WHO IS THE ULTIMATE PLANNING AUTHORITY IN MALAYSIA? REVIEWING THE POWERS AND ROLE OF THE APPEAL BOARD

Abstract

The Federal Constitution prescribes that town and country planning is a shared responsibility of the Federal and State Governments. The planning law in 1976 originally defined three levels of planning authorities all of them at the State level. This was expanded in 2001 to include a National as well as regional planning authorities. However, the quasi-judicial planning Appeal Board which is appointed by the State Government appears to be the ultimate authority since its decision is final and there is no power for the State or Federal governments to intervene. The Board is an innovation ahead of its time but its constitution lacks representation in relevant areas of expertise, power is concentrated on the Chairman and there are no apparent constraints on the scope and powers of the Board. A review of 12 years experience suggests that a restructuring of the Board should be carried to be more inclusive in its decision-making process. Its mandate and duty should be to protect environmental resources and public good rather than to serve private interests.

Introduction

The Malaysian planning law is closely modelled after the British counterpart. Its Town and Country Planning Act 1976[1] is substantially based on the Town and Country Planning Act 1970 of the UK[2] but

[1] *Town and Country Planning Act 1976* (Act 172) (Malaysia). This Act is referred to as the TCP Act 1976 in this article.

[2] Lee Lik Meng, Abdul Mutalip Abdullah and Alip Rahim, 1990, *Town Planning in Malaysia - History and Legislation* (Monograph, Universiti Sains Malaysia). Essentially, the Malaysian planning system created in 1976 is modelled on the Structure Plan /Local Plan system introduced in the 1970 Act of UK.

there are some innovations in the Malaysian law. One of which is the creation of State level planning Appeal Boards constituted as quasi-judicial bodies with powers to review and overturn the planning decisions of the local planning authorities. But the law is vague or silent on many issues concerning the powers and conduct of the Board and even though decisions of the Appeal Board are final the issue of the ultimate authority on planning matters must be examined in the context of the contentious Federal-State jurisdiction over matters concerning planning, land use and the environment. In Australasia where the Federal and State Governments traditionally have had less influence on land use and planning at the local level, the environmental courts and tribunals have the final say on planning matters. In UK, the proposal for the setting up of environmental courts have not received the government's support as it poses a threat to the political influence of the government over land use and planning[3]. Malaysia faces the same dilemma as UK except we already have a tribunal in place but after more than a quarter century only 3 out of 11 States have set up the Appeal Boards with lingering doubts amongst the political masters concerning the erosion of their policy jurisdiction. On the other hand the Appeal Board does not go far enough as it offers no avenue for active participation by third parties to protect the environment, amenities and the public interest.

PLANNING AUTHORITIES

Malaysia is a Federation with the jurisdiction of the Federal and State Governments clearly spelt-out in the Federal Consitution under the *Federal, State* or *Concurrent Lists*[4]. Specifically, *land* is defined as a State matter which had been interpreted to mean that the State Governments have final and ultimate authority on any dealings related

[3] See Environmental Planning, 32nd Report of the Royal Commission on Environmental Pollution, March 2002. www.rcep.org.uk and Malcolm Grant, The Environmental Court Project Final Report. Department of Environment, Transport and the Regions, UK (May 2000). http://www.planning.detr.gov.uk/court/index.htm.

[4] The lists are contained in the Ninth Schedule of Federal Constitution of Malaysia. See KV Padmanabha Rau, 1986, *Federal Constitution of Malaysia – A Commentary*, Kuala Lumpur, Malaysian Current Law Journal Sdn Bhd. p 567 –575.

to land. *Town and country planning* appears on the Concurrent List. This means that both the Federal and State Governments may perform this function. Finally, local government is on the State List but under the Local Government Act 1976 members of local authority including the President are appointed by the State Governments on a yearly or biennial basis and their annual budgets, major development expenditures and key senior management appointments require State Government approval. The local governments are hence subordinate to the State.

Planning Law

The TCP Act 1976 originally recognised three tiers of authority over land and development, all of them at the State level. The *State Authority* is the highest planning authority in the State, responsible for general policies in respect of the planning of the development and use of all land and buildings. It may issue directives and policies which must be complied with by the local authorities. At the second tier is the *State Planning Committee* (SPC), also with power to issue directives which the local planning authority must comply. It advises the State Government on planning matters and is the approving authority for Structure Plans and Local Plans. The SPC can direct the local planning authority to prepare local plans and could modify the plan or insert additional policies and contents and thereafter direct the implementation of the plan as amended. The Head of the State Government (Chief Minister or Mentri Besar) is automatically the Chairman of SPC which comprises 14 other members. The SPC does not participate directly in planning control and have no reserved power to call-in applications for planning permission submitted to the local planning authority for approval. At the lowest tier is the *Local Planning Authority*. Its powers to prepare structure plan have now been taken away. It has also now been compelled to prepare a local plan for its entire area and submit it to the SPC for approval. This is a tacit reminder that the State Government is the dominant player in planning. The local planning authority's powers in matters concerning land development are constrained in that they cannot approve developments contrary to the approved development plan. An amendment in 2001

now requires the local planning authority to take into consideration "the direction given by the Committee (i.e. SPC), if any"[5] when the local planning authority considers an application for planning permission.

The Federal Government has had very limited influence in terms of land development policies even though Article 92 of the Constitution provides for the adoption of a National Development Plan[6] by Parliament to protect the national interest. The Federal Town and Country Planning Department had made attempts to assert Federal rights over planning in the early 1960s but was unsuccessful[7] because of the State Governments' resistance to perceived encroachment into State matters especially on land, water and town planning. This will change when (and if) the new provisions in Town and Country Planning (Amendment) Act 2001[8] are fully and successfully enforced. The new provisions which will facilitate Federal intervention are the setting up a National Physical Planning Council[9] chaired by the Prime Minister with representations from all the States to advise both the Federal and State Governments on matters pertaining to town and country planning. The main instrument to enforce national policies will be the National Physical Plan[10] which must be taken into consideration in the preparation of State Structure Plans[11]. Further, the SPC must consult

[5] S 22(2)(aa) TCP Act 1976, amended via s 25(a), TCP (Amendment) Act 2001.

[6] Article 92(3) of the Constitution provides that the development plan means "a plan for the development, improvement, or conservation of natural resources of the development area, the exploitation of such resources, or the increas of means of employment in the area".

[7] The proposed Town and Country Planning Ordinance 1966 was submitted to the Ministry of Local Government by the Commissioner of Town Planning (Frank Watkinson) on 12.7.1996 and contain ed amongst others a proposal for a central planning authority headed by the Federal Minister. Various revisions were made and the Revised National Planning Act 1972 provided for 5 levels of planning authorities including National and Regional bodies. However, the planning law when finally approved in 1976 containcd no Nation al or Regional Planning bodies or plans.

[8] Act A1129, Percetakan Nasional Malaysia Berhad (National Printers). Gazetted on 27th September 2001.

[9] S 2A TCP Act 1976, inserted via s 7, TCP (Amendment) Act 2001.

[10] Provided for under Part IIB, s 6A TCP Act 1976, inserted via s 11, TCP (Amendment) Act 2001.

[11] S 7(3)(aa) TCP Act 1976, inserted via s 12, TCP (Amendment) Act 2001.

the Council for its direction and advice[12] when considering a draft structure plan. Major development projects would also have to be referred by the SPC to the Council for advice[13].

Land Law

In addition, the land law[14] vests immense powers on the State Land Administration (effectively this means the State Government) in dealings concerning land. One such provision under the National Land Code 1965 provides for the categorisation of land into three major categories of use (namely, *agriculture*, *building* and *industry*). The State's power to determine the land use category is apparently unfettered and its decisions supercedes whatever land use decisions made at the local authority level. Unlike the local planning authority, the State Authority is not compelled by law to consult any person, policy document or plan when deliberating applications for conversion from one land use to another[15]. In fact, it is not uncommon for the conversion to result in a conflict with the approved Structure Plan.

Amongst town planners in the government service, the prevalent view is that the State Authority in deciding on the applications for conversion under the land law should abide by or comply with the policies as laid out in the structure plan which was approved by the State in the first place. The States have not surprisingly been reluctant to adopt this position and has held the view that the approval of the

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[12] S 10(4)(a) TCP Act 1976, inserted via s 15, TCP (Amendment) Act 2001.

[13] S 22(2A) TCP Act 1976, inserted via s 25, TCP (Amendment) Act 2001. Major developments include new townships (with population over 10,000 or covering more than 100 hectares), airports, seaports, railway lines, highways, dams, main power stations and toxic waste disposal. Developments on hill tops, hill slopes and in designated environmentally sensitive areas are require consultation with the Council.

[14] National Land Code 1965 (Malaysia), henceforth referred to as NLC 1965.

[15] In comparison, the UK Minister for planning (Secretary of State for the Environment) must make his decisions based on his policies which could include a speech given at a dinner function.

structure plan does not necessarily bind its decision on land use under the land law[16]. Recent amendments will require the State Planning Officer to prepare State-level Structure Plans for approval by the SPC but there are still no provisions to compel either the State Land Administrator to take the approved Structure Plan into account when considering applications for conversion under the land law or for the SPC to honour the structure plan in any of its dealings.

The closest the Courts have had the opportunity to deliberate on this issue was is the *Sri Lempah* case in which the Federal Court had decided that the State Authority did not have absolute discretion when it imposes conditions of approval for conversion and subdivision. Even though one of the judges wrote in its judgment that if the application "fits in with town planning" then the Authority "must approve it", this case was brought to the Courts to challenge the conditions of approval rather than the approval itself[17]. As such, it offers little guidance on the position the Courts will adopt if a challenge is made against a State Authority for approving developments which are contrary to the approved plan or vice versa.

Even though the categorisation of land use is purportedly for proper land use planning, the land law does not provide the mechanism and framework for which planning is the prerequisite and the basis for decision-making. This apparent gap in the land law is a source of immense power to the ruling government to determine and dictate the development agenda of the State.

Apart from town planning and land administration, there also exist the long-standing tensions between the Federal and State Governments over the control of local governments. The Federal Government have no direct control over local governments and ministerial directives often encounter obstacles during implementation especially if it involves Federal and State Ministers from rival political parties even if they are from the same coalition government. Other issues in which

[16] However, in Penang, a Committee headed by a State Executive Councillor (a State level "Minister") has been set up to better coordinate and ensure lesser conflict between conversions and the approved plans.

[17] In *Pengarah Tanah dan Galian, Wilayah Persekutuan* v. *Sri Lempah Enterprise Sdn. Bhd* [1979] 1 MLJ 135.

Federal and State jurisdiction have been at loggerheads include water resources and environmental management[18].

The Appeal Board

Outside the framework discussed above, the Appeal Board has been challenging the powers of these planning authorities. Should we encourage it or tell them that they are going overboard? In this paper, we are concerned mainly in clarifying the powers of the Board.

S. 36(1) of the TCP Act 1976 provides for the establishment of an Appeal Board in every State in Peninsular Malaysia. The Act is an enabling legislation and can be adopted in whole or in part at the discretion of the various States. After 25 years, only three States (out of 11) have set up the Board while another one has become inactive. Penang State has more than 12 years experience in dealing with appeal cases while the Appeal Boards in other States (Selangor and Kedah) are only in their infancies.

In all the appeal cases for the area under the Municipal Council of Penang Island[19], the applications for planning permission were rejected by the local planning authority because of non-compliance with government policies, guidelines or requirements. Most did not comply with land use zoning, were incompatible with surrounding developments or failed to observe height controls. Between 1991 and 2000, a total of 142 appeal cases were registered with the Registrar for the Appeal Board of Penang State[20]. Of the 93 cases decided only 20% were successful. From these statistics alone, it would seem that the Appeal Board is reluctant to interfere with the decisions of the local planning authority but a closer examination of the decisions and grounds for allowing some of the appeals reveals otherwise.

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[18] For instance, the Courts have declared that the Federal Government have no jurisdiction over EIA in the State of Sarawak. See Alan K.J. Tan, "Preliminary Assessment of Malaysia's Environmental Law", National University of Singapore, http://sunsite.nus.edu.sg/apcel/index.html.

[19] There are two local planning authorities in Penang State, the other being the Municipal Council of Seberang Perai on the mainland.

[20] Jamil Ahmad, 'Procedures and Conduct of Appeal Board' (Paper presented at the Kedah State Appeal Board Workshop, Alor Setar, Malaysia, 15 August 2000 in Malay).

The Right of Appeal

The main thrust of appeals under the planning law relates to the refusal or grant of planning permission subject to conditions. The applicant and persons who had objected to a planning permission have the right of appeal. Other provisions for appeal relate to amount of compensation for revocation or modification of planning permission of building plan, and appeal against a requisition notice to discontinue use, to impose conditions or relocation of buildings. Other rights of appeal were added in 1995[21] against a tree preservation order and compensation related to such orders. There are no appeals against the structure or local plans and no appeals against enforcement actions. There is also no right of third party appeals or appeals to the tribunal to issue enforcement orders.

Constitution of the Board

The Board comprises a Chairman, a Deputy and not more than twelve other members appointed by the State Authority for a period not exceeding three years. The Chairman, who is appointed on the recommendations of the SPC with the concurrence of the Federal Minister, was previously required to be a member of the judiciary or a person with legal training (judge, advocate and solicitor, judicial officer). In Penang, the three Chairmen so far appointed had been either retired or ex-judges appointed for 2-year terms while the members comprised an overwhelming representation from the legal profession but have included medical doctors, an ex-company director and a teacher. Only one person with planning background have ever been appointed to the Appeal Board[22]. An amendment in 2001 now allows

[21] Town and Country Planning (Amendment) Act 1995 (Malaysia).

[22] Fong Chek Sam (deceased) was a former Director of the Penang State Town and Country Planning Department. He was appointed for two consecutive terms (Penang State Government Gazette dated 9th Nov 1989 and 10th Oct 1991).

the SPC to appoint a Chairman or Deputy Chairman who has no legal background[23] but this is inadequate.

Whenever it deliberates on an appeal, the Chairman and two other members constitute the Appeal Board, the selection being made by the Chairman. Usually this means that none of the Board members sitting at a hearing have any training or background in planning or related fields. Even though it is a Board of three, the Chairman can override the dissenting views of the majority by stating the reasons for his decision. The current constitution of the Board is unsatisfactory because none of the members have any background, experience or qualifications to deal with planning issues and merits. There is also an extremely heavy burden as well as concentration of power in the Chairman.

No formal training is given to any of the Board members. They learn the intracacies of planning and planning law and practices during the conduct of appeals[24] and the fact that the law does not require the members to be "professional planners" became an issue in one case but the Chairman pointed out that the situation was similar for members of the local planning authority[25]. It was pointed out that even though the local planning authority was advised by its town planning department, it could refuse to follow the advice of the experts. It however failed to highlight the fact that the Board does not have the benefit of independent expert opinion or advice. One Chairman took on the role of the conservation critic writing in the judgment that based on the photograph and her "untrained eye, (it) is an unremarkable looking building"[26] failing to see beyond architectural and aesthetic

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[23] S 36(2)(a) TCP Act 1976 was amended via s 12, TCP (Amendment) Act 2001 to insert the words "or other suitable qualifications and experience" relating to appointment of the Chairman and Deputy Chairman of the Appeal Board.

[24] The planners in the local authorities sometimes have to enlighten the Board members on planning matters at the hearings.

[25] Appeal Board case *Hwa Properties Sdn. Bhd. vs Majlis Perbandaran Pulau Pinang* (LR/PP/6/93).

[26] Written judgment of Appeal Board case *KHSB Marketing Sdn Bhd vs Majlis Perbandaran Pulau Pinang* (LR/PP/10/2001), dated 21 March 2002, p. 1.

values in urban conservation. Another Chairman undertook to forecast future development trends as well as to dismiss concerns with traffic congestion[27] and dealt with issues of height control and cityspace.

Despite objections from the local planning authority, the Appeal Board had also allowed counsel from a firm in which one of the partners was one of the members of the panel of Appeal Board[28]. Though the Chairman gave the assurance that the decision was above board and the member did not sit on the particular appeal, such accommodation by the Board raises issues of credibility. The law must address issues of possible conflict of interest amongst Board members.

The Australian (Victoria) law provides that the constitution of the Tribunal hearing a planning matter shall comprise the requisite number of "member(s) who has sound knowledge of, and experience in, planning or environmental practice in Victoria"[29]. The Victorian Tribunal may draw from its entire pool of members to consitute one-member or multiple-member Tribunals (depending on complexity) to hear a particular case. If a one-member Tribunal is constituted for a planning matter then that person must be an "expert" in planning matters. New Zealand has a similar setup for planning appeals but with emphasis for pre-hearing mediation and protection of public interest (personal hardships not being grounds for appeal)[30]. There are also provisions under the Resource Management Act 1991 of New Zealand in terms of the constitution and expertise of tribunal members as well as the bounds of their powers when acting under certain circumtances. In the case of planning appeals in UK, Planning Inspectors act independently but their assignments are made by the Planning Inspectorate based on the issues of the case. These Inspectors could be professionals from any relevant field but they are given extensive

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[27] Appeal Board case *Tetuan Leong Seng Construction Sdn. Bhd. vs Majlis Perbandaran Pulau Pinang* (LR/PP/16/92).

[28] Appeal Board case *Tetuan Ruby Development Sdn. Bhd. vs Majlis Perbandaran Pulau Pinang* (LR/PP/6/93).

[29] Victorian Civil and Administrative Tribunal Act 1998 (Vic).(Available online at http://www.vcat.vic.gov.au/). Part 16.

[30] Resource Management Act 1991, New Zealand. http://www.mfe.govt.nz/management/act.htm.

training in the handling of planning appeals. Parties dissatisfied with the conduct of Inspectors are also provided with avenues to complain.

Powers of the Appeal Board

In considering appeals against the decision of the local planning authority regarding applications for planning permission, the Appeal Board is empowered to make an order (s. 23(3)) including confirming the decision of the local planning authority or to allow the appeal. It does not allow the Board to *directly* grant planning permission but must rely on its power to direct the local planning authority to execute the decisions of the Board. This power is obviously very limited and does not empower the Board to assume all the powers available to the local planning authority (the decision-maker). The law is silent on whether the whole application is subjected to review. It also does not place a duty on the Board to have consideration of or reference to any policy, directives or approved plans as the basis for its decisions. Unlike the Industrial Court which is "entrusted to ensure social justice"[31], there is no specific agenda or mandate for the Appeal Board such as the protection of public interest and environmental resources.

In comparison, the British system allows the Minister to treat the whole application as being submitted for review and he has all the powers of the decision-maker. In Australia and New Zealand the appeals tribunals have all the powers of the decision-maker including the powers to affirm decision, to vary decisions, to set aside and make new decisions, and to set aside and remit matter for reconsideration. To be effective, the appeal authority or tribunal must obviously have the necessary powers to correct what is wrong. But despite the limited powers provided in the planning law, the Penang Appeal Board had ventured beyond its statutory powers with several of its decisions successfully overturned by the local planning authority through the Courts. For instance, the Penang Appeal Board had treated cases as

[31] V. Anantaraman, *Malaysian Industrial Relations, Law & Practice* (1997), Universiti Putra Malaysia Press. p 135.

"deemed refusals" but the Court of Appeal rejected this position as it is not provided for in the planning law[32].

The Appeal Board had also directed the local planning authority to grant planning permission even though the development (a factory) was contrary to the Draft Structure Plan relying on various grounds including the absence of demand for housing, preservation of jobs and the presence of similar workshops on adjacent lots[33]. The Board in this instance had invoked the "other material considerations" justification which is not available in the Malaysian planning law[34]. Even though s 22(2) of the TCP Act 1976 appears to allow the local planning authority to take any matter into consideration, it is argued that this provision is specific to *planning* considerations and not just any *other* material considerations[35]. However, the Federal Court had in the *Gelugor* case appeared to support this decision of the Appeal Board. It held that s 22(2) does not imply the local planning authority "must slavishly comply with" the Development Plan declaring that "it will suffice if it considers the Development Plan without incurring the obligation to follow it" [1999] 3 MLJ 51. This interpretation will obviously have a tremendous impact on decision-making by the local authorities and should be examined further elsewhere. However, the restraint on the local planning authority has not escaped the Court (but apparently ignored by the Appeal Board) when it noted that the planning authority is nevertheless debarred from granting planning permission under two situations, one of which is where the development contravenes the development plan. These positions of the Appeal

[32] Civil Appeal No. 0-01-50-00 in the Court of Appeal in *Chong Co. Sdn. Bhd. vs Lembaga Rayuan Pulau Pinang and Majlis Perbandaran Pulau Pinang*. Decision as reported to the local planning authority by its Director of Legal Department vide memo dated 28 Mac 2002 (S.45/9/1-78(U)).

[33] Appeal Board case *Goh Hock Seng vs Municipal Council of Seberang Perai* (LR/SP/4/91).

[34] This provision was originally included in the draft in 1972 but excluded from the TCP Act 1976. However, "other material consideration" is provided for in the Federal Territory (Planning) Act 1982 s. 22(4)(a) & (b). This justification have been used several times by the Board.

[35] Specifically, it requires that the local planning authority "shall take into consideration such matters as are in its opinion expedient or necessary for proper planning".

Board and the Federal Court should be examined in the context of the recent changes in the British law which gives the approved plan the most weight (plan-led) while "other material considerations" can be given any weight or none at all[36], a decision to be made by the Planning Inspector.[37]

The Appeal Board had also issued directives the Municipal Council of Penang Island to review its building line guideline within 6 months, a directive which the local planning authority deemed to be outside the powers of the Appeal Board. It had also asked the local planning authority to reconsider two applications rejected because the developments were contrary to the proposed land use as shown in the Approved Structure Plan, that is, "hill land". In these two cases, the State Authority had approved excision of the said parcels of land from "hill land" gazette under the Land Conservation Act. The Appeal Board concluded that the local planning authority could not reject the applications based on the approved plan alone. More importantly, it held that the decision of the State Authority to approve the excision from hill land was or should be treated as a directive to the local planning authority to allow development on the land. The Appeal Board accordingly referred both applications back to the local planning authority for reconsideration based "purely on its merits".[38] The power to remit the applications back for the reconsideration of the local planning authority is not provided for in the law.

The Appeal Board had also declared a rooftop garden within an enclosed condominium development as satisfying the requirements of the local planning authority with regards provision of 10% of the development area for public open spaces in residential developments. This "new planning policy" was eventually reversed by amendments to the TCP Act 1976 by Parliament in 1995 to clarify the definition of public open spaces. The Board had also created confusion when

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[36] James Cameron Blackhall, *Planning Law and Practice* (1998). Cavendish Publishing Ltd., London.

[37] Malcolm Brady, *'Material Considerations'* (1999) (16) Planning Inspectorate Journal http://www.planning-inspectorate.gov.uk.

[38] Appeal Board case *Datastream Corporation Sdn Bhd vs Municipal Council of Penang Island* [1993].

it adopted two conflicting positions regarding the relevance of referring to the provisions of a local plan under preparation when the local planning authority considered applications for planning permission. It had also given a liberal intepretation to the time limit imposed for lodging of appeals when it accepted an appeal submitted after the one-month period provided for by law.

These actions must be reviewed because the Board must act within the "four corners"[39] of the law from which it draws its powers and it has obviously breached those boundaries.

Independence and Finality of Decisions

The decision of the Board is final and cannot be challenged in any court of law. There is no specific provision for the Appeal Board or the appellants to refer a point of law to a higher Court either during or after the determination of an appeal. However, the Courts have ruled that the finality of decisions by similar quasi-judicial bodies may still be reviewed by the High Court on the grounds that the Board had made an error, exceeded its authority or acted outside the law[40].

The Appeal Board is constituted as an independent body[41] but reservations about the finality of decisions were raised in the 1980s with a suggestion for the possibility of a further appeal to the Chief Minister. The Legal Advisor at the Ministry of Housing and Local Government had argued against any need for a change to the provisions of the TCP Act 1976 on various grounds including the rule of natural justice and the rule against bias which was claimed to disqualify the Chief Minister (or the Federal Minister) because he would

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[39] This was established for the Industrial Court which was created under the Industrial Relations Act 1967. See V. Anantaraman (1997) p. 135 (see note 31).

[40] Ahmad Ibrahim and Ahilemah Joned, 1987.

The Malaysian Legal System. Dewan Bahasa dan Pustaka, Kuala Lumpur.

[41] Ismail Ibrahim, 'Functions and Role of Appeal Board Under Town and Country Planning Act 1976 (Act 172)' (Paper presented at the Kedah State Appeal Board Workshop, Alor Setar, Malaysia, 15 August 2000 in Malay).

have an obvious interest in the matter under dispute[42]. These are legitimate concerns but that independence must be exercised within the boundaries of the powers and mandates defined in the law.

The current British system of planning appeal has been in place since 1947 and through various amendments, the Minister is now conferred wide powers under the Town and Country Planning Act 1990[43]. Planning control over land development is rooted in Government Policy as declared by the Minister who is in turn answerable to Parliament. The British Courts had held it could not examine the merits of the Minister's decision and the Courts could not assume the role of the Minister. It was further held that the Minister was entitled to have a policy even if that policy was objectionable to other parties. The Courts should only be concerned whether the Minister had exceeded his powers or failed to give sufficient reasons for his decisions. Through various other cases since the 1940s, it is "now well established law that the Secretary of State is acting in a purely administrative capacity"[44]. It is based on this underlying principle that all appeals against the decisions of the local planning authority in Britain are submitted to the Minister because "in the ultimate analysis, it is government policy which is being placed in issue when an appeal" is made.[45] As such, the Minister is the final authority on planning matters. However, this position is now challenged by proposals for the Environmental Court where the ultimate authority will reside with the independent tribunal. One of the central issues in the debate is the independence of the appeal body to satisfy the requirements of the Human Rights Act. It is being argued that appeal to the Minister does not satisfy concerns for justice and impartiality. It is not surprising that the British Government is not yet convinced with the proposal even though one of the models for implementing the Environmental

[42] Notes of a briefing by the Legal Advisor to the Ministry of Housing and Local Government dated 27th July 1987 to the Committee for Town and Country Planning Act concerning Johor State Government's proposal to amend s. 36(9) and (13) of the Town and Country Planning Act 1976.

[43] Desmond Heap, *An Outline of Planning Law* (11th Edition, 1996).

[44] *Ibid* 34.

[45] *Ibid* 193.

Court calls for the parallel existence and retention of the current system of appeal to the Minister.

In countries where the independent tribunal system is used for planning appeals, there are also provisions for the Minister to intervene in the appeal process on issues affecting policy. In the State of Victoria, the Minister for Planning has the power to call in applications for planning approval being considered by the local authorities. In addition, if an appeal is made, the Minister is similarly empowered to call-in or intervene in the review if it touches on a major planning policy or "the determination of the review may have a substantial effect on the future planning of the area in which the land the subject of the review is situated".[46] In New Zealand however, the Minister does not have the right to intervene during an appeal even though he has the right to call-in applications for planning consent.

Whether the British model of appeal to the Minister or the tribunal model of a separate and independent body is adopted, the central issue is independence from the original decision-maker. In both cases, the finality of the appeal decision must be retained provided the mandates, mechanism and framework for the appeal process is firmly established. The intentions of tribunals are to provide a fast means of adjudicating and settling disputes in a less formal and less expensive manner and any allowance for further appeals to the Courts (other than on points of law) will be acrimonious, lengthy and costly to all parties. In the arena of planning, a consultative and participative process must be integrated into the framework as independence of the tribunal alone has not been demonstrated to be sufficient to protect the public interest.

Even though the Appeal Board is created as separate from the government and decision-making authorities, it nevertheless lacks the critical elements of independence as the members have no security of tenure and is appointed by the State government. The Penang Appeal Board has consistently shown that it is not reluctant to reverse the decisions of the local planning authorities but it has not shown that it is or will be willing to do the same if State policies or directives are involved.[47] But the most critical issue confronting the Malaysian

[46] Victorian Civil and Administrative Tribunal Act 1998 (Vic).

[47] See for example decisions on hill land excision (note 38).

planning community is the acceptance that planning decisions and their merits are subject to review outside of the traditional sphere of planning authorities. There is often disquiet and dissatisfaction in the local planning authorities when the Appeal Board rules in favour of the appellant. Some senior planners in the local authorities believe that planning decisions and the merits of the case are the domain of the planners advising the local planning authorities and should not be the subject of external review. They hold the view that any review of planning decisions should focus on the legal issues. Added to this is the fact that the State Governments have all along been suspicious of the imminent powers of the Appeal Board to review planning policies and decisions. The Appeal Board has not helped to soothe the feathers either because of its adversorial stance both in the proceedings and written judgments including branding the local authorities as intransigent. Independence and finality of decisions are crucial but the Malaysian planning fraternity and the community in general must arrive at a common vision of what role the planning tribunal should perform. Proceedings should be made less technical and should avoid judicial matters to create a friendly atmosphere for dialogue to achieve specific mandates spelt out by law.

Appeal on Planning Merit vs Legal Grounds

The British Planning Inspectorate makes it very clear that appeals will be considered on planning merits only and that all issues on law should be referred to the Courts. In Australia and New Zealand the provisions relating to appeals also have specific provisions for questions of law to be referred to the Courts. The Malaysian counterpart is completely silent on this issue and the Appeal Board in Penang have relied on both planning merit and legal grounds in its judgments. However, the Courts seems to have adopted a position similar to their British counterparts in deciding that issues of legality will be considered for judicial review despite the availability of an appeal process. It has also been reluctant to undertake judicial review of planning policies, the Federal Court[48]

[48] The Federal Court is the successor to the Supreme Court and is the final court of appeal in Malaysia.

indicating that it is reluctant to take on the role of the decision-maker in development approval and have referred cases back to the local planning authority to reconsider the application for planning permission based on the law, the merits of the case and policy considerations which the Court noted are "never static and it (the Court) is ill-equipped to consider".[49]

An issue arising from the Court judgments[50] is whether in fact the Appeal Board is empowered to consider issues of legality and points of law. The TCP Act 1976 is silent but the the decision of the Court of Appeal suggests that issues of 'error of law' and 'abuse of power' can be distinguished as being different from the type of cases for which the appeal procedure was provided. In other words, issues of legality should be not be under the purview of the Appeal Board. This would be consistent with the view that planning appeal is intended to review planning decisions based on planning merit, not on legal grounds.

Many cases have been decided on legal grounds. Two notable cases are highlighted in this paper. In the *Junimas* case, the Appeal Board concluded that the development charges imposed by the local authority were not ultra-vires but since there was no approval from the State Authority and the Policy was not published in the Government Gazette the Board went on to declare that the levy could not have effect[51]. In another case the Appeal Board dismissed a legal challenge by an appellant that the local planning authority's refusal to grant planning permission for a petrol station was (inter alia) in violation of Article 13 of the Federal Constitution which protects the rights of property ownership. The appellant made an appeal to the High Court which sustained the decision of the Appeal Board.

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[49] In *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* (Federal Court, Kuala Lumpur – Civil Appeal No 02-6 of 1996) [1999] 3 MLJ 78 the Court declined to issue an order to extend the period of validity of a planning permission even though it found that the local planning had acted outside of the law.

[50] See *Syarikat Berkerjasama Gelugor* case (note 49).

[51] Appeal Board case *Tetuan Junimas Sdn. Bhd. vs Municipal Council of Penang Island* (LR/PP/7/95).

The Ultimate Planning Authority

The is little doubt that the Appeal Board is and is meant to be the ultimate authority on planning decisions. But this power can only be invoked under specific conditions and does not position the Board as a planning authority of the first instance in that it does not initiate the formulation of planning policies or plans. It neither has the expertise, mandate nor supporting organisational structure and machinery to undertake such as task. As an appeal tribunal, its role is mainly to arbitrate disputes and to right any injustices brought to its attention.

Revamping The Tribunal

In the context of the political framework and Constitutional powers on town planning accorded to the various levels of government in Malaysia, it is necessary that the planning appeal mechanism, structure and function be reviewed and strengthened with coherent legal empowerments as well as restrictions. Unless the concerns of the various parties, especially the State Governments, are addressed, it will be another quarter century before the provisions are adopted by the other eight States. The Federal Government should be conferred rights extending to issue of national strategic concerns. The State Governments should be the highest authority on all other planning issues and policies and this power can be administered through the SPC as the operational machinery for planning administration in each State. However, the Appeal Board will ensure that such policies fullfil environmental protection and public interest agendas.

The independence of the tribunal is desirable but measures must be taken to bring greater professionalism and capability in handling planning issues in an inclusive, consultative, non-antagonistic and non-adversial atmosphere which is conducive to participation and transparency in decision-making focussed on resource management, protection of the environment and the public interest as against personal hardships or private gains (or loss). Members of the tribunal should comprise both legal and non-legal experts and must satisfy a set of criteria including knowledge of planning and environmental law, local government, economics, commerce, business, planning, resource

management, environmental protection, heritage conservation, architecture, engineering, social sciences, etc to be written into the law[52]. Currently, all Tribunals in Malaysia are staffed by members appointed for fixed terms (usually 2 years) and this has given rise to problems of continuity[53] but this is not unique to Malaysia. Other countries however have longer appointment periods of 5 years but the appointments are through the Judicial rather than the Executive arm of the government.

The right of the applicant or objector to appeal should be maintained but once an appeal is lodged, it should be mandatory to publicise the appeal and the Appeal Board should be required to initiate consultations with all interested parties including government agencies and public interest groups.

To be effective, the tribunal must have the same powers and limitations as the decision-maker (i.e the local planning authority) when it considers applications for planning permission. Its powers on issues concerning policies should be limited to correcting defects to protect the public interest and the environment. The constitution of each tribunal shall comprise experts relevant to the issues to be examined and does not necessarily have to be presided over by a Judge except when it involves legal issues wherein it should be provided the options for reference to the Courts. The decision should be by a majority of the tribunal after consultation with interested parties including relevant interest groups and government agencies.

The State Planning Departments currently performs a strictly administrative role as the Registrar for planning appeal and does not actively engage the parties in consultations or to offer planning advice either to the appellants or to the Appeal Board. This is because it does not have the mandate and does not have trained officers able to handle mediation and consultation prior to or during appeals. Their role in encouraging and promoting the consultative process in seeking a balance between development and environmental protection and resource

[52] See example in s 253 Resource Management Act 1991 (New Zealand) and Victorian Tribunal Act.

[53] Members of tribunals have no security of tenure. Their appointment for fixed tems which may or may not be renewed. See news article "Council: Industrial Court may face chaos" Friday 29 March 2002, *The Star Online* http://www.thestar.com.my.

management should be reviewed. Their role as Registrar should also be reviewed on whether it raises issues of independence of the Board especially in view of the 2001 amendments making the State Planning Officer the de facto local planning authority if an area does not have a local planning authority.

Beyond the planning law, there should also be a review of other relevant laws where decisions on land use are made by various authorities including the power of the State Authorities in conversion of land use under the land law and control over hill land as well as decisions by taken by DOE (on EIA), agriculture, forestry, mining, and so on which have tremendous impact on environmental quality. Such decisions affecting the environmental and public interest should be also subject to appeal.

Conclusion

This paper addressed two major issues : one, whether the provisions of the planning with regard to the Appeal Board had created an ultimate planning authority; and two, whether the Appeal Board had in fact acted in such a capacity in its conduct and handling of appeal cases.

Our finding is that the provisions of the law is vague as to the powers of the Appeal Board especially with regards to whether it should consider appeals cases based on planning merit or points of law. Despite the absence of specific powers, or perhaps because of the lack of specific guidelines, the Penang Appeal Board has in its conduct and decisions on many occassions acted as the ultimate authority. The creation of an independent Appeal Board is one of the innovations of the Malaysian planning system. However, its role and powers must be clarified to allay the reservations of the State Governments concerned that the Board may have been given too much power in the final determination of planning policies.

The Appeal Board could be said to be ahead of its time and needs to be nurtured further to play a positive role in good governance. Penang State is a hotbed for NGOs and public interest groups with some successful campaigns to protect amenities including Penang Hill and George Town's urban heritage. Penang Island itself is currently

embroiled in a highly publicised "public participation" exercise over the controversial Penang Outer Ring Road (PORR) with various groups supporting or opposing the project. But it is already a done-deal and will go ahead regardless of the opposition as the authorities have decided it is good for the community. Affected homeowners are vehemently opposed to the project because of intrusion and reduction in property value while public transport advocates have called for a comprehensive review of the options. Businesses are generally in favour but prefer the road to be toll-free. Environmental groups claim that there will be too much hill-cutting and destruction of flora and fauna. It is in such situations that the planning tribunal could in future play an active role in facilitating public consultation on projects affecting the community. Currently, such major infrastructure projects do not go through any planning approval process which would qualify it to be subject to appeal to the planning tribunal.

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Dr. Lee Lik Meng*

* Dr. Lee is an Associate Professor
of Town Planning at the School
of Housing, Building and Planning,
Universiti Sains Malaysia,
11800 Penang, Malaysia
(email : lmlee@usm.my)

LEGISLATION

The following list of Laws passed in Malaysia is a continuation of the list contained in (2001) 28 JMCL

FEDERAL ACTS

Bil. Akta Act No.	Tajuk Ringkas/Short Title
617	Akta Perbadanan Harta Intelek Malaysia 2002 Intellectual Property Corporation Act 2002
618	Akta Institusi Kewangan Pembangunan 2002 Development Financial Institutions Act 2002
619	Akta Kewangan 2002 Finance Act 2002
620	Akta Penapisan Filem 2002 Film Censorship Act 2002
621	Akta Bantuan Bersama Dalam Perkara Jenayah 2002 Mutual Assistance in Criminal Matters Act 2002
622	Akta Pemberian Mengikut Bilangan Orang 2002 Capitation Grant Act 2002
623	Akta Lembaga Perkhidmatan Kewangan Islam 2002 Islamic Financial Services Board Act 2002

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