PLANNING APPEAL BOARD

– THE WAY FORWARD

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In many developed countries, planning law is both a fertile and a complex field of practice for planners, architects, and lawyers. In those places, development is not just a big business only for developers and contractors. City, urban & rural planning is a serious business, and a big business, for the professionals too.

It is not yet so, in Malaysia.

Gathered in this room are several distinguished scholars in planning law, including some of my learned colleagues in Penang and from Selangor and Perak, who will be able to spearhead a more rapid development of planning law in this country, and soon give it the prominent seat it deserves, across the various professional disciplines that it straddles.

Purpose/Objective of planning law

When owners of neighbouring lands appeal to the Appeal Board, their aim is usually to stop a development, or to alter an aspect of it. When they succeed, and obviously sometimes they do, they will hail the fact that a development is stopped or modified. They will say that justice is served, from their point of view.

But it must be appreciated that the purpose of planning law, and the function of the Board, is **NOT** to prevent or hinder development. The objective is also **NOT** to preserve the status quo, generally speaking, with exceptions such as in the case of heritage preservation.

In fact, planning law proceeds on the very presumption that development is inevitable, necessary, and desirable.

Rather, the objectives of planning law **include** the following:

- To regulate and manage proper and sustainable development, for both the current and future needs of a society
- To promote better urban and rural living
- To ensure equality of treatment of planning applicants and other interested parties
- To correct any irrationality, impropriety, unreasonableness or disproportionality in decisions made by local planning authorities
- To ensure that, in the process of decision-making, the competing interests of different parties are taken into account, together with public interest.

Planning law is therefore pro, rather than anti, proper development.

Role/Function of the Appeal Board

The primary role of the Appeal Board is to uphold planning law, when reviewing disputed decisions of local planning authorities that come before it, in order to see if the decisions are properly made in accordance with planning law – e.g. whether they pass the *Wednesbury* reasonableness test. I use the phrase 'disputed decisions', because the vast majority of decisions made by local planning authorities are not disputed, and do not come before the Board at all.

It is important to realise that it is **NOT** the role of the Board to make planning policies of its own, or to set aside or modify a planning policy (made by planning authorities) with which it disagrees; except where a policy (or its interpretation or implementation) infringes some aspect of planning law.

Planning law is wide in scope, flexible, and constantly evolving. Staying within the framework of its role and jurisdiction, the powers of the Board are wide indeed. That is the legislative intention – as exemplified by section 36(10)(g) of the Town & Country Planning Act 1976, which empowers the Board to *"make any order* ***whether or not provided*** *for by, and* ***not inconsistent with****, this Act"* [emphasis supplied].

A few issues relating to the functioning of the Board

Within the limited time allocated to me for this short presentation, I will only be able to briefly highlight a few issues concerning the functioning the Board, which may be interesting to the professionals and to members of the public.

The right of owners of neighbouring lands to appeal to the Board exists only where there is no local plan. I am aware that there are many who lament that there is no local plan yet, in Penang. I trust they know that, as soon as a local plan comes into place, only planning applicants and developers whose applications are rejected by the local planning authorities will be able to file appeals to the Board. No neighbouring landowner will be entitled to file an appeal to the Board against an approved planning-permission. This category of appeals (by neighbouring landowners) currently forms about 70% of all the appeals heard by the Board. Reducing the number of appeals by about 70% would be music to the ears of the members of the Board, work-load wise, if that is what the people in Penang as a whole desire.

Is the process before the Appeal Board adversarial or inquisitorial in nature? Or is it a combination of both? The Board has so far not had the occasion where it needs to make a decision on this issue. I am inclined to think that it should be a combination of both adversarial and inquisitorial processes; but this question has to be answered on another day.

Proceedings in the Appeal Board are judicial in nature. Some would insist that they are quasi-judicial; but with little difference in terms of its implications. Natural justice must be observed, at the price of inevitably lengthened proceedings. Affected parties, though not named in an appeal, ought to be given the opportunity to be adequately heard. The practice of the Board is to place merits above technicalities.

Is the appeal-structure to the Board a continuum of the statutory scheme laid down in the Act, by which a decision can be arrived at, either to approve or reject a planning application, and (if granted) on the conditions which may be attached to it? This is another interesting question which the Board will answer, if and when an appropriate opportunity presents itself in the future. Its significance concerns whether a successful planning applicant would have acquired a vested right to develop when his application is approved by a local planning authority notwithstanding an appeal having been made to the Board within the time allowed; or if the right is vested only upon the determination of such an appeal(in the planning applicant's favour).

A constant task of the Appeal Board in every case it has to decide is to balance competing interests of the parties involved. This is oftennot easy, as the House of Lords had acknowledged in *South Bucks District Council v Porter* [2003] UKHL 26 @ para 20:

> *"I do not pretend that it will always be easy in any particular case to strike the necessary balance between these competing interests, interests of so different a character that weighing one against the other must inevitably be problematic."*

The local planning authority is always the respondent in every appeal coming before the Board. In an appeal by a planning applicant, a neighbour-objector (if there is one) is an'unnamed party'. In an appeal by a neighbour-objector, the planning applicant becomes an'unnamed party'. But there is another important, unnamed and invisible party that the Board has consistently recognised – namely the public at large. Planning law is never divorced from public interest. When the Board balances competing interests, or determines an appeal, public interest is never far from its sight and its mind.

Very recently, a local planning authority appears to be mounting an argument that, either generally or in some circumstances, the Appeal Board is not entitled to take into account public interest. The Board will soon be hearing full arguments on this 'new' matter never before raised by anyone; and will render its decision thereafter.

Lately as well, there has been an apprehension expressed by some that, if the Appeal Board sets aside a planning permission granted by a local planning authority, that planning authority or the State Government may be liable to pay damages to the planning applicant for its loss of the development.

I wish to, emphatically, correct this misapprehension. An appeal to the Board from a decision of a local planning authority is a right and a procedure provided by statute; and the Board is expressly empowered by the Act (among its other powers) to set aside a planning permission where it deems fit to do so. **No issue of damages can arise**, as a consequence of the outcome of a statutory appeal procedure.

The misconception might have come from a confusion with the provisions of section 25 of the Act. That section deals with a totally different scenario – where a local planning authority

itself revokes its own earlier decision in the grant of a planning permission. That section has nothing to do with the situation where a planning permission granted by a local planning authority is set aside or altered by the Appeal Board.

Impartiality of the Appeal Board

Impartiality is a *sine qua non* for any judicial or quasi-judicial body. The Appeal Board jealously guards and maintains its impartiality at all times. It is beholden to no one and to nothing, except to planning law and the dictates of justice. It is influenced only by sound arguments, just law, and the facts of a case.

An impartial mind is an open mind. But, as Bertrand Russell had warned, *"an open mind must not be confused with an empty mind"*.

When a decision of a local planning authority is overturned by the Board, some are quick to see it as a revelation of an error that has been committed by the planning authority or by the State Government. I would suggest to you, ladies and gentlemen, that it is in fact the opposite. When the Board from time to time differs from the local planning authority and overturns the latter's decision, it is testimony of a healthy system that is functioning well. And such a system is made possible by a State Government that is willing to set up and maintain an independent mechanism of check-and-balance, and to allow it to function independently and impartially. This is testimony of the strength, and not a weakness, of the State Government.

The way forward for the Appeal Board in Penang

I have identified a few matters relating, directly or indirectly, to the functioning of the Appeal Board, to which attention should be given, and for which action is required. I will briefly mention them here.

Currently, the average time taken for an appeal to be determined by the Board is certainly not expeditious enough. This is because the Board does not operate full-time. Both the Chairman and the Deputy Chairman are busy legal practitioners, who are only able to perform their tasks at the Board on a part-time basis. The longer-term solution is for the State Government to identify suitable candidates who would be able to head a full-time Appeal Board which can conduct hearings at least 15 full days in a month, until all backlogs are cleared. Thereafter, the extent of the need for a full-time Board can be reassessed. Whenever this suggestion can be implemented, I will be ever ready to step aside, after completing any part-heard cases.

In the past few years, in almost all the appeals lodged by neighbours/objectors, the respondent (local planning authority) has adopted an approach of taking a backseat and largely leaving it to the planning applicant to justify the grant of the planning permission that was being challenged. That is not a satisfactory state of affairs. A respondent is the primary party who has to justify the decision it has made in granting a planning permission. A planning applicant will no doubt also seek to argue that the planning permission is rightly

granted; but in so doing it approaches the matter from a dissimilar perspective – one that pays far less heed (than would a local planning authority) to issues of public interest.

It is hoped that, from now on, local planning authorities will start to take a lead role at the Appeal Board, in defending the decisions it has made.

There is a need for state assemblymen, city or town councillors, planners, architects, officers, personnel and other persons involved in the various committees and departments which are concerned with the process of coming to a planning decision, to strengthen their knowledge of planning law. To cite an example: there seems to be a widespread belief that, as long as the relevant planning guidelines are complied with, one needs to go no further. This is not a correct understanding of the law. Uncritical application of policy guidelines is often not a complete answer to the more complex questions concerning the propriety, reasonableness or proportionality of a planning decision.

In *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-samaServaguna Sungai Gelugor*[1999] 3 MLJ 1, the Federal Court had the following to say:

> *"The statutory requirement in s 22(2) of the Act 'to take into consideration' the provisions of the Development Plan does not mean that the local planning authority must slavishly comply with it"* [@ p.51G]
>
> *"In the field of planning law, the Court must remind itself of the* ***fluid nature*** *of statutory purposes, and not to restrict itself by giving* ***undue weight to the original intention of Parliament****"* [@ p.78A, emphasis added]

In *Westminster City Council v Great Portland Estates PLC* [1985] 1 AC 661@ 674B, the House of Lords remarked that: *"Development plans are no inflexible blueprint establishing a rigid pattern for future planning control. Though very important, they do not preclude a local planning authority in its administration of planning control from considering other material considerations."*

In the hierarchy of importance, development plans (i.e. structure plans & local plans) rank higher than policy guidelines. Yet the highest courts both in Malaysia and in the United Kingdom have cautioned against treating them as being cast in stone. What more with guidelines.

The State might want to look into the possibility of setting up a limited-scope legal-aid fund, to assist deserving and impecunious parties to engage counsel to represent them at the Appeal Board. This will address situations where one party is ably represented and another is not.The feasibility of such a scheme, of course, needs to be further studied.

Appeals by neighbours-objectors to the Board are likely to be considerably reduced, if planning applicants and developers, at the application stage, make much greater effort to consider and accommodate the neighbours' viewpoints, when objections are received at the enquiry stage before the local planning authority. I believe that currently most of them will only do so if directed by the local planning authority. That does not have to be the case, because frequently, though obviously not in every instance, creative ways can be found (e.g. in their layout or design) to accommodate or allay the neighbours' fears or concerns, without

any significant negative impact on what the planning applicant wishes to do, or on its projected profits.

In the application process, planning applicants may be well-advised not to take 'short cuts' which could provide an additional ground of appeal to the Board and take them onto a longer route instead. This sometimes happens with regard to the submission of a very substantially amended plan, and for it to be treated within the same application and not as a fresh application; while objectors are not notified of the same and not given an opportunity to comment on the vastly amended plan. Before the Board, a legal argument can be mounted that a decision made by the local planning authority in such circumstances suffers from procedural impropriety, and breaches natural justice. A developer who pursues such a 'short cut' may end up doing itself a disfavour.

Related to the issue last-mentioned is that developers and local planning authorities might like to consider the possibility of having submission of alternative layouts in a single planning application, right from the start. However, the legal aspects of this idea need to be further examined.

Stricter law enforcement will, in my view, help to reduce the number of disputes brought to the Appeal Board. Take traffic issues for instance. Complaints of traffic congestion in an area during peak hours, when investigated, sometimes reveal that they are not due to inadequacy of physical infrastructure. Rather, it is often due to the poor level of civic consciousness, complemented by the lack of strict law enforcement – such as the all-too-frequent phenomenon of double-parking or triple-parking, or other forms of unlawful obstruction of traffic – which cause otherwise adequate infrastructure to fail to cope.

Therefore, hand-in-hand with stricter law enforcement, there has to be more public education on planning issues and citizens' responsibilities in law-compliance. NGOs that are vocal in planning issues must at the same time take the initiative to regularly educate the public that good planning will not be effective if a large portion of the public continues to disregard legal regulations.

I hope I have been able to provide you with some fruits for thought regarding planning matters and the work of the Appeal Board, which could be further discussed during the course of today.

I suspect that I have overstayed the time allocated to me; and so I shall end here. There is a lot of work to be done, by all of us, in the months to come. I thank all of you for the kind attention you have generously given me; and I wish you a fruitful and enjoyable day of seminar ahead.

Thank you.