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BULETIN Rayuan

NEGERI PULAU PINANG

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TERBITAN KES TAHUN 1995

JABATAN PERANCANG BANDAR DAN DESA NEGERI PULAU PINANG

LEMBAGA RAYUAN NEGERI PULAU PINANG

D/A Jabatan Perancang Bandar Dan Desa

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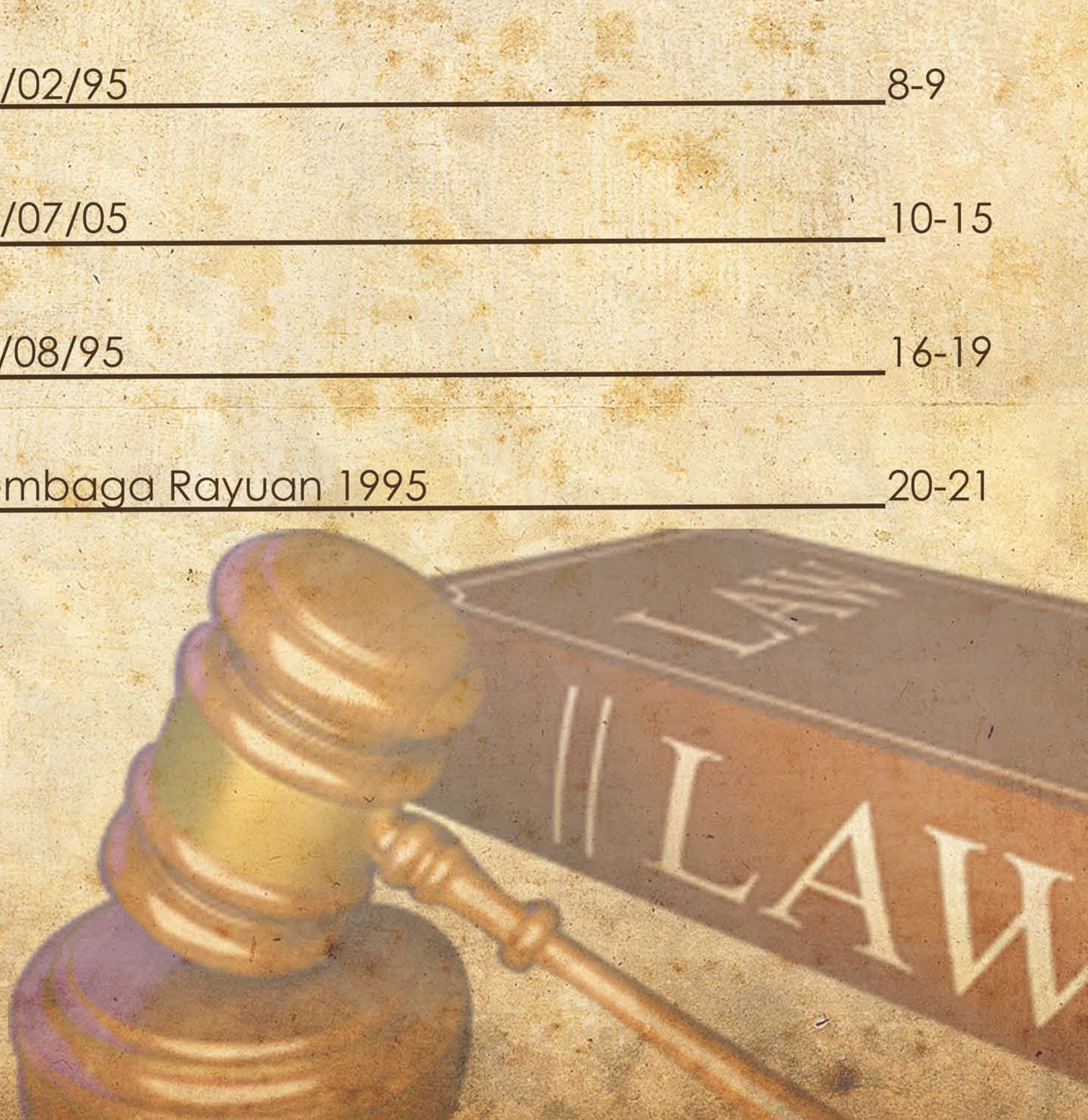
BULETIN RAYUAN



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BULETIN RAYUAN

PENASIHAT
Tuan Hj. Zainuddin Bin Ahamad

EDITOR
Puan Raimah Binti Kassim

PEREKA GRAFIK
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Perutusan Pengerusi

Y.B Tuan Pengerusi Perancang Bandar Dan Desa, Perumahan Dan Kesenian

Jilid Terbitan Kes Lembaga Rayuan Negeri Pulau Pinang ini merupakan satu usaha yang penting. Kes-kes yang telah diputuskan di Lembaga Rayuan sejak 1990an dijilidkan dan diterbitkan untuk pengetahuan orang ramai. Terbitan ini bukan sahaja akan menjadi bahan rujukan kepada pengamal undang-undang, ahli akademik dan juga memberi manfaat kepada profesional yang terlibat dalam perancangan. Ratio decidenci dalam keputusan ini akan menjadi panduan kepada orang ramai bagaimana sesuatu keputusan Lembaga Rayuan dicapai berasaskan undang-undang dan fakta.

Lembaga Rayuan di Pulau Pinang adalah antara Lembaga Rayuan yang aktif di Malaysia. Ini sejajar dengan kedudukan Pulau Pinang sebagai satu negeri yang pesat dalam pembangunan. Negeri Pulau Pinang juga mempunyai kumpulan aktivis serta individu yang aktif dalam memberi pandangan kepada authoriti dari segi isu-isu pembangunan dan perancangan. Ini merupakan petanda yang positif memandangkan kayu pengukur kejayaan sesebuah negeri bukan hanya bergantung kepada kepesatan pembangunan tetapi juga tahap penyertaan orang ramai dalam hal-ehwal awam.

Dewan Undangan Negeri Pulau Pinang pada persidangan November 2011 telah meluluskan Rang Undang-Undang Kebebasan Maklumat Negeri Pulau Pinang. Ini merupakan satu perundangan yang penting memandangkan halatuju pentadbiran Negeri Pulau Pinang ialah supaya ketelusan dari segi pentadbiran Kerajaan Negeri dapat dipertingkatkan. Ini sejajar dengan Prinsip Competency, Accountability dan Transparency yang dipelopori oleh Kerajaan Negeri.

Maka, usaha Terbitan Kes Lembaga Rayuan Negeri Pulau Pinang diteruskan untuk volume 5 untuk keputusan tahun 1995 ini sejajar dengan halatuju ketelusan maklumat yang dipelopori.

Ini juga merupakan satu usaha berterusan untuk memartabatkan Lembaga Rayuan di Pulau Pinang sebagai satu entiti yang berwibawa dan berkecuali. Saya bagi pihak Kerajaan Negeri mengalu-alukan Terbitan Kes Lembaga Rayuan Negeri Pulau Pinang dan juga jilid-jilid yang berikutnya.

Y.B Wong Hon Wai
Ahli majlis Mesyuarat Kerajaan Negeri Pulau Pinang
(Perancang Bandar & Desa, Perumahan dan Kesenian)

Prakata Pengarah JPBDPP

Assalamu 'alaikum w.b.t dan salam sejahtera.

Bersyukur ke hadrat ilahi dengan limpah, hidayahNya serta pelbagai inisiatif telah diambil oleh Jabatan Perancang Bandar dan Desa Negeri Pulau Pinang, khususnya Unit Korporat dan Lembaga Rayuan dalam usaha menjadikan JPBDPP sebagai sebuah jabatan yang berdaya saing baik diperingkat negeri mahupun di peringkat Persekutuan seiring dengan langkah transformasi Negara, maka terhasillah Buletin Lembaga Rayuan Vol.3/2013 ini.

Tujuan asal penerbitan Buletin Lembaga Rayuan ini adalah untuk berkongsi informasi berkenaan kes-kes terdahulu dan keputusan yang telah dikeluarkan oleh Pengerusi Lembaga Rayuan Negeri (satu badan bebas yang dilantik oleh Pihak Berkuasa Negeri) terhadap permohonan perancangan bagi pihak yang terkilan atau tidak berpuas hati dengan keputusan PBPT dan boleh merayu seperti yang diperuntukkan dibawah Akta 172 Subseksyen 236(2)(a).

Bagi maksud Kanun Keseksaan (Penal Code) yang digunakan, Lembaga Rayuan dianggap makhamah undang-undang dan pihak Lembaga Rayuan boleh memanggil dan memeriksa saksi serta boleh memaksa pengemukaan apa-apa dokumen bahawa ia percaya menjadi relevan dan penting kepada kes.

Buletin Lembaga Rayuan merupakan naskah berinformasi yang diterbitkan oleh JBPDPP dan dijadikan medium mendekati pihak awam yang sentiasa dahagakan pengetahuan berkaitan kes Lembaga Rayuan. Diharap Buletin Lembaga Rayuan ini mampu menjadi bahan rujukan kepada yang berminat dengan perundangan terutama yang berkaitan perancangan bandar dan desa.

JPBDPP akan terus berusaha untuk menerbitkan lebih banyak kompilasi-kompilasi keputusan Lembaga Rayuan dari tahun ke tahun untuk dijadikan sebagai bahan rujukan dan panduan dalam memperkukuhkan dan memperbaiki isu perancangan yang timbul pada masa kini amnya bagi negeri Pulau Pinang.

Sekian. Terima kasih.

Tuan Hj. Zainuddin bin Ahamad
Pengarah Jabatan Perancang Bandar dan Desa
Negeri Pulau Pinang

Dari Perspektif Pendaftar

Assalamualaikom dan salam sejahtera untuk pembaca sekelian.

Di dalam terbitan kali ini, para pembaca sekelian dapat melihat bagaimana ketika mana keadilan hendak ditegakkan, kekangan masa menjadi perkara kedua. Kita melihat disini beberapa kes rayuannya dimasukkan melebihi tempoh masa yang ditetapkan oleh undang-undang, tetapi Lembaga berpendapat sedikit kelewatan boleh dimaafkan berbanding perkara pokok yang diperdebatkan walau pun telah jelas di bawah peruntukan S.23(1) "sesuatu rayuan terhadap keputusan pihak berkuasa perancang tempatan yang dibuat di bawah S.22(3) boleh dibuat kepada Lembaga Rayuan dalam tempoh satu bulan dari tarikh keputusan itu disampaikan kepadanya...".Perkataan "boleh" (atau "may") sebenarnyalah yang telah memberi kelonggaran atau ruang untuk tidak secara rigid mematuhi tempoh masa ditetapkan. Implikasinya akan berbeza sekiranya perkataan "hendaklah" digunakan (sebaik perkataan "mesti" atau "wajib")

Di dalam terbitan kali ini juga para pembaca dapat melihat bagaimana kekalahan di pihak PBT adalah kerana bertindak di luar bidang kuasa mereka (ultra vires) dan di dalam kes yang diterbitkan ini PBT mengutip bayaran pemajuan tanpa punca kuasa yang sah. Sebarang tindakan PBT perlu berasaskan kepada asas-asas perundangan yang sah dan peruntukkan yang disokong keupayaan atau bidangkuasa yang digariskan oleh undang-undang untuk PBT. Di dalam bertindak mengikut undang-undang ini juga, tuntutannya adalah perlunya tindakan atau keputusan yang konsisten. Di dalam kes yang diterbitkan ini sahaja, kita dapat melihat bagaimana isu tidak konsisten di dalam membuat keputusan menyebabkan kekalahan pihak PBT di dalam perbicaraan di Lembaga Rayuan.

Kemungkinan ada di antara kita yang tidak sedar yang pindaan kepada pelan yang telah diluluskan sebenarnya adalah sama seperti pelan baru yang dikemukakan. Pelan pindaan (walau pun di setengah-setengah PBT mengekalkan fail lama/asal di atas alasan-alasan tertentu – misalnya memudahkan kerja-kerja pemantauan dan sebagainya), permohonan pelan pindaan berkenaan mengikut Lembaga Rayuan perlu dilayan sama seperti permohonan baru. Dengan kata lain permohonan pelan pindaan kebenaran merancang berkenaan perlu melalui proses yang sama seperti permohonan baru. PBT juga perlu membuat pertimbangan dan keputusan baru bagi pelan pindaan berkenaan, bukan mengesahkan pindaannya sahaja.

Di pihak perayu (samada pemaju atau jiran yang membantah) juga tidak boleh melepaskan tanggungjawab dan hak mereka dengan menyalahkan pihak PBT bilamana mereka sendiri tidak arif dengan garispanduan atau peraturan-peraturan yang digunapakai oleh PBT. Mereka juga perlu menjalankan tanggungjawab untuk memastikan mereka tahu apa yang PBT rancangkan untuk tanah mereka kerana hak merancang dan mengawal pembangunan adalah hak yang diperuntukkan oleh undang -undang kepada PBT di bawah Akta Perancangan Bandar dan Desa 1976 (Akta 172). Di dalam kes LR/SP/08/95 pula kita dapat melihat bagaimana Lembaga Rayuan mengiktiraf isu pencemaran merupakan faktor yang relevan di dalam mempertimbangkan dan membuat keputusan ke atas permohonan kebenaran merancang.

Para pembaca yang budiman, saya dengan rendah hati ingin merakamkan ucapan ribuan terima kasih di atas sambutan anda di laman facebook kami. Sukacita dimaklumkan, JPBD Negeri Pulau Pinang kini sedang di dalam proses membangunkan aplikasi e-rayuan yang mana antara lain ciri-ciri yang terdapat di dalam aplikasi online ini adalah carian kes-kes mengikut katakunci misalnya bagi membuat carian kes-kes berkaitan zoning, tanah bukit dan sebagainya. Pada ketika ini Jabatan baru sahaja menyiapkan Fasa 1 e-rayuan yang melibatkan data conversion dari format hard copy kepada format digital (yang mana data ini kelak akan digunakan di peringkat Fasa kedua e-rayuan). Jadi saya berharap para pembaca sekelian dapat bersabar menantikan fasa 2 e-rayuan dan saya sesungguhnya berharap ianya dapat memberi manafaat kepada semua lapisan stakeholder khususnya warga Perancang Bandar dan Desa kita.

Raimah Kassim
Pendaftar Lembaga Rayuan Negeri Pulau Pinang

Istilah Undang-Undang

LEMBAGA RAYUAN NEGERI PULAU PINANG

MANDAMUS (man-dame-us) [Latin, We comand/ we order.]

A writ or order that is issued from a court of superior jurisdiction that commands an inferior tribunal, corporation, Municipal Corporation, or individual to perform, or refrain from performing, a particular act, the performance or omission of which is required by law as an obligation.

(mandamus) n. a court order to a government agency, including another court, to follow the law by correcting its prior actions or ceasing illegal acts.

A writ or order of mandamus is an extraordinary court order because it is made without the benefit of full judicial process, or before a case has concluded. It may be issued by a court at any time that it is appropriate, but it is usually issued in a case that has already begun.

WRIT OF MANDATE

A writ (more modernly called a "writ of mandate") which orders a public agency or governmental body to perform an act required by law when it has neglected or refused to do so. Examples: After petitions were filed with sufficient valid signatures to qualify a proposition for the ballot, the city refuses to call the election, claiming it has a legal opinion that the proposal is unconstitutional. The backers of the proposition file a petition for a writ ordering the city to hold the election. The court will order a hearing on the writ and afterwards either issue the writ or deny the petition. Or a state agency refuses to release public information, a school district charges fees to a student in violation of state law, or a judge will not permit reporters entry at a public trial. All of these can be subject of petitions for a writ of mandamus.

Quo Warranto

kwoh wahr-rahn-toe) n. the name for a writ (order) used to challenge another's right to either public or corporate office or challenge the legality of a corporation to its charter (articles).

A legal proceeding during which an individual's right to hold an office or governmental privilege is challenged.

In old English practice, the writ of quo warranto—an order issued by authority of the king—was one of the most ancient and important writs. It has not, however, been used for centuries, since the procedure and effect of the judgment were so impractical.
Currently the former procedure has been replaced by an information in the nature of a quo warranto, an extraordinary remedy by which a prosecuting attorney, who represents the public at large, challenges someone who has usurped a public office or someone who, through abuse or neglect, has forfeited an office to which she was entitled. In spite of the fact that the remedy of quo warranto is pursued by a prosecuting attorney in a majority of jurisdictions, it is ordinarily regarded as a civil rather than criminal action. Quo warranto is often the only proper legal remedy; however, the legislature can enact legislation or provide other forms of relief.

Statutes describing quo warranto usually indicate where it is appropriate. Ordinarily it is proper to try the issue of whether a public office or authority is being abused. For example, it might be used to challenge the Unauthorized Practice of a profession, such as law or medicine. In such situations, the challenge is an assertion that the defendant is not qualified to hold the position she claims—a medical doctor, for example.In some quo warranto proceedings, the issue is whether the defendant is entitled to hold the office he claims, or to exercise the authority he presumes to have from the government. In addition, proceedings have challenged the right to the position of county commissioner, treasurer, school board member, district attorney, judge, or tax commissioner. In certain jurisdictions, quo warranto is a proper proceeding to challenge individuals who are acting as officers or directors of business corporations.

A prosecuting attorney ordinarily commences quo warranto proceedings; however, a statute may authorize a private person to do so without the consent of the prosecutor. Unless otherwise provided by statute, a court permits the filing of an information in the nature of quo warranto after an exercise of sound discretion, since quo warranto is an extraordinary exercise of power and is not to be invoked lightly. Quo warranto is not a right available merely because the appropriate legal documents are filed. Valid reason must be indicated to justify governmental interference with the individual holding the challenged office, privilege, or license.

ULTRA VIRES (uhl-trah veye-rehz) adj. Latin for "beyond powers,"

In the law of corporations, referring to acts of a corporation and/or its officers outside the powers and/or authority allowed a corporation by law. Example: Directors of Highfliers, Inc. operate a small bank for its employees and friends, which corporate law does not permit without a bank charter, or sells shares of stock to the public before a permit is issued.

The doctrine in the law of corporations that holds that if a corporation enters into a contract that is beyond the scope of its corporate powers, the contract is illegal.

The doctrine of ultra vires played an important role in the development of corporate powers. Though largely obsolete in modern private corporation law, the doctrine remains in full force for government entities. An ultra vires act is one beyond the purposes or powers of a corporation. The earliest legal view was that such acts were void. Under this approach a corporation was formed only for limited purposes and could do only what it was authorized to do in its corporate charter.

No. Rayuan : LR/PP/01/95

CADANGAN 6 TINGKAT RUMAH PANGSA (36 UNIT) DI ATAS LOT 005664-005669 & 005767-005771, MK. 13, DAERAH TIMUR LAUT, DI LINTANG PANTAI JEREJAK. 6 PULAU PINANG UNTUK TETUAN ISLAND VIEW SDN BHD

Between
TETUAN ISLAND VIEW
(Appellant)

And
MAJLIS PERBANDARAN PULAU PINANG
(Respondent)

Appellants

En. Balasundram, counsel

Respondant

Puan Khor Choon Eng, area Architect
Pn Maimunah

Alasan Penolakkan KM

Ketinggian dikekalkan

Alasan Rayuan

a) The number of Unit has been reduced from 40 to 36 units. This mean there is a reduction in the proposed density of the scheme.

b) A more luxurious scheme which is more compatible to the existing class of houses in the surrounding are, the floor areas have been increased with the size of units ranging from 1,013 sq. ft.. to 1.311 sq. ft. In order to accomodate bigger size units, the building heighthas to be maintained at 6 storey.

DECISION

After hearing what the respondent's representative had to say in reply to learned counsel for the appellant, we were of the unanimous opinion that there was no reason why the appeal should not be allowed. We now give our reasons.

A Preliminary Objection

A preliminary objection was taken to the hearing of the appeal on the ground that it was lodged out of time. Appellant's counsel conceded that the appeal was not lodged in time but submitted that the delay was so short as to be immaterial. We are of the clear opinion that where the delay is contumelious and occasions difficulties to the other side, we should not hesitate to uphold such an objection. But the time has long passed when the time-table laid down in any code of procedure had to be strictly followed. It was, for example, the practice in the Courts that an appeal from the High Court to the Court of Appeal would not be heard if lodged out time, unless with the special leave of the Court. Such special leave was never granted except for the most compelling of reasons. That rule has long been changed and Court are now given fairly extensive powers to enlarge time. In s.23 of the Act, the word used is "may". In our view, this gives the Board a discretion and in the discretion and in the circumstances of this case, we see no reason why this discretion in favour of the appellant should not be exercised.

There is another consideration. Dismissing appeal on this procedural issue alone is not the end of the road for the appellant. It has only to make another application to the Planning Department on the same grounds and the same subject will come before the Appeal Board, after such bureaucratic delay as the appellant may encounter.

Subject Matter Of The Appeal

The appellant's first application was to build on lots 5664, 5669 and 5767-5771 situate in Mk.13, Daerah Timur Laut Lintang Pantai Jerjak 6, Pulau Pinang a 4-storey block of medium cost flats. Permission was granted on

June 15, 1990. The appellant, instead of proceeding with the approved plans, sought to amend them and to build instead a six-storey block of apartments. One of the results of the amendment was to reduce the density from 40 units to 36 units. The other was increase the area of each unit from 1,012 sq. ft to 1,311 sq.ft. A third result was that the height of the structure was increased. The application to amend plans was submmited on November 6, 1991.

The application was rejected, eventually.

The Delay

On October 2, 1995, the Planning Department advised the applicant of the rejection of the amendment. In the intervening period of four years the appellant was, repeatedly, told to re-amend its plans to conform to the originally approved plan for a four-storey block but it failed to have its amended plan considered or rejected. It was left in limbo.

The difficulties encountered by the appellant to have its application considered make a sorry saga of how bureaucracy could sometimes be made to work to obstruct development the recital of the event that occurred and of the considerable difficulties the appellant encountered is too tedious to set out. It is, think, sufficient to note that at every turn,the appellant was repeatedly told to amend its plans. But it never had its new plans processed nor a decision taken. It was also never told what would be the height that would be approved, despite several requests for such information but in the end the appellant was forced to assume,rightly as it turned out, that it was required to amend to a 4-storey building.

Every appeal for reconsideration met with the same fate. No firm decision was taken. It does appear that unless the appellant was willing to be persuaded to conform, it would not be allowed to build.

The Planning Department had not condescended to given its reasons, if there are any, to the appellant for the stand taken by it. If its reason was to keep the matter before it and not allow it to proceed to an appeal to the Appeal Board, then this intransigence is coercion by persuasion and coercion by a department of the Government is an abuse of power.

The Appeal Board has had occasion several times in the past to stress that under the Town & Country Planning Act, the duty of MPPP as the organ empowered under the Act to determine the planned development of the area of its jurisdiction, is to consider each planning application and come to a decision. It can reject it altogether or to grant it subject to such conditions as may be reasonable. It is expected that each application will be considered only on sound planning principles. But, under the same Act which confers on it is jurisdiction, its powers or the exercise of those powers are subject to review by the Appeal Board constituted under the Act. Since the law allows an appeal from any planning decision of the local government department so entrusted,
any obstruction to prevent an appeal or any move to make any appeal difficult or onerous for the appellant would be a denial, contrary to the law, of a right given by law to the land-owner or
developer.

It ought to be realized that, among other things, there are remedies at law for the enforcement of legal rights. The Planning Department would do well to consider whether any failure to process any application for planning permission within a reasonable time would not subject it, at great cost, to an order of Mandamus, i.e. to an order that it does what the law has empowered it to do.

The Decision

The started reason for the rejection were three in number. In the enumeration adopted by Council, the first was that permission previously given had been for a 4-storey block. The second was that the area is a housing area for 2-storey semi-detached houses. The third was that Council had given the appellant several opportunities to amend but the appellant had failed to avail it self of such opportunities.

Comments on the Council's reasons

We have already dealt with the third reason. If the Council holds that its word simpliciter, is law and must be obeyed, then it must realise it has not that power. The failure or refusal of any land-owner to accept any suggestion from the Planning Department could not result in a blank refusal to process the application. The clear duty of the Planning Department is to submit the application, with its reasons for not recommending it, to the Council for its decision.

At the hearing of the appeal, this issue was explained to the Council's representative. After some hesitation, she agreed Council had the jurisdiction.

There should have been no doubt the answer.This Appeal Board has had occasion in the past to stress that an application to amend a previously approved plan is an application just as much as is a new application and requires the decision of Council. If authority is needed, reference may be made to case of Pilkington v. Secretary of State for the Environment & Ors. [1974] 1 All ER 283, relied on by learn counsel for the appellant.

The next question is whether Council did consider the amended plan. If it did, what are the reasons for its decision to refuse planning permission? On this, the Council's representative had nothing to say.

We pause to make the following comment. We had every sympathy for this representative. Arguing a case on appeal is obviously not within her training and expertise and we do not think it is fair to saddle her with such a brief. But, more to the point, the Council, by appointing someone who had not the faintest idea of what is involved in an appeal, of what are the questions of fact and of law raised at the appeal, could not even be to pay lip-service to the law which gives it jurisdiction on planning matters, if such jurisdiction is subject to appeal, should not the Council accept these provisions of law, if it were to show its adherence to the law. On a practical footing, perhaps, Council should contend that it had good planning reasons for its decisions and should not be afraid at any time to defend its decisions. A manifest way to do this is by endeavouring to persuade the Appeal Board of the soundness of its reasons. If it defaults by failing to enter a meaningful appearance before the Board, then it runs the danger of being misunderstood and of having its decisions overturned. Unless, of course, it does not think its reasons correct.

The only proof that Council did consider the amended application appears in the stated grounds for the rejection to be that the area is planned for a two-storey housing estate.

Quite frankly, we find this reason so astonishing that it calls into doubt whether Council was advised to reject the application on this ground. If it was, then the Planning Department would have failed to inform the Council that it had previously advised it to approve plans for a four-storey block. It had also failed to suggest to Council that this second reason is entirely contrary to and inconsistent with the first and third reasons. If the requirement is that the appellant reduces the height of the building from 6-storeys to 4-storeys, it would still be violation of the reservation for a 2-storey housing area. This second reason is therefore too ridiculous to need further consideration.

But it does not seem to be even true that the area is set apart for a two-storey development. Council for the appellant asserts that the Council has in this area allowed to be built a 6-storey apartment block to be built on lot 151 at Tingkat Pantai Jerjak and a 10-storey block of apartments on lots 3994 and 4692. It has also approved the construction of a 7-storey block of apartments on lots 1773 and 1774 and a 16-storey apartment building on lot 148 Lintang Pantai Jerjak. We have heard no denial and we must assume this statement to be true.

If true, there was not the slightest reason for upholding Council's refusal of planning permission. For these reasons, we allowed the appeal.

Penang.
30 September, 1996.

Tan Sri Chang Min Tat.
Chairman

KEBENARAN MERANCANG CADANGAN KEMAJUAN 1 UNIT RUMAH SESEBUAH 3 TINGKAT DI ATAS LOT 4065 MK. 13, DAERAH TIMUR LAUT, TINGKAT BATU UBAN 4, PULAU PINANG UNTUK EN. YEOH ENG SAN DAN PN. CHAN ASH SIM

No. Rayuan : LR/PP/02/95

Between
TETUAN EN. YEOH ENG SANG & PUAN CHAN ASH SIM
(Appellant)

And
MAJLIS PERBANDARAN PULAU PINANG
(Respondent)

Appellants

En Ooi Teik Hoe, Counsel

Respondant

En. Tan Thean Siew
Town Planner, Penang

Alasan Penolakkan KM

Ketinggian rumah-rumah yang sedia ada di kawasan ini hanya 2 tingkat sahaja

Alasan Rayuan

a) The MPPP has failed to take all the relevent circumstance into consideration when rejecting the Appellant 's application.

b) The MPPP's ground is rejecting the Appellantis application is contrary to section 22(1) of theTown & Country Planning Act 1976 in failing totake into consideration the fact there are already high rise appartments and condominiums being constructed or in the process of construction in the adjacent lot and neighbouring lots.

c) There is no legal basis to justify or support the MPPP's rejection of the Appellant's application.

DECISION

The appellant-land-owners had originally applied for and obtained approval for 2-storey house on Lot 4065, Mk. 13, DTL, Tingkat Batu Uban 4, Pulau Pinang. The approval is said to be still valid. But they thought that a 3-storey house would mean a better utilisation of the land. They then applied for planning permission to build one unit three-storey house but their application was rejected.

This particular lot originally was part of a road provided for the development of the area. With the re-alignment of this road, part of the land released together with an odd lot became this lot 4065. The area, now bordered by Tingkat Batu Uban Satu and Tingkat Batu Uban Empat, and including both sides of Tingkat Batu Uban Dua and Tiga, was planned for 2-storied houses. It is not a deniable fact that this lot 4065 is considerably larger than any of the other lots in the area.

Learned Counsel for the appellants referred to the development north of this area. Immediately north and to the west is an area marked and used as a sewage treatment area and a car-park. But north and west are several high-rise buildings, some already constructed and others in the course of construction.

In an anti-clockwise direction, they are a 6-storey car-park and sports centre, then a 22-storey condominium a 27-storey, in 3 blocks, high-rise condominium, next a 21-storey apartment block. Further north area a 5-storey block and another 15-storey block of low-cost flats.

Lot 4065 is therefore sandwiched between an area of 2-stories houses and an area of high-rise building.

Admittedly, as the Respondent would stress, it more naturally belongs to the 2-storey development. That factor was clearly in the opinion of the Respondent decisive. The Respondent would stress that in the rejection of the application, it has been consistent in its approach.

Consistency is of course a virtue very much to be desired. It has the great advantage of never having a decision thrown back at you. Against that is the realisation that a local plan is not so sacrosanct as to prevent any departure therefrom where conditions justify it.

I do not think I need again refer to the several decisions I have relied on for this approach, since I do not think that the Respondent thinks otherwise. One does not have to look too hard to find examples of apparent inconsistencies, examples of three-storied buildings in a row of 2-storey houses. I also recall an appeal in which MPPP argued against an application because the building had an attic-floor above the first floor in an area in which it is said all the buildings are 2- storey houses. And yet, I see being constructed in the same area a building unashamedly of three storeys. Presumably, in all these instances of departure from the local planning, there are circumstances which justify the departure. But the point is there may be departures where circumstances justify it.

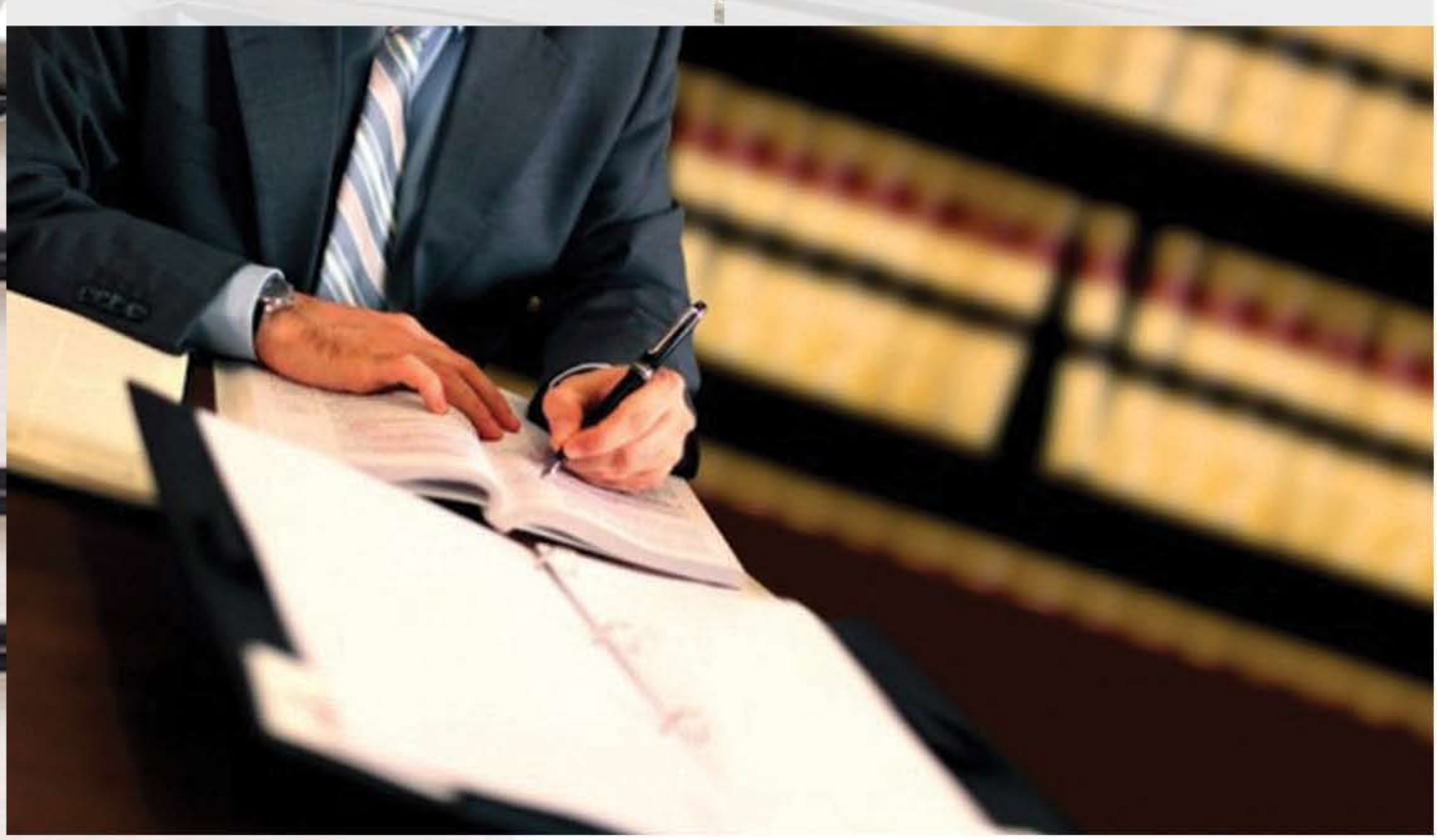
In the present matter, it is clear that in the opinion of the relevant people there are no such circumstances. The existing conditions of the surrounding area call for 2-storey building. The letter of rejection relied entirely on this one factor.

We have given due consideration to this submission. Mr. Tan Thean Siew sought to expand further on this. But we also think some consideration should also be given to the undeniable fact that this is a corner lot situated between two distinct areas. We consider the size of the lot. We also consider that aesthetically no outrage to the scene is occasioned. Even looked at from the north, with the 2-storey houses in the back-ground, we do not think there is a feeling of incongruity as there would be if the 3-storey building was surrounded by 2-storey buildings. It is not. Viewed from the south with the high rise buildings as a back-drop, we would have thought that the 3-storey building fits naturally and unintrusively into back-ground.

In these circumstances we are all agreed that the appeal should be allowed. In coming to our decision thus, I am not unaware I have not done justice to submission of learned counsel on the provisions of the Town & Country Planning Act, 1976. I trust learned counsel will now see that I have not done so only because it is necessary.

Penang
22 Disember, 1995

Tan Sri Dato' Chang Min Tat
Chairman



No. Rayuan : LR/PP/07/95

PERMOHONAN REBAT BAYARAN 50% BAYARAN INFRASTRUKTUR- PELAN BANGUNAN NO. 32822(LB) DAN PELAN BANGUNAN NO. 30562(LB). PEMBANGUNAN BLOK-BLOK PANGSAPURI DI ATAS LOT 3545, 3456-3470, 3495-3499 & 3472 DAN 1 BLOK RUMAH BERKEMBAR (2 UNIT) DIATAS LOT 3491 & 3492, MK.18, DAERAH TIMUR LAUT , MEDAN FETTES, PULAU PINANG UNTUK TETUAN JUNIMAS SDN BHD

Between
TETUAN JUNIMAS SDN BHD
(Appellant)

And
MAJLIS PERBANDARAN PULAU PINANG
(Respondent)

Appellants

Kelewatan membayar bayaran kemajuan dari tarikh yang sepatutnya dibayar.

Respondant

Dr. C.V Das , Counsel
Ms. Karen Lim , Counsel
En. Murgan, Legal Officer MPPP

Alasan Penolakkan KM

Dato' Lakbhir Singh, Counsel
with him Puan Ajit Kaur

Alasan Rayuan

a) The total amount of development charge payablewas calculated by the Majlis Perbandaran Pulau Pinang to be RM 902,494,35.

b) The application have satistisfied all the guide lines terms and condition and procedures of the Majlis Perbandaran Pulau Pinang in respect of the policy for the grant of a rebate of the development charge.

c) The action of the Majlis Perbandaran Pulau Pinang in disallowing the application and apllication of the Appellants is unfair and unjust and a discriminatory departure from the policy relating the rebate of thedevelopment.

DECISION

As a condition for the grant of planning permission on May 14, 1990, for 10 blocks of apartments and two units of semi-detached houses on Lots 3545, 3456-3470, 3495-3499, 3472, 3491 and 3492 Mk. 18, DTL, Pulau Pinang, the developer was required to pay a development charge at the rate of RM 5 per square foot. The amount of this development charge was not expressly stated. It had to await the determination of the floor area. The Appellant's architect was only told of the amount after he had consulted the relevant officials in the MPPP (the Respondent). The total amount came to RM 902,484.35.

The development charge was imposed because the plans for which planning permission was sought and which were approved called for an increase in the number of housing units to be constructed. The result of this increase inevitably means an increase in the use, density of floor area of the land, an increase in the resident population and a greater call for the provisions of additional services necessary for this increased population. The municipal services must necessarily be paid for and by none better than the developer who would, with ordinary business acumen, pass the charge on to the purchasers. The local authority must therefore be empowered to collect fees to pay for the expenses involved in the provision of such services.

This development charge was imposed under MPPP's so-called policy or guide-line, the Dasar Potongan Bayaran Pemajuan Infrastruktur or Infrastructure Development Charge, more briefly, Development Charge.

But there are statutory provisions for this development charge. They can be found part V of the Town & Country Planning Act, 1976. S. 32 is the authority for the levying of a development charge in a plan which results in "a change of use, density of floor area" of the land. Section 33 deal with the determination of the development charge and s.34 with the mode of payment of the charge. s.35 names.

the person who may make rules in respect of this charge. It is relevant enough to require it to be cited in full:

S..35. State Authority may make rules for the purpose of giving effect to and carrying out the provisions of this part or of prescribing anything that may be or is required under this part.

The State Authority may therefore delegate to another person, say, the local authority, the power to make these rules. In doing so, any terms and conditions laid by the State Authority will be binding on the delegated authority.

Facts Of The Case

The Appellant initially accepted the duty to pay this development charge. In fact it could not do otherwise. It was a condition for the approval of the building plans. It made a first payment of RM 451,247.17 towards the said development charge on July 22, 1994. The Appellant then applied for a rebate of 50%, which it claimed was allowable under a subsisting policy of the MPPP at the material time. Apparently without waiting for the reply to this application, the Appellant paid the balance. It did so on September 17, 1994. The Appellant was advised by letter from the Pengarah Bangunan, Dated October 30, 1995 that MPPP had two days earlier rejected the application for the 50% rebate.

The Appellant lodged an appeal. Clearly it was this refusal to grant the rebate of 50% expected by the Appellant that brought about the appeal. But, not unexpectedly, opportunity was taken to appeal against the levy of the development charge itself. Only, in the alternative, was the appeal against the refusal to grant the rebate.

The notice of appeal was lodged on November 27, 1995, well within the one month provided in s. 23(1) of the Town and Country Planning Act, 1976 and Rule 4 of the Appeal Board Rules, 1989. But with regard to the development charge, it was late.

At the first hearing, MPPP took a preliminary objection to the appeal.

Preliminary Objection

At the hearing of the appeal, the Respondent not surprising took apreliminary objection to the appeal on two grounds. The first is that it is now too late to challenge the imposition of the development charge

The second is that the rebate is outside the scope of s.23 of Act and cannot therefore be a subject of appeal.

With great respect, we take the view that the development charge as a condition for the planning permission is within the matters that may be appealed from. If the development charge is to be imposed, it must be subject to any rebate the law allows on the fulfillment of the conditions to qualify for the rebate. We therefore hold the opinion that an appeal lies from the refusal to grant the rebate.

As for the appeal against the imposition of the development charge, the appeal is out of time, in fact by some 5 years and 5 months. The question then arises whether the Board in the judicious exercise of its discretion should enlarge the time.

We took time to consider this objection but after due consideration, we held that the development charge as a condition for planning approval is appealable, as is the question of rebate. If only out of deference to counsel, I now give my reasons for dismissing the preliminary objection.

Our Reasons For Dismissing The Preminilary Objection

The contention by Dr. C.V Das, learned counsel for MPPP that the Appeal Board has no discretion to enlarge time or perhaps that it should not do so.

Dr. Das Urges with his customary persuasion and force that the one month is a mandatory provision and, in his words, "goes to the jurisdiction of the Appeal Board." He cites several cases in which the appeal court had refused to allow an appeal lodged out of time. All these cases dealt with laws whose validity could not and were not be challenged.

Utterex UDC v. Clarke & Ors. [1952] Ch. D. 70 was an appeal from a land acquisition order. In Griffiths & Anor. V Secretary of State for the Environment & Anor. [1983] 1 All ER 439, HL(E), the appeal was against refusal of planning permission. The provisions of the Industrial Relations Act were the subject matter in Fung Keong Rubber Manufacturing (M) Sdn. Bhd. v. Lee Eng Kiat & Ors. [1981] 1 MLJ 238, FC. and in V. Sinnathamboo v. Minister for labour & Manpower [1981] 1 MLJ 251, Mohd. Azmi J. Cohen v. Haringey London BC [1980] P& CR

142 is a case dealing with the compulsory purchase of land. The Legal Profession Act, Singapore is the subject matter in James Chia Shih Ching v. Law Society of Singapore [1985] 2 MLJ 169, PC.

The Malaysian cases are of course binding on me. The other cases are so strongly persuasive that I would have without much hesitation followed them. But for one consideration. They deal, as remarked earlier, with laws validly made so that there can be no challenge to the legality of the delicious sought to be impugned. Where there is room for argument as to the legality ogf the law, here, the particular development charge that was in fact imposed, different consideration arise If this board like any other Court in the land, however, high or however low, is to administer justice according to the law, it must pay regard to the validly of the law that is sought to be applied.

The Appellant's challenge to the development charge is on the doctrine of ultra vires. The Appellant contends that it is ultra vires the Town and Country Planning Act, 1976. For ourselves, the challenge was sufficient to set us on a query whether in terms of the afore-cited s.23, the development charge is payable to the local authority by virtue of the provisions of this Act or any other written law. If it is not so payable, then the Respondent has no right to impose or collect the charge.

It is trite to remind ourselves that an administrative act taken without due or effective authority lays it open to challenge by judicial review in a competent Court of law for an order of "Quo Warranto"
("by what authority")..

What this Appeal Board is concerned with is the due and proper exercise of the rue of law. Where an Act or a by-law is called in question, we do not think that we should hesitate to act properly in the matter.

In the Court of Criminal Appeal in England where by reason of the discovery of new evidence or the uncovery, if I may coin a word, of facts which should have been made known to the trial Court, doubt then arises as to the correctness of the conviction, the Court of Criminal Appeal had no hesitation to entertain an appeal, even long after the time of appeal had passed, and then treating the application for time as the appeal, went on to determine whether the conviction could be safely upheld.

Where justice is the consideration, the question of adherence to a time-table must give way to the up-holding of the rule of law.

On this consideration, if we find that there is some doubt as to the validity of the development charge, we must accept the duty to the appeal. We will herefore hear the appeal, if necessary giving an extension of time for doing so. At the appeal, the issue must be whether the guide-lines have legal effect.

The Power Of The Local Authority To Levy The Development Charge

As was noted earlier on, the power to levy the development charge is given to the State Authority. Where delegated to the local authority, it becomes part of the local authority's power to impose taxes, rates and other dues for the performance of its various duties and the provisions of municipal services necessary for community living.

The legislative provisions for the imposition of such taxes, etc are contain in Part V of the Local Government Act, 1976 which deals with General Financial Provisions. Section 39 provides for the revenue of a local authority. It read as follows:

s.39. The revenue of a local authority shall consist of:

> (a) all taxes, rates, rents, licence fees, due and other sums payable to the local authority by virtue of the provisions of this Act or any other written law.

Further s.102 of the Local Government Act, 1976, provides as follows:

> 102. In addition to the powers of making by-laws expressly or impliedly conferred upon it by any other provisions of this Act, every local authority may from time to time make, amend and revoke by-laws of all such matters as are necessary or desirable for the maintenance of the health, safety and well-being of the inhabitants or for good order and government of the local authority area.

Every by-law therefore made by it requires the confirmation of the State Authority. Proof of such confirmation is by publication of the by-law in the Gazette, as provided in s.106 of the same Act.

s.106. The publication in the Gazzette of any by-law, rule or regulation shall constitute sufficient notice of the by-law, rule or regulation and of the due confirmation of the State Authority of the same..

It is therefore clear that any by-law, rule or regulation made by the local authority requires confirmation by the State Authority and publication in the Gazette. Whether the imposition of all such taxes, rates. rents license fees, dues an other sums payable to the local authority is made by by-laws or by rule or regulation, the confirmation of the State Authority is required as well as publication in the Gazette. If any doubt still remains, it is removed by the provisions of s.103 of the same Local Goverment Act, 1976. It reads:

> s.103. Every by-law shall not have effect until it is comfirmed by the State Authority andpublished in the Gazette.

It is just as clear that no local authority can claim it has, suo motu, legislative powers. The local authority may make any by-law it deems necessary for the performance of its functions, including the levying of any taxes, rates, rents....and other sums, any such by-law, rule or regulation has no effect until it is comfirmed by the State Authority and published in the Gazette. Once there is such a publication, no challenge can he had to the confirmation and every member of the public must be taken to have notice of it.

Appellant's Contention Of Ultra Vires

These statutory provisions do not support Dato' Lakhbir Singh's submission that the development charge is ultra vires the powers of MPPP. In our clear view, MPPP has powers to make by-laws for the levying, among others, of development charges.

The Practice of MPPP

We are advised that MPPP has in council adopted policies for the regulations of municipal services and the charges to be imposed for such services. It calls such policies "guide;lines" It has published a compendium of such guide lines in a publication termed Dasar-Dasar/ Garispanduan-Garispanduan.

But whatever the terminology, we do not understand these guide-lines or policies to be anything but by-laws, rules or regulation and, in this particular case, the development charge to be a particular sum payable to the local authority within the scope of s.39 of the Local Goverment Act, 1976, vide supra.

What MPPP did not however do was to seek the comfirmation of the State Authority for such guide-lines or policies, as required by law or to publish the same in the Gazette, so as to make them unchallengeable. It has, in answer to a question by me, not published the relevant guide-line or policy as a comfirmed by-law in the Gazette.

The Consequence Of The Practice

Even considered as a by-law properly made under the statutory powers given to MPPP, the Infrastructure Development Charge, by reason of the failure to publish it in the Gazette, is caught by the provisions of s.103 of the Local Goverment Act, 1976 and has no legal effect.

MPPP's Contention

Dr. Das concedes that if the Infrastructure Development is caught by this s.103 Town & Country Planning Act, 1976, he has no proper reply. He however contends that the development charge is not a by-law, rule or regulation so as to be required by s.103 of the Local Goverment Act, 1976 to seek the confirmation of the State Authority or publication in the Gazette. Its legal validity is derived from s.132 of the Street, **Drainage and Building Act, 1974 (as amended) read with s.32(3) of the Town & Country Planning Act, 1976.**

> s.132 provides as follows:
>
> s.132 (1) There shall be established for the purpose of this Act in each local authority a fund to be known as the "Improvement Service Fund' into which shall be paid all monies that may from time to time be paid to local authority for the purposes of carrying out the provisions of this Act, all moneys recoverable by the a local

authority from any person under this act or by any by-law made there under and any contributions from any person toward the beautification, construction or lay-out of any street, drain. gutter or water-course.

.S32(3) of the Town & Country Planning Act, 1976 reads as follows:

> s.32(3) The State Authority may, by rules made under s.35 exempt any person or class of persons or any development or class type, or category of development from liability to the development charge, subject to such conditions as the State Authority may specify in the rules.

The wording of this s.32(3) is so without relevance to the matter in hand that I can only conclude I have not heard Dr. Das correctly. On the other hand, I cannot myself find any provision that qualifies s.132 of the Street, Drainage and building Act, 1974.

With he greatest of respect, I do not agree. Requirements of payment into the Improvement Service Fund must be laid down in specific by-laws, rules or regulations and where there are no such by-laws, rules or regulations which are effective,then, even if a development charge comes within the categories laid down in the sections - the beautification, construction or lay-out of any street,drain, gutter or water-course-it cannot be demanded or require to be paid.

Not without reluctance, I am driven to the conclusions that there is, in the circumstances of MPPP's guide-lines or policies, no legal basis for the development charge, or, more correctly, no provisions to make it effective.

Learned Counsel for the Appellant has not raised the question of the interest required to be paid and, in fact, paid on the development charge for late payment. But by the same reasoning, there is also no legal basis for the interest. Also, where there is no effective development charge due, no interest can be levied for late payment.

The Rebate

The conclusion I have reached relieves me of the necessity of dealing with the claim for the rebate of 50%.

Estoppel

Dr. Das raises the issue of estoppel. After agreeing to pay and having paid the development charge and MPPP has acted on this agreement and payment, the Appellant is said to be estopped from claiming a refund. In my view and with respect, it is a matter of grave doubt that the payment of the development charge can be termed a consensual agreement to raise the issue of estoppel.

The Guide-Lines or Policies of MPPP

Perhaps it may of some assistance if I take time off to refer to these Guide-lines or Policies of MPPP. It is only with this aim that I do so.

Mr Lawrence Loh, the consultant architect of the Junimas project, complained of no being in a position to know these guide-lines. This was not the first time that such complaints were made nor will it be the last, unless a policy of open administration is adopted. Mr. Loh was, of course forced in severe cross-examination to admit that though he did not know at the relevent time the full conditions for this development charge, he could have found them out by liaison with the relevant officials in MPPP as in fact he did.

But that, with respect, is not the point. The point is whether in matters that concern them, the developers ought not to have a ready source of information. They should not have to forage for it. Liaison is of course not to be discouraged but one asks, does it not depend on the officials concerned and does it always produce ready answers?.

I Think I can best illustrate this point by asking the legal profession to consider what would be the position if the various rules and regulations made under the acts passed by Parliament or the State Governments were not made available by publication in the Gazette and members of the Bar have to attend at the Attorney-General's chambers or the chambers of the State Legal Advisers to find out what these rules and regulations are.

Perhaps MPPP should consider, for the reasons given in this decision, all the guide-lines and policies adopted by it have no legal effect for want of confirmation by the State Authority and publication in the Gazette, how it is going to enforce them. I should make it clear that I am in no way deciding this point. It does not arise in this appeal and I have not the benefit of arguments. It is a matter that I must have leave to the relevant parties.

Conclusion

The appeal must therefore be allowed, though not for the reason advanced by learned counsel for the Appellant but because MPPP has not at any time demonstrated that the levy made not under s.132 of the Streets, Drainage and Building Act but under the provisions of Part V of the Local Government Act has been comfirmed by the state Authority and published in the Gazette, as required by law and consequently has effect.

There will be an order for the repayment to the Appellant of the full development charge paid and the interest levied on it. No order as to costs.

Penang
January 24, 1997

Tan Sri Dato' Chang Min Tat
Chairman

No. Rayuan : LR/SP/08/95

PEMOHONAN KEBENARAN MERANCANG UNTUK CADANGAN KILANG 'KILN-DRY' SETOR DAN PEJABAT DI ATAS LOT-LOT 1808 DAN 3927, MUKIM 11, SEBERANG PERAI SELATAN(LETAKNYA DI JALAN CHANGKAT SEBERANG PERAI SELATAN) PULAU PINANG UNTUK TETUAN MALPOM BHD.

Between
TETUAN MALPOM INDUSTRIES SDN. BHD
(Appellant)

And
MAJLIS PERBANDARAN SEBERANG PERAI
(Respondent)

Appellants

En.Chew Sien Chee, Counsel

Respondant

En. Zahari bin Senu, Town Planner.

Alasan Penolakkan KM

a) Kilang tersebut menimbulkan masalah pencemaran udara iaitu pelepasan asap hitam yang masih tidak dapat di atasi serta tidak mengikuti kehendak-kehendak Jabatan Alam Sekitar.

b) Sebahagian kawasan kilang terletak atas lot 3927 di bawah geran mukim yang belum mendapat kelulusan ubah syarat tanah

c) Mendapat bantahan daripada lot bersempadan iaitu lot 1809 atas sebab-sebab pencemaran udara, air dan kacauganggu.

Alasan Rayuan

a) Kami telah menerima surat dari Jabatan Alam Sekitar menyatakan tiada halangan terhadap pemohonan ini kerana masalah pencemaran udara adalah terkawal. Kami juga telah memohon kepada Pejabat Tanah Negeri untuk mendapatkan kelulusan mengubah syarat tanah.

b)Geran bagi lot 1808 ad
alah untuk penggunaan industri oleh kerana Jabatan Alam Sekitar telah mengakui bahawa masalah pencemaran adalah terkawal, maka bantahan dari tuan tanah 1809 bersempadan tidak timbul lagi.

DECISION

The appellant applied for planning permission to build two "kiln-dry" factories on Lot 1808 and an office and store in adjoining Lot 3927, both lots situate in Mukim 11, Seberang Perai Selatan. The application was submitted originally on December 27, 1993 and, for reasons not made known to us, re-submitted on April 13, 1995.Though the application implied that construction would await the planning permission sought, in fact and in the truth the construction had been completed without planning permission some years earlier and both the kiln-dry factories had been in operation, the office and the store in use. So this is yet another case when planning permission is sought after the construction had been completed

The application was submitted to and considered by the Planning and Building Committee of Majlis Perbandaran Seberang Perai ("MPSP") on September 20,1995. The Committee accepted the recommendation of the Planning Department to reject it and did so. This decision was confirmed by the full Council two days later, on September 22, 1995. This appeal is therefore from that decision

The reasons given for the rejection of planning permission were, firstly , the pollution caused by the noxious fumes from the factories, secondly , the objections of the neighbouring land-owners and, lastly, the breach of condition of land use of one of the two titles.

Lot 3927

Part of the factories, the office and the store were built on this Lot 3927, which is held under a Mukim Grant. The condition of land-use was agricultural.

The constructions are therefore a breach of condition and subjects the land-owner to the consequences for such a breach. We had dealt in the past with such user of agricultural land for building purposes and we had stressed that such user must be preceded by an application to the relevant authorities for conversion or changes of land use and since the Appeal Board has no jurisdiction to allow any conversion, the appeal must necessarily be dismissed and the refusal of planning permission confirmed.

The appeal with respect to Lot 3927 is accordingly dismissed

If it is of any consolation to it, the appellant could note that the land-use recommended in the Structure Plan appears to be for priority development. It might therefore consider making an application for conversion in accordance with this recommendation in the Structure Plan. But until it had done so and obtained the conversion, the construction of a godown or store is a contravention of the law.

Lot 1808

This lot is designated for industrial purposes. No difficulty as is encountered with Lot 3927 therefore arises.

On this lot stood an old palm oil mill. To supply the energy required for the whole process of oil-extraction, two furnaces had been built for the raising of steam in the boilers. There was also an incinerator. The appellant sought to expand by venturing into the wood-drying industry. For this purpose, it built a kiln of some considerable size, again without planning permission.

The construction might not be in contravention of the condition of use but it was without or it anticipated planning permission and is a breach of the law.
Post-hoc application for planning permission was rejected because of the noxious fumes emitted from its furnaces to which the neighbouring land-owners had objected. The Department of Environment also considered the emissions a serious hazard and danger to the environment, but would appear to have subsequently certified that the fumes no longer pose a polluting hazard, even when, on its own admission, the appellant had done nothing to remedy the situation. Because of this apparent turn-about, the Board decided to inspect the premises which it did in the company of the Appellant's officials and directors and a representative from the Department of Environment.

We found an incinerator at full blast, giving off a thick columns of yellowish smoke that covered the area like a pall. The other two furnaces were, as I personally noticed, banked down, probably as the result of the result of the advanced notice given of our intended visit. There was consequently no smoke emission from them. The emission from the incinerator was however sufficient to cause me discomfort. My eyes smarted. I wondered what would be the situation if the other two furnaces were in full operation. To resolve the conflict between the very apparent and palpable pollution with the clearance by the Department of Environment , we sought the advice of the Department.

YM Raja Rokiah R. Saigon, the Director, without the compulsion of a sub-poena, did us the honour of appearing in person. She was not required to be sworn in as a witness but made a statement which the appellant indicated through its counsel that it accepted. The clearance was given as the result of an appeal by the appellant and the result of an inspection. Quite clearly, the mill operation had been moderated for the visit, since on its own admissions, the appellant had been moderated for the visit, since on its own admission, the appellant had done nothing to modify the incinerator or the two furnaces. But after the inspection, the mill operations returned to normal, bringing further complaints from the neighbouring and at least two proceedings against the appellant, which the appellant compounded. The Director also advised that the situations was in her opinion so bad that she wanted to take severer action but her action was not approved by her superiors. She was clearly of the opinion that there was and still is serious pollution.

The Director's advice served to confirm our personal impressions from the visit we made. It saved me from having to deal with the technical details of the mill operation. All I need to note is shortly this :

The normal source of fuel come from the vegetable residue of the fruit bunches. They are the empty fruit bunches, the mesocarpic fibre from the fruit and the shell. It is not now the practice to burn the empty fruit bunches in the furnaces as fuel because of the pollution but to use them, after crushing them into smaller pieces, as mulch on the land between the oil-palms. The appellant has followed the practice of not using the empty fruit bunches as fuel but it is burning them in an incinerator. It says it does so partly to dispose of them and partly to derive potash, a fertiliser,from the combustion. The result of this combustion is an emission of thick yellowish black smoke, as was seen by us in our visit.

There need not be this pollution if care has been taken to reduce the moisture content of the bunches and to ensure that there are no oil-bearing fruit lets left on the bunches by an inefficient or incomplete stripping. Moisture and oil are the two major causes of pollution. An inefficient or badly designed incinerator would lead to incomplete combustion. It was admitted that the appellant's incinerator was of the certain vintage and inefficient..

The appellant's plant manager also advised that the fuels for the furnaces were (1) the mesocarp fibre of the fruits after they have been stripped and the oil extracted under pressure and (2) the cracked shell of the nut. I am advised that the mesocarp fibre from an oil-mill of at least 20-ton per hour capacity, would be sufficient fuel to serve the needs of the mill. The plant-manager admits that the capacity of this particular mill is 25-ton per hour. There would not therefore be any necessity to burn the cracked shell. In other mills, the shell, as I am advised, is used not for fuel but as road or earth filler in the plantation, the reason is the shells are a source of pollution. The shell becomes wet in the cracking process and it has an oil content. Oil is also present in the shell. Wet shells tend to cause thick black smoke (due to unburnt carbon particles).

In this mill, the fact of serious pollution must mean that apart from the unnecessary pollution from incinerating the empty fruit bunches, the appellant has failed to take any or any significant steps to ensure that the fuel used in the furnaces is so treated as to minimise the result of combustion.

The incinerator and the two furnaces are part of the oil-mill. The plans for the wood-drying kiln did not seek the construction of another or other furnaces. But the steam required for the process of wood drying is to be derived from the oil-mill's two boiler. This would mean a more intensive use of these two furnaces. With a more intensive burning there would be a heavier pollution. There is evidence before us that when one of the furnaces broke down, dependence on the remaining one furnace led to a heavier use and to more complaints.

For this reason, I consider that the question of pollution is a relevant factor in considering the matter of planning permission.

It follows that the appeal must be dismissed.

Penang
January 24, 1997

Tan Sri Dato' Chang Min Tat
Chairman

STATISTIK KES-KES LEMBAGA RAYUAN NEGERI PULAU PINANG MENGIKUT PIHAK BERKUASA TEMPATAN, DAERAH, KATEGORI KES & KEPUTUSAN KES BAGI TAHUN 1995					
PBT	DAERAH	KATEGORI KES		KEPUTUSAN KES	BIL. KES
		S23(1)(a)	S23(1)(B)		
MPPP	DTL	4	-	DIBENARKAN	3
			-	DITOLAK	-
			-	BATAL/TARIK BALIK	1
MPSP	SPU	1	-	DIBENARKAN	1
			-	DITOLAK	-
			-	BATAL/TARIK BALIK	-
	SPT	1	-	DIBENARKAN	-
			-	DITOLAK	-
			-	BATAL/TARIK BALIK	1
	SPS	3	-	DIBENARKAN	2
			-	DITOLAK	1
			-	BATAL/TARIK BALIK	
JUMLAH		9		JUMLAH	9

STATISTIK KE LEMBAGA RAYUAN 1995 MENGIKUT PBT DI PULAU PINANG			
	BIL. KES DIBENARKAN	JUMLAH KES KESELURUHAN	% KEKALAHAN
MPPP	3	4	75%
MPSP	3	5	60%
JUMLAH	6	9	

Statistik Kes-kes Lembaga Rayuan Negeri Pulau Pinang 1995

TAHUN RAYUAN DIKEMUKAKAN	NO. RUJUKAN	TAJUK KES	DAERAH	MUKIM/ SEKSYEN	KATEGORI KES	NAMA PEGERUSI	TARIKH RAYUAN DIKEMUKAKAN	NAMA DAN ALAMAT PERAYU	NAMA DAN ALAMAT AGEN/WAKIL	HURAIAN RINGKAS MENGENAI RAYUAN	HURAIAN RINGKAS MENGENAI KEPUTUSAN PERINTAH, AWARD DLL LEMBAGA RAYUAN	KEPUTUSAN LEMBAGA	TARIKH KEPUTUSAN	TEMPOH PROSES (hari)	CATATAN
1995	LR/PP/1/95	Permohonan Merancang No. P.1060 – Cadangan Pangsapuri 6 Tingkat (36 Unit) Diatas Lot 5664-5669 & 5767-5771, Mk.13, DTL, Lintang Pantai Jerjak 6, Pulau Pinang.Untuk Tetuan Island View Sdn. Bhd.	DTL	Mk.13	S.23(1)(a)	Tan Sri Dato' Chang Min Tat	23/01/95	Tetuan Island View Sdn. Bhd. 14-A, Chulia Street, Pulau Pinang.	Tetuan Ghazi & Lim	Mesyuarat Jawatankuasa tetap Perancangan & Bangunan pada 03. 05. 93 telah memutuskan menangguh permohonan merancang No. P.1060 dan Pelan bangunan No. 3193 (LB) untuk meminta pemohon membuat pindaan kepada ketinggian projek.		DIBENARKAN	15/08/96	570	Kes di bicarakan pada 15. 08. 96. Keputusan Lembaga Rayuan pada 15. 08. 96
1995	LR/PP/2/95	Permohonan Kebenaran Merancang Bagi Tujuan Cadangan Pemajuan 1 Unit Rumah Sesebuah 3 Tingkat Diatas Lot 4065, Mk. 13, DTL Tingkat Batu Uban 4, Pulau Pinang.Untuk Tetuan Yeoh Eng San dan Puan Chan Ah Sin.	DTL	Mk.13	S.23(1)(a)	Tan Sri Dato' Chang Min Tat	05/05/95	Tetuan Yeoh Eng San dan Puan Chan Ah Sin, 2, Lorong Chantek, 11600, Pulau Pinang.	Tetuan Ooi Lee & Company peguam & peguamcara, No, 64-E, Lebuh Bishop, First Floor UOB Building, 10200, Pulau Pinang.	MPPP telah menolak cadangan diatas sebab-sebab yang berikut :- i) Memandangkan ketinggian rumah-rumah yang sediada dikawasan ini hanya 2 tingkat sahaja.		DIBENARKAN	28/10/95	176	Kes dibicarakan pada 28. 10. 95. Keputusan Lembaga Rayuan pada 28. 10. 95
1995	LR/SP/3/95	Permohonan Kebenaran Merancang Untuk Cadangan Pindaan Rumah Teres 2 Tingkat Kepada Rumah Kedai 2 Tingkat Diatas Lot-Lot 002151-002163, Mk. 14, SPU. Untuk Tetuan Waytatt Enterprise Sdn. Bhd.	SPU	Mk.14	S.23(1)(a)		27/07/95	Tetuan Waytatt Enterprise Sdn. Bhd. C/O Price Waterhouse 5th. Floor UMBC Bulding, Lebuh Pantai, 10300, Pulau Pinang.	Tetuan Tham Chan Soo, M/S Pan Asian Akitek Collaborative 14, Jalan Sitiwan 11600, Pulau Pinang.	MPSP telah menolak kebenaran merancang diatas sebab-sebab berikut :- i) PTD (utara) tidak menyokong kerana keluasan oleh pihak berkuasa negeri adalah rumah teres 2 tingkat , tiada parking. ii) Kaluasan untuk parking tidak diterima; iii) L/R mengarahkan supaya perayu berunding dengan Pengarah Perancang Bandar MPSP mengenai 'set back 16' untuk keperluan Parkling jika ditimbang untuk rumah kedai.		DIBENARKAN	12/08/96	382	Kes dibicarakan pada 12. 08. 96. Perbicaraan akan disambung semula setelah selesai perundingan tersebut. Kes telah di selesaikan di luar mahkamah.
1995	LR/PP/4/95	Permohonan Kebenaran Merancang Untuk Cadangan Perubahan, Tambahan Dari Kediaman Kepada Pusat Perkhidmatan Kanak-Kanak Diatas Lot 1395 & 1444, Sek. 4, GT.Tetuan Montessori Nursery Centre Sdn. Bhd.	DTL	Sk.4 GT	S.23(1)(a)	Tan Sri Dato' Chang Min Tat	05/10/95	Tetuan Montessori Nurssery Centre Sdn. Bhd. 78, Taman Jesseltton, 10450, Pulau Pinang.	Tetuan KH Architect, 24, Jalan Imigeresen, 10400, Pulau Pinang.	MPPP telah menolak cadangan diatas sebab-sebab yang berikut :- i) Perlingkungan lot ini adalah kediaman. ii) Kawasan ini adalah kawasan kediaman yang eklusif dan taman asuhan akan menimbulkan kacau ganggu.		BATAL	15/08/96	315	Kes dibicarakan pada 15. 08. 96. Kes rayuan DiTarik Balik 14. 08. 96

Statistik Kes-kes Lembaga Rayuan Negeri Pulau Pinang 1995

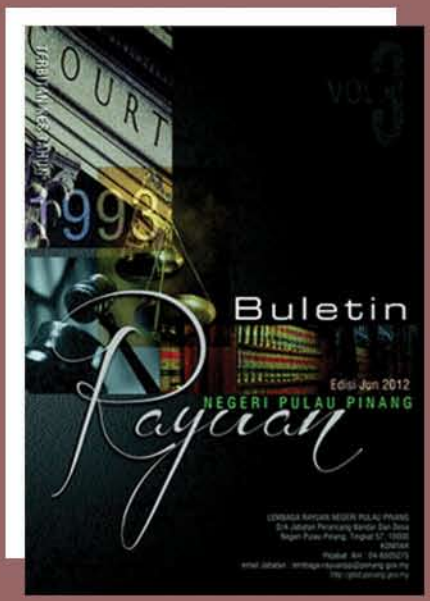
TAHUN RAYUAN DIKEMUKAKAN	NO. RUJUKAN	TAJUK KES	DAERAH	MUKIM/ SEKSYEN	KATEGORI KES	NAMA PEGERUSI	TARIKH RAYUAN DIKEMUKAKAN	NAMA DAN ALAMAT PERAYU	NAMA DAN ALAMAT AGEN/WAKIL	HURAIAN RINGKAS MENGENAI RAYUAN	HURAIAN RINGKAS MENGENAI KEPUTUSAN PERINTAH, AWARD DLL LEMBAGA RAYUAN	KEPUTUSAN LEMBAGA	TARIKH KEPUTUSAN	TEMPOH PROSES (hari)	CATATAN
1995	LR/SP/5/95	Permohonan Kebenaran Merancang Untuk Cadangan Membina 4 Unit Kedai Pejabat 2 Tingkat Diatas Lot 485 Dan 766, Mk. 11, Bandar Nibong Tebal, SPS. Untuk Tetuan Lim Eng Hai.	SPS	Mk.11 Bandar Nibong Tebal	S.23(1)(a)	Tan Sri Dato' Chang Min Tat	28/10/95	Tetuan Lim Eng Hai, 52, Jalan Taman Greenview, 11600, Pulau Pinang.	tiada	MPSP telah menolak kebenaran merancang diatas sebab-sebab yang berikut :- i) PTD tidak menyokong kerana bercanggah dengan kelulusan asal iaitu untuk rumah kediaman dan pelan pecahan sempadan. ii) L/R bersidang dan membenarkan rayuan tersebut kerana tanah tersebut adalah tanah bandar dan syarat nyata dalam geran tidak menghalang pembangunan lain.		DIBENARKAN	12/08/96	289	Kes dibicarakan pada 12. 08. 96Keputusan Lembaga Rayuan pada 12. 08. 96
1995	LR/SP/6/95	Permohonan Kebenaran Merancang Untuk Cadangan Sebuah Kilang Serta Pejabat 3 Tingkat Dan Sebuah Kilang 1 Tingkat Yang Sediada Di Atas Lot 1012, Mk. 14, Jalan Bukit Tambun, SPS. Untuk Tetuan Uniform Components Sdn. Bhd.		Mk.14	S.23(1)(a)	Tan Sri Dato' Chang Min Tat	21/11/95	Tetuan Uniform Components Sdn. Bhd. 1510, Jalan Bukit Tambun, Simpang Ampat.	tiada	Sebab-sebab penolakan :- i) Plan Struktur disyorkan untuk tujuan kediaman akan memberi pencemaran kawasan kediaman disekeliling. ii) Terlibat dengan 50 kaki Jalan Khidmat JKR. - Bantahan dari pemilik lot bersebelahan .	Lembaga Rayuan bersidang pada 10.10.96 dan memutuskan supaya kilang pemohon dibenarkan beroperasi selama 4 tahun dari tarikh keputusan untuk memberi peluang perayu memindahkan kilang ke kawasan Bukit Pancor di Nibong Tebal.	DIBENARKAN	10/10/96	324	Kes dibicarakan pada 10.10. 96. Keputusan Lembaga Rayuan Pada 10. 10. 96
1995	LR/PP/7/95	Permohonan Rebat 50% Bayaran Infrastruktur –Pelan Bangunan No. 32833(Lb) Dan Pelan Bangunan No. 30562 (LB) Pembangunan Blok-Blok Pangsapuri Di Atas Lot 3545, 3456-3470,3495-3499 & 3472 Dan 1 Blok Rumah Berkembar (2 Unit) Diatas Lot 3491 & 3492, Mk. 18, DTL, Medan Fettes, P. Pinang.Untuk Tetuan Junimas Sedirian Berhad .Untuk Tetuan Junimas Sendirian Berhad.	DTL	Mk.18	S.23(1)(a)	Tan Sri Dato' Chang Min Tat	27/11/95	Tetuan Junimas Sendirian Berhad No. 14-C, Jalan Pahang, 10400, Pulau Pinang.	Tetuan Lakhbir Singh Chahl & Co. Peguambela dan Peguamcara, No.12, Abu Siti Lane, 10400, Pulau Pinang.	MPPP telah menolak cadangan diatas sebab-sebab yang berikut :- i) Permohonan untuk rebat mengikut rekod, pihak tuan telah membayar bayaran kemajuan lewat dari tarikh yang sepatutnya di bayar oleh tuan.		DIBENARKAN	24/01/97	424	Kes dibicarakan pada 24. 01. 97. Keputusan Lembaga Rayuan pada 24. 01. 97
1995	LR/SP/8/95	Permohonan Kebenaran Merancang Untuk Cadangan Kilang, Setor Dan Pejabat Diatas Lot-Lot 1808 Dan 3927 Mk. 11, SPS. Untuk Tetuan Malpon Industries Bhd.	SPS	Mk.11	S.23(1)(a)	Tan Sri Dato' Chang Min Tat	29/11/95	Tetuan Malpon Industries Bhd. 3609, Jalan Changkat, 14300, Nibong Tebal.	Tetuan Chew Sien Chee & Co. Peguambela dan Peguamcara No. 27, 2 nd. Floor Tingkat 7, Taman Indrawasih, 13600 Perai.	MPSP telah menolak cadangan diatas sebab-sebab yang berikut :- i) Masalah pencemaran udara iaitu pelepasan asap hitam yang masih tidak dapat diatasi. ii) Lot3927 belum mendapat kelulusan ubah syarat iii) Bantahan dari pemilik lot 1809	Pada perbicaraan bertarikh 3/9/96, Lembaga memutuskan menangguhkan perbicaraan rayuan ini dan satu lawatan tapak akan diadakan pada satu tarikh yang akan ditetapkan kemudian.	TOLAK	24/01/97	422	Kes dibicarakan pada 24. 01. 97. Keputusan Lembaga Rayuan pada 24. 01. 97
1995	LR/SP/9/95	Cadangan Mendirikan Kilang 3 Tingkat Industri Ringan 27 Unit (6 Unit Jenis A & 21 Unit Jenis B) Diatas Lot 645, Mk. 11, SPT. Untuk Tetuan Yeoh Lee Siang (M) Sdn. Bhd.	SPT	Mk.11	S.23(1)(a)	Tan Sri Dato' Chang Min Tat	06/12/95	Tetuan Yeoh Lee Siang (M) Sdn. Bhd. No. 11, Jalan Macalister, 10400, Pulau Pinang.	Tetuan East Design Architect Sdn. Bhd. 41-3-1 Wisma Berjaya Prudential, 41, Jalan Cantoment, 10250, Pulau Pinang.	MPSP telah menolak cadangan diatas sebab-sebab yang berikut :- i) PBPT (SPT) tidak menyokong kerana tanah pertanian perlu ditukar syarat. ii) Jab. Alam Sekitar tidak menyokong kerana akan menyebabkan kesesakan dan kacauganggu		BATAL	29/08/96	267	Kes rayuan Ditarik balik pada 29. 08. 96

NEGERI PULAU PINANG

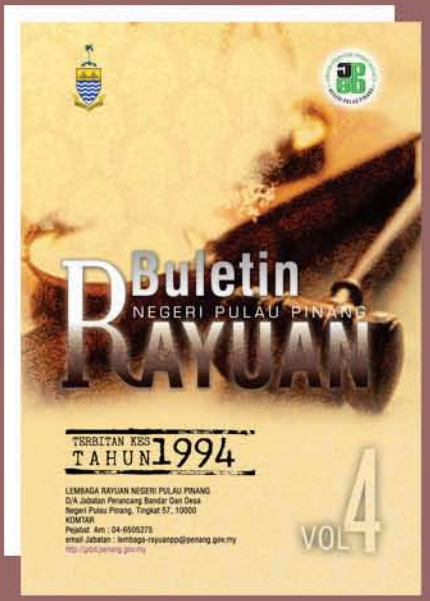
Lembaga Rayuan

HARGA JUALAN : RM50.00

HARGA JUALAN : RM110.00



HARGA JUALAN : RM150.00



HARGA JUALAN : RM70.00

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