



Laws and legal boundaries

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> The need for legislative intervention and support

THIS week, we feature an article by lawyer Datuk Pretam Singh Darshan Singh referring to the action taken by the Malaysian Anti-Corruption Commission (MACC) on improprieties relating to waiver of bumiputra allotment of houses in Johor.

OF STATE COUNCILS AND HOUSE PRICES

There has been practice to impose a condition on housing developers, that they should set aside certain portion of the houses they build, to be sold to bumiputras and in the event they are unable to sell these lots, the developer has to pay a penalty. This raises the issue of whether the state, i.e. the local planning authority, has the power to impose such an award (no matter how noble the intention may be).

This issue is not new and has been discussed previously in the courts of law. One such case is the landmark lawsuit between Majlis Perbandaran Pulau Pinang vs Syarikat Berkerjasama Serbaguna Sungai Gelugor [1999] 3 CLJ 65.

In this case, the dispute was whether Majlis Perbandaran Pulau Pinang (Penang City Council) had the power to impose the disputed condition whereby 30% of low-cost houses have to be built and sold at a cost not exceeding RM25,000 per unit in accordance with "garispanduan-garispanduan mengenai rumah pangsa murah Majlis" (Council guidelines on low-cost housing).

The people (society) agreed at its AGM, that the selling price of a two-bedroom flat, measuring an average of 500sq ft, shall not exceed RM32,000 and a three-bedroom flat, measuring an average of 650sq ft, shall not exceed RM45,000.

Being in a dilemma due to the ceiling price stipulated in the guidelines on low-cost housing, the developer sought the intervention of the courts as it

was of the understanding that the council had no such power to impose conditions relating to prices of houses.

THE VERDICT

The case, described as a "veritable legal porcupine bristling with interesting and complex points of Law" went on appeal to the Federal Court. It was a landmark case in the field of "Planning Law and Judicial Review" in this country and prominent counsel on both sides put up very convincing arguments that ran across six days.

At the end, Edgar Joseph Jr (Federal Court judge) made no apologies for the "acres of paper and streams of ink" that were devoted to the preparation of the unanimous judgment by the Federal Court.

Joseph held that it is axiomatic that local authorities are creatures of statute and their qualities and powers can only be derived by reference to what is expressed or implicit in the statutes under which they function.

The statutory scheme of the Local Government Act confers upon local authorities a distinct political function, to which the courts, by application of ordinary principles of statutory construction, should give effect.

"Taken at its full face value, the above provisions would appear to confer unlimited power on the planning authority to impose any condition it wishes (for example), because it considers the condition to be in the interest of the housing



policy of the state government. But, the matter must be probed further."

On probing further, the Federal Court concluded that the entire decision of Majlis Perbandaran Pulau Pinang was wholly null, void and of no effect and stated that the council had no power to fix the prices of houses.

SIMILAR CASE

In the case of Cayman Development (Kedah) Sdn Bhd vs Mohd Saad Bin Long [1999] MLJU 290, Cayman was a housing developer that wanted to develop a piece of land in the Mukim of Alor Merah, Alor Star, constructing a low-cost housing project. The state authority of Kedah imposed a condition that the developer had to:

"Menjual rumah-rumah yang dibina dengan harga kurang 5% daripada RM25,000.00 (RM23,750.00)."

[Translation: "To sell the built houses with 5% discount off RM25,000.00 (RM23,750.00)."]

When the developer sold the houses without the stipulated discount, the purchasers sued the developer to enforce the discount as imposed by the state authority of Kedah.

At the High Court, Hishamuddin J held that the state authority has no power to fix the requirements regarding the price of each of the units to be sold to the public, as well as the discount

of 5% (to be given), as these are not the kind of requirements envisaged by the National Land Code.

Hishamuddin J: "I have no doubt whatsoever of the good intention of the state authority, and that in prescribing the price and the discount, it certainly had in mind the interest of the low-income group of the general public, who



would constitute the potential buyers of the low-cost units. Yet, with the greatest respect, I do not think that Parliament, in enacting Subsection 125 (5)(c) of the National Land Code, had in mind to confer on the state authority such huge power, so as to empower it to even fix the price of the low-cost units for the purpose of sale to potential buyers, let alone to prescribe any discount.

"Such requirements, as imposed, are commercial in nature. The state authority, being a regulatory body on matters pertaining to land, in determining the nature of the requirements to impose (if any) when approving a conversion, should avoid entering into the commercial arena. Instead, it should only confine itself to matters directly pertaining to the usage of land and the imposition of rent and premium (consequential to the conversion)."

LAWS AND LIMITATIONS

Both these cases illustrate the point that both the state authority and "majlis" (state council) have no power to impose any condition relating to prices of houses and discounts, as these are considered commercial aspects that both should avoid entering into. Being mere regulatory bodies, they should only confine themselves to regulatory matters such as prescribing the usage of land and the imposition of rent and premium consequential to the conversion (of usage to the land).

Both cases remain unchallenged



and continue to be good precedents as there have not been any legislative amendments to overturn these decisions. It is therefore timely to look into the fixing of the quota and subsequent penalty being imposed, as it may not have the proper legislative support.

A proper legal framework may be the step forward, as such quota and penalty imposition is also prevalent in other states.

Datuk Pretam Singh Darshan Singh, a lawyer by profession, has previously worked as senior federal counsel, deputy public prosecutor with the Attorney General's Chambers and legal adviser to several government departments and agencies. He is currently partner at a legal firm while simultaneously serving as president of the Tribunal for Home Buyers' Claims. Leveraging his vast knowledge and decades of experience, he contributes articles to local and international journals, besides delivering lectures and talks at relevant forums.



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