KERTAS KERJA 4

PIHAK BERKUASA TEMPATAN vs PERAYU : APA UNTUK RAKYAT?

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HOTEL OLIVE TREE, JALAN MAHSURI, BAYAN BARU

OLEH :

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PEGUAM CARA DAN PEGUAM BELA

'LOCAL AUTHORITY v APPELLANTS: WHAT IS FOR THE PUBLIC?'

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INTRODUCTION

This working paper is presented at a Seminar organised by the Department of Town and Country Planning of Penang entitled *'Lembaga Rayuan di Era Baharu Digital*' held on 14th March 2016. The given topic of this paper is *'Local Authority v Appellants: What is for the public?'*

The views and discourses given here should be nothing new. Albeit of little surprise considering that laws regulating development plans has existed in Malaysia since 1976 and the Penang Appeals Board has been deliberating on Planning Permission appeals for the last 25 years. I shall however attempt to present such views on a backdrop of the recently gazetted Appeal Board Rules 2015 and recent decisions given by the State's Appeals Board.

The recommendations proposed by herein are not mine alone but a summary of suggestions discussed between myself and other lawyers frequently appearing before the Appeals Board.

PROLOGUE

Public participation has always been a cornerstone of Malaysian planning laws, where not only is the public's interest and voice deemed crucial but made mandatory under Statute.

As a matter of history, the **Town and Country Planning Act 1976 ('TCPA')** in Malaysia had largely resembled the amended Town and Country Planning Act 1947 of United Kingdom. A post-war Britain moved towards modern urbanisation of its towns by 'nationalising' the ability of a landowner to develop his own land. Through the establishment of County and Borough Councils, Local Authorities were formed and tasked to come up with Development Plans for its locality. Correspondingly, a landowner was required to apply for Planning Permission before being allowed to develop his own land and was made to pay a

Development Charge in return. In such manner, a Local Authority could regulate development within its' District and ensure that development is done in line with the macro policies of the ruling Government.

In simple words, a landowner was no longer able to have absolute rights to develop his own land in the manner and way he pleases. He is made to conform to not only national and/or local development policies and plans but, as it turned out, to also consider the wishes of his neighbours and sentiments of the public in his locality.

This urban planning concept, we see replicated in Malaysia where it is statutorily provided under **Section 9**, **12A** and **13** of the TCPA that the public's participation and 'voice' must be recognised, heard and considered by the State prior to gazetting and implementing Structure Plans and Local Plans; even at the Plans draft stages.

It is then axiomatic that, as seen in **Section 21** TCPA, at the stage of a landowner's Planning Permission application to the Local Authority; public interest or his neighbours' views are crucial factors of consideration for the Local Authority before it arrives to a decision.

Flowing the Local Authority's decision on a Planning Permission application, it is prescribed in **Section 23** TCPA that if a landowner fails in obtaining or is not satisfied with the conditions imposed in the Planning Permission, he can file an appeal to the Appeal Board. Conversely, if he did get his Planning Permission to the dissatisfaction of his neighbours, his neighbour too can file an appeal. A landowner or his neighbours have equal rights to appeal against the Local Authority's decision and be heard by the State's Appeal Board.

This paper shall consider public interest through the eyes of the **Neighbour** only. The absence of discussion on the Developer/KM Applicant's perspective should not imply that a Developer's right is any lesser to its' Neighbour.

THE APPEAL BOARD AND THE APPEAL BOARD RULES 2015

Before the Appeal Board, a landowner's neighbour takes the position and is termed an **'Appellant'** (as suggested in the titled topic) in a case where the objections taken by the said neighbour is disregarded or dismissed by the Local Authority, and Planning Permission is subsequently granted to the landowner [an appeal under Section 23(1)(b) TCPA].

Alternatively, a landowner's Neighbour takes the position and is termed an **'Objector'** before the Appeal Board in a situation where the Planning Permission application was not granted or allowed with conditions by the Local Authority; and a dissatisfied landowner files an appeal against such decision [an appeal under Section 23(1)(a) TCPA]

This paper shall refer to the landowner's neighbour as the '**Neighbour'** irrespective of the nature of appeal being discussed. The TCPA description of what is a 'Neighbour' under circumstances of a Planning Permission application is elaborated later on.

CONTEXT

To understand the rights of a Neighbour before the Appeal Board, it would be a prerequisite to understand the institution in which the said Neighbour is appearing before *vis-a-vis* the Appeal Board:-

1. The Appeal Board is a quasi-judicial tribunal created by Statute.

2. Constituted pursuant to **Section 36(1)** TCPA which reads '*...For the purposes of this Act, there shall be constituted an Appeal Board in and for the State'*, the Appeal Board finds its powers and jurisdiction under the express provisions of **Section 23(3)** and **36(10)** TCPA as well as the gazetted Rules made under **Section 36(15)** TCPA, all of which reads:-

***Section 23 (3)**:- After hearing the appeal, the Appeal Board may make **an order**-*

(a) confirming the decision of the local planning authority and dismissing the appeal;

(b) allowing the appeal by direction the local planning authority to grant planning permission absolutely or subject to such conditions as the Appeal Board thinks fit;

(c) allowing the appeal by setting aside any planning permission granted; ***or***

(d) allowing the appeal by directing the local planning authority to remove or modify any condition subject to which planning permission has been granted or to replace the condition with such other condition as the Appeal Board thinks fit.

***Section 36 (10):-** In respect of an appeal before it, the Appeal Board-*

(a) shall bear the appellant and the local planning authority;

(b) may summon and examine witnesses;

(c) may require any person to bind himself by an oath to state the truth;

(d) may compel the production and delivery of any document that it considers relevant or material to the appeal;

(e) may confirm, vary or reverse the order or decision appealed against;

(f) may award costs; and

(g) may make any order whether or not provided for any, and not inconsistent with this Act.

> ***Section 36 (15):-*** *The State Authority may make rules to prescribe the procedure of appeals to the Appeal Board and the fees payable in respect thereof, and to regulate the proceedings of the Appeal Board but, until such rules are made and in operation, the Appeal Board shall, for the purpose of its proceedings, as far as practicable follow the Subordinate Courts Rules 1950*

3. The current **Rules** applicable for the State of Penang's Appeal Board is the Appeal Board Rules 2015 gazetted on 22nd October 2015.

4. By operation of the TCPA, the Appeal Board finds itself established within a 3 tier hierarchy of planning authorities (in a State) of which at the 'top':-

   (1) the **State Authority**, as prescribed in **Section 3** TCPA, who establishes general development policies and who's directions must be adhered to by;

   (2) the **State Planning Committee**, formed under **Section 4** TCPA, which regulates, coordinates and control planning policies on land and development matters in the State and who's directions under Section 4(5) TCPA, must be conjunctively adhered to by;

   (3) the **Local Authority** as prescribed under **Section 5** TCPA and who's functions are described in **Section 6** TCPA.

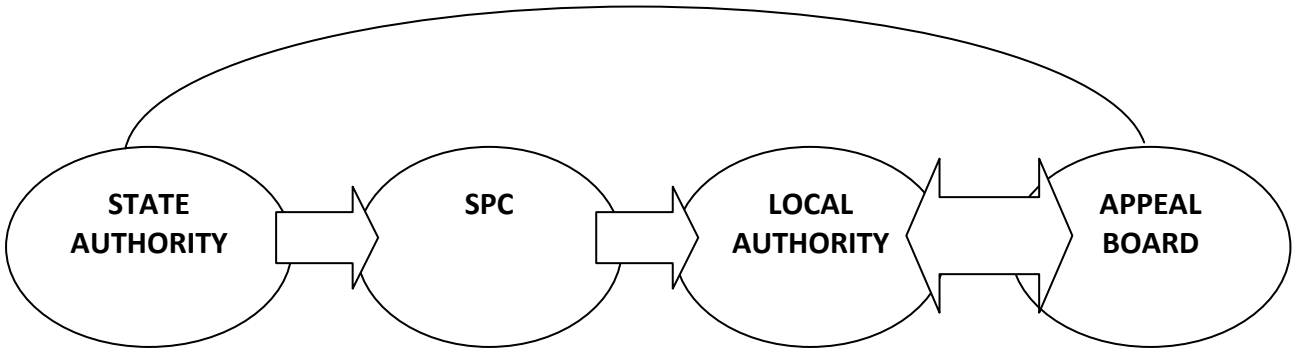
5. Reading Section 36(2) and 36(15) TCPA together, it appears also that the Appeal Board does not only have its' Board members appointed by the State Authority but is regulated procedurally by the State Authority. Compounding this with the intent of Section 3 TCPA (the State Authorities responsibilities) and the Board's powers under Section 23(3) TCPA, it would appear, in my humble opinion, a clear separation of autonomous

power for the Appeal Board to operate **outside** the 3 tier planning hierarchy and be deemed the 4th and 'final planning tier' within the State.

6. In hearing an appeal the Board, as the 4th and final apex of a Planning Permission application within the State, would ensure that the State Authority's general planning, development policies and guidelines are applied in a legal, fair and proper manner by the Local Authority. The finality of the Board's decision within the administration of planning in a State is seen in Section 36(13) TCPA which reads:-

***Section 36 (13)**:- An order made by the Appeal Board on the appeal before it shall be final, shall not be called into question in any court, and shall be binding on all parties to the appeal or involved in the matter.*

To Illustrate:-



A NEIGHBOUR'S RIGHT IS AS GOOD AS THE LANDOWNER

- A RIGHT TO BE HEARD & TO APPEAL -

A Neighbour's right to be heard or appeal is not a mere common law right or established under the laws of equity. It is a substantive Statutory right that cannot be abrogated. Justice Gopal Sri Ram in the Court of Appeal case of **Majlis Perbandaran Pulau Pinang v Lembaga Rayuan Negeri Pulau Pinang & Anor [2005] 4 CLJ 885**, said:-

'*...the right of appeal is not a common law right either as a matter of private or public law. It is a creature of statute. If it is not given then it does not exist. And once given, it is a substantive and not a mere procedural right.'*

By means of Statute, it is expressly clear that:-

1. If the land in which Planning Permission is applied for lies in an area where there is no Local Plan (on the Penang Island, that would be the **Penang Island Local Plan 2020** which has yet to be gazetted for now) in place, neighbouring land owners have a statutorily enshrined right to object to the said application. In short, a Neighbour has a right to be heard. See Section 21(6) TCPA which reads:-

Section 21(6):- *If the proposed development is located in an area in respect of which* ***no local plan exists for the time being****, then, upon receipt of an application for planning permission, or, where directions have been given under subsection (3), upon compliance with the directions, the local planning authority shall, by notice in writing served on them,* ***inform the owners of the neighbouring lands of their right to object*** *to the application and to state their grounds of objection within twenty-one days of the date of service of the notice.*

2. The definition of a **Neighbour** [used invariably throughout this paper as a reference to the 'public'] is as defined in Section 21(8) TCPA which reads:-

Section 21(8):- *In this section, "neighbouring lands" means -*
(a) lands adjoining the land to which an application under this section relates;
(b) lands separated from the land to which an application made under this section relate by any road, lane, drain or reserved land the width of which does not exceed 20 metres and which would be adjoining the land to which the application relates had they not been separated by such road, lane, drain or reserved land;

(c) lands located within a distance of 200 metres from the boundary of the land to which an application under this section relates if the access road to the land to which the application relates is a cul-de-sac used by the owners of the lands and owners of the land to which the application relates.

It is worth to note that even before the enactment of the TCPA, Malaysian Courts long recognised the rights and have given legitimacy to the locus of a Neighbour to object or have his views considered before development takes place on an adjoining land.

Illustrated in cases such as **Wellesley v Yegappan [1966] 2 MLJ 177,** where the Municipal Council of Province of Wellesley allowed an individual to voice his objections to the development plan submitted by his neighbour, and **Tok Jwee Kee v Tay Ah Hock & Sons Ltd and Town Council, Johore Bahru [1969] 1 MLJ 195** where the Lord President of the Federal Court, Tun Suffian essentially recognised public participation of a Neighbour in a development plan application before the Johore Baharu Town Council.

After the coming into force of TCPA, the Supreme Court in **Datin Azizah Bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur & Ors [1992] 2 MLJ 393** had even quashed a Planning Permission granted by the Mayor of the Federal Territory (who had argued that the **Federal (Territory) Planning Act 1982** had repealed **Rule 5 of the Planning (Development) Rules 1970** on whether a neighbour had a right to object to a development application.

The quashing of the Planning Permission was solely for the DBKL's failure to give notice to an adjoining land owner about the application for Planning Permission and recognised a Neighbour's right of participation.

The 1992 decision of Datin Azizah, brought about the amended **Planning (Development) (Amendment) Rules 1994 for the Federal Territory** by the DBKL which recognised public participation but limited only in cases of increase of density and change of land use.

It turned out that, in Kuala Lumpur this limited restriction of public participation left much to be desired in terms of public interest as seen in the Gasing Heights case; but shall be a topic reserved for a discussion in another forum. See Justice Aziah Ali's in the High Court of Kuala Lumpur's decision in **Judicial Review No: R1-25-137-2008 (Ramachandran Appalanaidu & 107 Ors v Dato Bandar Kuala Lumpur & Gasing Meridien Sdn Bhd)**, confirmed by the Court of Appeal in **[2012] 1 LNS 625**.

To note, Section 21(6) TCPA is not applicable to the Federal Territory of Malaysia as established in the Gasing Heights case **[2012] 1 LNS 625;** where it was found that Section 21(6) TCPA is inconsistent and inferior to the Federal (Territory) Planning Act 1982.

This is clearly distinguishable from Penang where the TCPA is all-sovereign.

However, in or around the same time as the Court of Appeal's decision on Gasing Heights in 2011, the Penang High Court had decided that a Neighbour had no rights to participate in Planning Permission appeal where the Landowner/Developer is the Appellant before the Appeal Board.

- A RIGHT TO APPEAL -

Procedurally described above, once a Local Authority makes a decision on a Planning Permission application, a Neighbour has a statutory right to appeal to the Appeal Board against the decision of the said Local Authority; should he be dissatisfied with the decision. Statutorily:-

1. This is unequivocal under Section 23(1)(b) TCPA.

2. At this juncture, we pause to note that, within the confines of the TCPA **alone** there appears to be no **express** provision as to the rights of the Neighbour to participate before the Appeal Board; in a case where a Landowner/Developer appeal against the decision of a Local Authority in

dismissing the Planning Permission application or attaching conditions to the said Planning Permission application [an appeal under Section 23(1)(a) TCPA].

> ***Section 23 (1)****:- An appeal against the decision of the local planning authority made under subsection 22(3) may be made to the Appeal Board within one month from the date of the communication of such decision to him, by-*
>
> ***(a)*** *an applicant for planning permission aggrieved by the decision of the local planning authority to refuse planning permission or by any condition imposed by the local planning authority in granting planning permission; and*
>
> ***(b)*** *a person who has lodged an objection pursuant to subsection 21(6) and is aggrieved by the decision of the local planning authority in relation to his objection.*

Reading Section 21(6) and (8) TCPA, which expressly recognises a Neighbour's right to participate and be heard at the decision making stage of the Local Authority; it would appear that a 'natural equation' can be drawn that a Neighbour would similarly have a chance to participate and ventilate his same objections before the Appeal Board. The Appeal Board being the final forum/arbiter that decides whether the Local Authority correctly refused the Planning Permission.

This opinion of 'natural equation' was found to be incorrect in the Penang High Court in **Judicial Review: 25-88-11/2011 (Palmex Industries Sdn Bhd v Lembaga Rayuan Pulau Pinang & Ors)** where:-

1. The learned High Court Judge quashed a decision of the Penang Appeal Board allowing Neighbours to participate in an appeal by the Developer before the Board.

2. In quashing the Board's Award, the High Court also awarded 'damages' to the Developer, payable by the Neighbours.

3. The learned High Court Judge has thus far prepared no written grounds. However, *ex tempore* grounds read out to Counsels present, and graciously relayed to me by learned Counsel for the Neighbours, Mr. C.K. Ung centres on His Lordship's reasoning that:-

   (i) The (then) Appeal Board Rules 1989 did not provide a requirement for the Registrar to serve a copy of the Developer's (Appellant) Notice of Appeal against the Local Authority on the Neighbour(s);

   (ii) Thus the Neighbours cannot be recognised to have *locus standi* or right to participate and be heard before the Appeal Board.

The newly gazetted **Rule 10(d)**, **12** and **16(c)** to the Appeal Board Rules 2015 has, hopefully now, laid to rest concerns of Neighbour(s) emanating from the Palmex decision.

It is now without any doubt, established under the Board Rules, that a Neighbour has equal rights to be heard and participate in an appeal before the Appeal Board, as follows:-

(i) **Rule 10(d)** of the 2015 Rules provides that the Registrar of the Appeal Board must serve a copy of the notice of appeal on all Objectors (Neighbours) who is not an Appellant.

(ii) **Rule 12(1)(a)** of the 2015 Rules provides that a Neighbour who is not an Appellant, has 14 days to inform the Registrar whether he intends to be heard in the Appeal.

(iii) **Rule 16(c)** of the 2015 Rules provides that a Neighbour who is not an Appellant shall be entitled to be heard during the appeal provided Rule 12(1)(a) and (b) has been complied with and that the manner of his participation is always subject to the discretion of the Board.

PROCEEDINGS BEFORE THE BOARDS

- DISCOVERY OF DOCUMENTS -

Moving on to proceedings before the Board, a Neighbour either in the capacity of an Appellant or an Objector often faces one extremely big hurdle. That is to obtain documentary evidence.

In most cases, a Neighbour's would be limited and confined to the contents and documents found in the Record of Appeal prepared by the Local Authority.

There would be, in most cases, no ready access to other pertinent or relevant documents to the appeal such as Guidelines behind a certain decision of the Local Authority, Environmental Impact Assessment Report, Traffic Impact Assessment Report or Geo Technical Reports submitted to the Local Authority by the Landowner/Developer; to name a few.

In a paper published in the International Journal of Humanities and Social Science Vol. 1 No. 3; March 2011 titled '**Access to Public Participation in the Land Planning and Environmental Decision Making Process in Malaysia'** Professor Ainul Jaria Maidin referred to Dato' Goh Ban Lee's observation in **'Urban Planning in Malaysia History Assumptions and Issues (Malaysia, Tempo Publishing, 1991) p.106'** and commented that:-

> *'...In Malaysia there are two problems faced related to information. One is the* ***lack of information*** *and there are n****o other effective methods for providing information****. The public often faces difficulty in accessing the relevant information. The planning register is often not available for public viewing. The planning authority considers it as their prerogative either to release or withhold any information. The plans prepared by the planners, use technical planning jargons that are difficult for laypersons to comprehend. The public is often unaware of the preparation of the plans except by advertisements in the daily newspapers. As such people living in rural areas are not aware of the existence of such plans and will not be able*

to provide their views, which are very relevant. The public is also have problems in accessing reports and studies commissioned by the government where useful and specialised information relating planning and environmental aspects are gathered. Internet facilities are not fully utilised to provide useful information to the public. Thus, the planning officials must devise methods to dissemination of relevant information to the public in order to promote effective public participation...'

In 2015, before the Appeal Board of Penang two cases namely, LR/PP/5/2015 and LR/PP/20/2015, had Neighbours adopting the provisions of the Rules of Court 2012 and filing applications for production and discovery of Plans and documents necessary for the ventilation of their appeals. Only through and after this means of discovery applications, were various Plans and Guidelines that were not included in the initial Record of Appeal(s) saw light before the Board.

Today, the amended Appeal Board Rules 2015 has made it easier for a Neighbour to seek production or access to documents for purposes of the appeal proceedings in the following manner:-

1. **Rule 6(4)** of the Rules now dictates that a Neighbour who is an Appellant must request from the Local Authority, within 14 days from his Notice of Appeal being filed, the documents that he so wishes to be included in the Record of Appeal (to be prepared by the Local Authority).

2. **Rule 11(b)** of the Rules also imposes an additional duty on the Local Authority to liaise with a Neighbour on the information and documents that are deemed necessary by the Neighbour to be included in the Record of Appeal.

3. **Rule 12(1)(c)** of the Rules allows a Neighbour who is not an Appellant and merely participating in the appeal, to have at hand and in advance all plans and documents relied in support by the Landowner/Developer.

- SUBSTANTIVE RIGHTS OF A NEIGHBOUR -

[Examples/Scenarios are loosely based on actual appeals before the Board]

On the substantive rights of a Neighbour, my humble opinion is that before the Board (or in fact even at the stage of the Planning Permission being deliberated upon by the Local Authority) a Neighbour only expects and ought to be given two things:-

a. an assurance that the Local Authority adopts **certainty in policy making;**

b. as assurance that the Local Authority applies **certainty in implementing such policies.**

Succinctly put, a Neighbour would expect and should have the comfort to trust that his legitimate expectation of the Local Authority's treatment of a Planning Permission preserved.

In Malaysia, our Civil Courts have long recognised the existence of legitimate expectation of a Neighbour.

This 'right' of expectation against or of the Local Authority is not only in respect of the procedure of how a Local Authority exercises their functions in accordance to Law, but also in respect of the reasonableness of the final outcome of such decision.

In particularity here, are situations where, for example:-

(1) The Local Authority suddenly departs or reneges from a previously made decision/directive in respect of guidelines or method of applying guidelines, and proceeds to grant Planning Permission;

(2) The Local Authority fails to give adequate notice to affected persons when it comes to matters affecting the entire locality such as increased density or change of land use [crucially in Penang where the Penang Island Local Plan 2020 has yet to be gazetted and in place]; or

(3) The Local Authority suddenly 'challenges' an element of procedure, policy or jurisdiction of an institution; when it has not done so for the past 25 years.

Justice Edgar Joseph Jr held in the Federal Court Judgment of **Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65** that it is a legitimate expectation for a Local Authority to give notice [which in my view ought to be given to all affected persons] when a previous decision of the same Local Authority is being reneged upon:-

> *'...The concept of legitimate expectation has not only an impact on procedure but also a substantive impact. In the circumstances, the Court of Appeal was right when, touching upon how the legitimate expectation of the Society had a procedural impact, the court held that the Council should have given advance notice of its intention to impose the disputed condition because the rules of natural justice demanded it. As a matter of fairness, reasons should have been given by the Council as to why it was imposing the disputed condition and thus resiling from the original approval of planning permission which was free from any pricing condition...'*

In fact, Justice Edgar also observed:-

> *'...The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current development towards an increased openness in matters of government and administration. But the trend is proceeding on a case by case basis (R. v. Royal Borough of Kensington and Chelsea, Ex p. Grillo [1996] 28 HLR 94), and has not lost sight of the established position of the common law that there is no general duty, universally imposed on all decision-makers.*
>
> *It was reaffirmed in Reg. v. Secretary of State for the Home Department, Ex p. Doody [1994] 1 A.C. 531, 564, that the law does not at present recognise a general duty to give reasons for administrative decisions. But is it well established that there are exceptions where the giving of reasons will be*

required as a matter of fairness and openness. These may occur through the particular circumstances of a particular case…'

Public bodies, Authorities and Administrators ought to take heed of Justice Edgar's observation 16 years ago that there is a crucial need for giving 'reasons' of a decision, sustainable or otherwise, especially when it involves a departure or change of a previous position by such body, Authority or Administrator.

Public perception being the natural consequence of public participation in planning, demands the need for openness, fairness and the right to be informed.

A Local Authority ought to as a matter of standard method of practice or procedure give reasons when it departs or renege from a previously taken position or especially when its' decision affects an entire locality/public interest as whole; such as allowances of increased density applications.

In another case, Justice Ramly Ali in **Tunku Nadzaruddin v Dewan Badaraya Kuala Lumpur [2003] 5 MLJ 128** referred to legitimate expectation in this discussed context as follows:-

'*There are two forms of legitimate expectation, namely, the applicant is capable of having a legitimate expectation of a right to be heard before a decision is made (procedural legitimate expectation), and the applicant is also capable of having a legitimate expectation that the first respondent when making his decision, will not renege on his previous assurance of reverse his previous policy (substantive expectation)…'*

To paraphrase the famous words of Lord Hewart CJ in **R v Sussex Justices, Ex parte McCarthy [1923] All ER Rep 233**, that justice must be seen to be done; at the stage of a Planning Permission application and/or before the Appeal Board, accountability of the Local Authority must not only be practiced but must also be seen to be practiced.

Not only does a lack of reason give rise to unsavoury thoughts in the minds of the Neighbour/Public, but it would also give rise to an unfair scenario where wrongful perception or judgment is casted upon the Local Authority's integrity and conduct by the Public.

- ACTUAL GRIEVANCE -

More often, than expected, a lack of understanding of the conditions and technical planning jargons imposed on a Planning Permission causes Neighbour(s) to object or file appeals to the Appeal Board. Compounding the above, a lack of access to and communication with the Landowner/Developer often causes misunderstandings in the minds of the Neighbour.

Invariably, a Neighbour may not even be aware that his actual grievance or concerns have already been catered for and/or addressed by way of conditions imposed on the Planning Permission itself or subsequent construction Plans.

For example:-

1. A Neighbour's objects that flooding may occur on his land if a development next door takes place. In the planning deliberation stage of the Local Authority, there was no Earthwork Plan or Road & Drainage Plan simply because those documents would not have been ready at the stage the Planning Permission was applied for [when a Neighbour launches his first objections under Section 21(6) TCPA].

2. Practically, if Planning Permission is then granted, the Neighbour would most likely file an appeal where he is notified by way of a 2 page letter stating that the Landowner/Developer's Planning Permission has been approved.

3. Ensuing from that, the Neighbour finds himself engaged in months of proceedings and case managements before the Board; only to subsequently realise that it was at all times a recommendation by the Local Authority's technical department and subsequently made a condition in the approved Earthwork Plans for a proper drainage system to be constructed catering to his land's catchment area.

Hereon, **Rule 6(4)** and **11(b) & (c)** of the Appeal Board Rules 2015 serves to effectively promote engagement/communication and disclosure of documents and/or plans between all parties. The Local Authority, the Landowner/Developer and the Neighbour(s) would thus be better able to sieve out misunderstandings of one another and get to the real grievance of the 'other' party.

In such scenario, the Local Authority must actively strive to not only play the role of 'approver' of the Planning Permission, but also take on a supervisory role on the development works and/or to assist the Board in addressing issues raised by affected parties.

To relate to the example given above:-

4. The Local Authority must at its' very first opportunity notify the Neighbour as to the prohibition or condition imposed on the Earthwork Plan.

5. Next, the Local Authority ought to ensure that the Landowner/Developer does indeed comply with such the condition imposed. Thus putting an end and assisting to resolve a pending appeal before the Board.

6. The Local Authority should not instead deem that the previously imposed planning condition/prohibition against the Landowner/Developer is suddenly ineffective and that the Landowner/Developer need not slavishly comply with such a condition; just because the Neighbour is challenging the Local Authority's decision before the Board.

At this juncture, it is opportune to clarify that the presumption given in the title of this paper, *'Local Authority vs Appellant',* is rather incorrect.

Before the Board, a Local Authority should not be *'against* or *vs'* the Appellant. It should never be the case nor has it ever been implied or expressed in any case authority or Statute that a Local Authority must take an adversarial stand against the Neighbour, *vice versa*. In fact, looking at **Rule 16(e), (g)** and **(h)** of the 2015 Rules and Section 36(10) TCPA together, the Board is an inquisitorial Board needing not adversaries before it.

Objectively, what is only expected of the conduct of the Local Authority by the Neighbour/Public in proceedings before the Board, is as Justice VT Singham in **Ah San v Majlis Bandaraya Ipoh [2005] 7 CLJ 473** held:-

> *'…The Majlis Bandaraya as a Local Authority is under a duty to act fairly to all parties and not at their whims and fancies or for an ulterior object and in total disregard to the written law. The Officers of the Majlis Bandaraya must act in accordance with natural justice, equity and good conscience in the performance of their statutory duty under the Local Government Act and subsidiary Legislations.*
>
> *…Rate payers have a legitimate expectation that the Local Authorities will act fairly, and not arbitrarily and not inconsistently towards them so as not to have a discriminatory effect upon any of them if it is found that it is accompanied by an element of unfairness or infringement of a land owner's right…'*

RECOMMENDATIONS

In ending this paper, I humbly present the following recommendations to further the rights and interest of Neighbour(s), namely:-

1. That the planning principles and concept of notification to neighbouring land owners under Section 21(6) Town and Country Planning Act 1976 is maintained and consistently enshrined in the Local Plan;

2. That it is made mandatory for the Local Authority to include within the Record of Appeal, a copy of the original approved A0 size KM Plan with the technical department comments;

3. That Rule 15 of the Appeal Board Rules 2015 be amended to include the notification of the Appellant and Objectors of the first case management date before the Appeal Board; irrespective of whether the Record of Appeal has been prepared and completed by the Local Authority; and

4. That the number of sittings of the Penang Appeal Board be increased until the Penang Island Local Plan 2020 is gazetted and in place.

****** END *****

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