

Sarden of Knowledge and Virtue

The Dispute Resolution Mechanism in the Town and Country Planning System in Malaysia:

An Analysis and Suggestions for Reform Ainul Jaria Maidin

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Introduction

Town and Country Planning Act 1976 provides that in the event if a person is aggrieved with the decision of the local planning authority, appeal can be made to the appeal board.

The appeal board is an administrative tribunal, established by law externally from the judicial system which sits and decides on questions of fact and law in determining disputes between individuals and government department or between individuals.

Establishment of planning appeal board

establishment of an appeal board to hear all disputes arising from the decision of the local planning authorities in the course of administering the planning decision making and development control system.

Administrative tribunal

Members of appeal board

- A State Authority may by notification in the State Gazette, with the concurrence of the Minister, appoint a Chairman and a Deputy Chairman of the Appeal Board, being persons who have had judicial experience or other suitable qualifications and experience.
- Chairman and a Deputy Chairman of the Appeal Board, are appointed from persons who are or have been judges or advocates and solicitors of the High Court or members of the Judicial and Legal Service of Malaysia or who have had judicial experience or other suitable qualifications and experience.
 - S 36(2)(a) of the Town and Country Planning Act 1976.

Conduct of proceedings

Town and Country Planning Act 1976 (Appeal Board) Rules 1989, regulates the functioning of the Appeal Board.

Jurisdiction

- Planning permission is refused or granted subject to conditions. The applicant for planning permission as well as objectors (where applicable) have the right of appeal;
- Revocation or modification of planning permission or building plan approval previously granted by the local authority. This right is with regard to the amount of compensation to comply with the notice. There is no right of appeal against the revocation or modification order itself;
- right to appeal against the notice and the amount of compensation to recover the costs and expenditure due to depreciation of the value of property arising from effect of issuance of requisition notice.
 - Right of appeal against:
 - a tree preservation order;
 - the amount of compensation awarded with regard to such orders; and
 - an order to replace trees removed in contravention of the Act

Who can seek recourse from Appeal Board

- An application to an Appeal Board is limited to persons who are aggrieved by the decision of the local planning authority.
- Applicant for planning permission and adjoining neighbours who have made objections pursuant to section 21(6) TCPA 1976 have the right of appeal against the revocation or modification of planning permission or building plan approval previously granted by the local authority.
- There is no right of appeal against the revocation or modification order itself. This right is with regard to the amount of compensation to comply with the notice

Conduct of an Appeal by Appeal Board

- Appeal Board is required to hear the appellant and the local planning authority.
- The Board has a right summon and examine witnesses, can require any person to bind himself by an oath to state the truth.
- The Board may compel the production and delivery of any document that it considers relevant or material to the appeal.
- Upon hearing all the evidence and witnesses, the Appeal Board may confirm, vary or reverse the order or decision appealed. The Appeal Board may also make any order whether or not provided for so long such an order is not inconsistent with, the provisions of the TCPA 1976.
- Every person summoned by the Appeal Board to attend its proceedings is legally bound to attend at the place and time specified in the summons.
- Every person required by the Appeal Board to produce or deliver any document to the Appeal Board or to any public servant is legally bound to produce or deliver the document.

Decision making powers of chairman

- Chairman makes decision of Appeal Board after considering the opinions of the other two members.
- Chairman is not bound to conform to the opinions of the other two members or either of them and he shall record his reasons for dissenting.
- chairman in arriving at the decision solely, unanimously or by majority is bound to comply with the rules of natural justice.
- Federal Court, held that the principles of natural justice are applicable to all cases where an individual is adversely affected by an administrative action, whether it is labelled 'judicial', 'quasi-judicial' or 'administrative', or whether or not the enabling statute makes provision for a hearing.

Compliance with Rules of natural justice

- Rules of natural justice must be complied with:
 - rule of 'audi alteram partem' (that no man shall be condemned unheard)
 - rule against bias (that the judge must be impartial and neutral in making his decision
 - Personal Bias
 - Pecuniary Bias
 - ■Policy Bias

Impartiality of decision

- Assurance to the aggrieved person of the impartiality of the decision maker since the decision of the Appeal Board is final and cannot be made subject to appeal to a court of law.
- However, if the person can prove that the members of the Appeal Board has acted unfairly by failing to observe the rules of natural justice, then an application to review the decision of the authority is available.

Powers of Appeal Board

- Appeal Board can overturn the decision of the local planning authority.
- It is often said that the powers of the Appeal Board is uncontrollable and it is the supreme decision making body in the land use planning decision making and development control process.

Case analysis

- Hwa Properties Sdn. Bhd. v Majlis Perbandaran Pulau Pinang
- applicant appealed against the direction of local planning authority to the Planning and Building Standards Committee.
- Appeal was rejected on the ground that the proposed development is not compatible with the draft local plan.
- The applicant appealed to the Appeal Board. The Appeal Board in allowing the appeal held that the additional population of an extra floor could not possibly cause loss of amenities and congestion.

Datastream Corporation v Majlis Perbandaran Pulau Pinang

- An appeal against the decision of the Penang Town Council to reject the application for planning permission by Datastream Corporation to develop a land in Paya Terubung. The reason for rejecting the appeal was based on the ground that the proposed development is hillside land, which is located within the Interim Zoning Plan. Further, the Penang Island Structure Plan and the Paya Terubung local plan clearly provides that that development in that area should not be permitted. Appeal Board allowed the appeal granted the applicant the permission to develop.
- This proves that the Appeal Board has wider powers compared to the local planning authority. The Board has decided against the development policies outlined in the structure and local plans.

- Richvale (M) Sdn Bhd v Majlis Perbandaran Pulau Pinang Appeal No.LR/PP/8/93
- Appeal Board allowed appeal by the applicant seeking to develop hillside land despite the clear prohibition in the development plans prohibiting developments in those areas.
- case demonstrated the discretionary powers of the Appeal Board in overruling any decision made by the local planning authority.
- Appeal Board demonstrated that they can make a decision incontravention of the planning policies incorporated in the development plans.
- Though power to grant permission to an application for planning permission is with the local planning authority, the discretionary powers of the Appeal Board is unfettered.

Extent of Powers of Appeal Board

- Appeal Board can make any order:
 - either to confirming the decision of the local planning authority, or
 - allow the appeal by directing the local planning authority to grant planning permission absolutely or subject to conditions,
 - allowing the appeal by setting aside any planning permission granted or 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 other conditions

Exclusion of Appeal to Court

- An order made by the Appeal Board on an appeal before it, is final and cannot be called into question in any court, and is binding on all parties to the appeal or involved in the matter. Town and Country Planning Act 1976 s 35(13)
- This means that there is no right of appeal against the decision of the Appeal Board.
- The word 'final' or 'final and conclusive' provided in a statute has been widely considered by the courts.

It has been uniformly held that they preclude any appeal to a court of law

Rationale for exclusion of appeal

Statutory provisions are designed to protect administrative orders and determinations against judicial review by describing them as final or by providing that no appeal or review will lie against the decision of administrative tribunals

Rationale for Judicial Review

- Courts should not be deprived of their supervisory jurisdiction.
- Court remains entitled to review the decision on the traditional grounds upon which an application for judicial review may be made.
- If decision is *ultra vires* because the decision maker did not have jurisdiction to make a decision, or because he misconstrued his powers, or because he acted in bad faith or contrary to the requirements of natural justice or because he took into account irrelevant matters or failed to consider relevant matters, then there is no 'decision' to which the statutory exclusion can apply.

- Pentadbir Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise [1979] 1 MLJ 135 (FC)
- Court is not an appellate authority that is vested with more powers than the approving authority but it is a judicial authority that is empowered to check as to whether the approving authority has acted in excess of its powers provided in the Act.

Zain Azahari Bin Zainal Abidin v Datuk Bandar Kuala Lumpur [1995] 2 CLJ 478

- court agreed that it is the function of the local planning authority, and not the court, to determine the planning of the city of Kuala Lumpur because they are best suited to carry out this task.
- It is the planning authority who should decide whether a planning approval should be granted or refused, as the planning authority has access to the information and material relevant to the decision making process. This affirms the fact that the court is not willing to disturb planning authorities' in matters related to planning applications.

Limited access to Appeal

Access to dispute resolution mechanism in the land planning system is limited to planning authorities and persons aggrieved by decisions made by the planning authorities.

group of persons allowed to make an appeal to Planning Appeal Board is limited

Any interested third parties and Non-Governmental Organisations ("NGOs") have no right to seek relief against the decision of the planning authorities irrespective of the harm that may arise from such decisions.

Environmental division in courts

- Malaysian judiciary, has established Environmental Courts that started operating throughout Malaysia since 10th September 2012.
- The Chief Registrar's Practice Direction No.3 of 2012, "The Establishment of the Environmental Court", provides as follows:
 - Environmental cases are assigned to the designated courts at the Sessions Court and the Magistrates' Courts level (42 Sessions Courts and 53 Magistrates' Courts).
 - ■Involving 38 Acts and Ordinances, 17 Regulations, Rules and Orders.
 - Environmental cases are being given priority. Special codes are

Environmental court

■ The present Environmental Courts only deal with prosecution of environmental offences and do not handle civil claims.

The Environmental division handle cases related to environment and planning appeals under the Town and Country Planning Act 1976 and Environmental Quality Act 1974 as well as from all other subsidiary and related legislation.

This division could hear planning and environment appeals from lower courts, especially the Magistrate and Sessions Court, which are the lower tier in the hierarchy of courts.

Comparative perspective

- George Pring and Catherine Pring, Greening Justice: Creating and Improving Environmental Courts and Tribunals (The Access Initiative 2009) 1.- over 350 specialized forum for resolving environmental disputes are now found in many countries in every region throughout the world.
- Nicholas Robinson, 'Ensuring Access to Justice Through Environmental Courts' (2012) 29 Pace Envtl L Rev 363, 381 (noting that informal estimates suggest there are over 400 ECTs throughout the world).

The surge in popularity of ECTs, and the concomitant benefits that have been experienced by stakeholders in jurisdictions that have established and utilized these specialized forum.

Way forward

- successful forums are those that have been established as a superior court (the LECA NSW)
- as a division of a superior court (Environmental Division of the Superior Court of Vermont)
- inferior courts (the Environment Court of New Zealand, the Planning and Environment Court of Queensland, and the Environment, Resources and Development Court of South Australia)
- tribunals with one or more environmental divisions or streams (eg the State Administrative Tribunal of Western Australia, the Victorian Civil and Administrative Tribunal or the Environment and Lands Tribunals of Ontario

- The goal of facilitating the just resolution of the real issues and proceedings is more difficult to measure.
- Harry Woolf, Access To Justice: Final Report To The Lord Chancellor On The Civil Justice System In England And Wales 2 (1996) identified a number of principles which a civil justice system should meet in order to ensure access to justice. The system should aspire to:
- (a) be just in the results it delivers;
- (b) be fair in the way it treats litigants;
- (c) offer appropriate procedures at a reasonable cost;
- (d) deal with cases with reasonable speed;
- (e) be understandable to those who use it;
- (f) be responsive to the needs of those who use it;
- (g) provide as much certainty as the nature of particular cases allows;
- (h) be effective: adequately resourced and organised.

Essential elements to improve decision making

- Knowledgeable and Competent Judges and members
- Input from technical expertise
- Provide Alternative Dispute Resolution Mechanisms
- Just, Quick, and Cheap Resolution of Proceedings
- Independent Judiciary
- Access to Public Participation
- Publicising of decisions of Appeal Board

Suggestions for Appeal Board

- The jurisdiction of Appeal Board need to be enhanced as a special forum can help promote achievement of sustainable development.
- The functioning of a specialist court has proved useful in resolving the disputes arising in the land and environmental areas.
- A specialist forum will be able to manage the special nature of the planning and environmental disputes as it involves scientific, geographical, and legal aspects. Involvement of experts from various disciplines is necessary to reach a fair and just decision.

Terima Kasih