units.

5.0 SUB-DIVISION OF LAND

Sub-division of land is a process whereby land held under final title is sub-divided into two or more portions and each portion to be held by the same proprietor but under separate titles (s. 135 NLC).

Conditions for approval of sub-division of land (s. 136) :

- (a) that the sub-division would not contravene any restriction in interest to which the land is subject
- (b) that the sub-division not contrary to any written law in force, that any law imposed have been complied with
- (c) that any necessary approval of planning authority has been obtained; that sub-division not contrary to any plan approved by the State Authority for the development of the area
- (d) that no item of land revenue is outstanding
- (e) that written consent has been obtained from every person or body entitle to the benefit of - a charge of the land, a lease of the land etc.
- (f) in the case of agricultural land, will not be less than two fifths of a hectare
- (g) that the shape of each subdivided lot will in the opinion of the State Authority suitable for the purposes for which it is intended o be used
- (h) a satisfactory means of access available as of right from such portion either to a road, a river, a part of the foreshore or a railway station, or to a point within the land from which such a means of access will be available.

Therefore, the right of the registered proprietor to subdivide his alienated land is not absolute. Non-compliance with any of the conditions as set out in section 136 (1) may trigger off the rejection of the

application for subdivision (s.138(3) which must be made in the statutorily prescribed Form 9A (s.137(1). However, upon its approval, survey fees and land titles issuance fees must be paid in advance by the applicant/registered proprietor (s.138(4).

6.0 PARTITION OF LAND

Any alienated land held by two or more persons as co-proprietors may be partitioned or divided so as to vest in each of these proprietors, under a separate title, a portion of the land of an area proportionate as nearly as may be to his undivided share in the land (s. 140 NLC). Section 141 (1) (a) provides that the State Authority will approve an application for partition if each of the co-proprietors consented to the application to partition the land. However, co-proprietors holding the majority share in the land may apply for approval to partition the said land. An application shall be made in Form 9B.

7.0 AMALGAMATION OF LAND

Amalgamation of land is a process whereby two or more contiguous lots of alienated land held under separate title held by one proprietor are combined into one and to be held by him under one single title - s.146. However, no amalgamation shall be approved in the following circumstances :

- (a) where the lots to be amalgamated are all held under Land Office title and their combined area will exceed 4 hectares;
- (b) where the said lots are held partly under Registry title and partly under Land Office title;
- (c) where any dissimilarity exists between any of the said lots in any of the following respect :
 - the periods for which they are held
 - the rates at which rent is payable
 - the categories of land use, conditions and restrictions in interest (s. 147 (2) & (3)

8.0 CONCLUSION

The housing and property development sector has always been one of the major contributor to the continued buoyant growth of Malaysia. In lieu of the present growth in its property sector and also its future development, the law with regard to categories of land in the country need to be change adding to the three traditional categories, a fourth category of land depending upon the particular needs of the development.

As pointed out earlier in the paper, legislative development procedures i.e. conversion, subdivision amalgamation etc., are very simple and convenient as it is based on well documented and easily digestible legislation i.e. the NLC and the State Land Rules. On the other hand, restrictions imposed by laws and regulations are viewed by property experts as a discouraging factor which hinders development as there are no proper documented guidelines or policies to the State Authority's power of approval to land development application. This diversity in land use planning policy has resulted in uncertainty and confusion which in turn would drive investors from this sector. It is also observed that the restriction were not governed by any statute but merely depended on political and socio-economic consideration prevalent at the time of the respective state. Therefore, what is needed called for a uniform national land use planning policy formulated by the National Land Council, which will serve the interest of all - the State,

the developers, the landowners and the nation as a whole. In this regard, policy analyst have noted that the policy so formulated is merely directory in its affirmative aspects in so far as no method is known by which the legislative bodies of the State Government could be required to enact specific legislative measures. However, it is possible that legislation enacted by the State Authority contrary to the directions of the National Land Council may be held to be unconstitutional.

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