Rethi Development Sdn Bhd v Majlis Perbandaran Seberang Perai

APPEAL BOARD (PULAU PINANG) — APPEAL NO LR/SP/29 OF 2009
YEO YANG POH CH, SHAROM AHMAT AND AMIRUDDIN FAWZI
16 DECEMBER 2010

Constitutional Law — Fundamental liberties — Equality before the law — Condition imposed in planning permission requiring at least 30% of units to be built be reserved for Bumiputra buyers 5% discounted price — Whether discriminatory — Whether contravening equality provisions — Federal Constitution art 8

Local Government — Town and country planning — Application for planning permission — Appeal against conditions imposed on planning permission — Condition that at least 30% of units to be built be reserved for Bumiputra buyers at 5% discounted price — Condition that planning applicant must provide plot of land for surau and contribute money in lieu of constructing surau — Whether conditions fairly and reasonably relating to planning considerations — Whether conditions unnecessary — Whether conditions running foul of 'Wednesbury reasonableness' test — Whether conditions ultra vires

Local Government — Town and country planning — Planning conditions — Validity — Criteria to determine validity of planning conditions imposed by planning authority

Local Government — Town and country planning — Planning considerations — Town and Country Planning Act 1976 s 21(3)(g) — Whether ambit of s 21(3)(g) unlimited — Conditions imposed must be necessary for purposes of planning

The appellant had in 1986 applied for ('the original KM application') and obtained planning permission ('the original KM') to develop its land. The development was to comprise four blocks of five storey walk-up flats ('the original development'). Pursuant to the original KM, the appellant had completed the construction of only two blocks of flats ('the completed portion'). In other words, the original development has only been partially carried out. The portion of the land upon which the remaining two blocks of flats were supposed to be built remained vacant ('the uncompleted portion'). In late 2008, the appellant submitted another application to the respondent for

planning permission ('the present KM application') to obtain the respondent's permission to change the type of buildings to be erected on the uncompleted portion, ie from two blocks of flats to terrace and semi-detached houses ('the alterations'). The respondent approved the alterations and granted the present KM application, subject to, inter alia, the following conditions: (i) that the appellant must reserve for Bumiputra buyers, at least 30% of the units it proposes to build, with a sale price at five per cent less than that for other buyers ('the *Bumi* lots condition'); and (ii) the appellant must provide an identified plot of land measuring about 4,500 sqft ('the *surau* site') and must transfer the *surau* site to the Majlis Agama Islam Negeri Pulau Pinang ('MAINPP') for a nominal sum of RM1. The appellant was also required to make a contribution of RM54,120 to MAINPP in lieu of its constructing the *surau* ('the *surau* condition'). The appellant appealed against the imposition of both these conditions. The appellant contended that the present KM application was not a new or fresh application for planning permission and thus the respondent was not entitled to impose such new or additional conditions. The appellant also argued that it had 'in spirit' fulfilled the *Bumi* lots condition because when developing the completed portion, it had already sold to *Bumiputra* buyers more than 30% of the developed and yet unbuilt units put together.

Held, allowing the appeal and directing the respondent to remove the *Bumi* lots condition and the *surau* condition from the planning permission:

(1) The present KM application was not 'the original KM application'; nor was it an 'old application'. It was factually a 'new application'; and one that needed to be considered and decided upon by the respondent; *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1 distinguished (see para 10).

(2) 30% of units of flats does not equate with 30% of units of terrace houses. Further, the matter concerned a new approval in relation to a new application. The appellant could not conveniently make use of what it had purportedly done years ago in respect of a different part of the land, especially that which was done not in contemplation of the fulfillment of a condition not then existing (see para 15).

(3) To be valid, a planning condition imposed by a local authority must satisfy the following criteria: (a) it must fairly and reasonably relate to the permitted development. The authority does not have an unfettered discretion to impose whatever condition it likes; (b) the condition imposed must be reasonable (in the *Wednesbury* sense of the word); and (c) the authority must not exercise its discretion for an ulterior object, no matter how desirable that object may be; *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 referred (see para 19).

(4) The second part of the *Bumi* lots condition was ultra vires (regardless of its objective). Regulating property prices is not within the purview of town planning. It cannot be said to fairly and reasonably relate to planning considerations. The same would apply to the first part of the *Bumi* lots condition, namely the requirement for the appellant to reserve as *Bumi* lots 30% of the properties it intended to develop at the uncompleted portion. This, too, did not fairly and reasonably relate to planning considerations; *Cayman Developments (K) Sdn Bhd v Mohd Saad bin Long & Ors* [2000] 7 MLJ 659; *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 followed (see paras 20–21).

(5) The *Bumi* lots condition ran foul of two other principles of law. First, it failed the *Wednesbury* reasonableness test. Discriminating against a person on account of the colour of her skin (or her DNA) is unreasonable. Second, by using race as the criterion for favourable or unfavourable treatment, the *Bumi* lots condition contravened the equality provisions under art 8 of the Federal Constitution. The matter did not fall under any of the exceptions created in art 8 or art 153. Hence, the *Bumi* lots condition was unsustainable at law (see paras 25–26 & 29–30).

(6) The ambit of s 21(3)(g) of the Town and Country Planning Act 1976 is wide, but not unlimited. The matter in respect of which directions may be given must be a matter 'necessary for the purposes of planning'. The direction given must comply with legal principles, including for example the *Wednesbury* criteria (see para 37).

(7) The provision of *suraus* (just as the provision of other places of worship) is a relevant matter for planning consideration, in the context of town and country living in Malaysia. However, that is not to say that the respondent is entitled to impose any condition that it wishes regarding the provision of places of worship. The respondent is only entitled to impose conditions that are necessary, reasonable and proportional in the circumstances of a particular case. In the present case, the respondent's own evidence showed that another *surau* was not needed at that vicinity. Imposing a condition when the need does not exist fails the *Wednesbury* reasonableness test (see paras 38–39).

[Bahasa Malaysia summary

Perayu pada tahun 1986 memohon untuk ('permohonan KM asal') dan memperoleh kebenaran merancang ('KM asal') untuk memajukan tanahnya. Pembangunan tersebut terdiri daripada empat blok rumah pangsa tanpa lif lima tingkat ('pembangunan asal'). Menurut KM asal, perayu telah menyempurnakan hanya dua pembinaan blok rumah pangsa ('bahagian yang telah disempurnakan'). Dalam kata lain, hanya sebahagian daripada

pembangunan asal dapat dijalankan. Bahagian tanah di mana dua blok rumah pangsa yang selebihnya seharusnya dibina masih lagi kosong ('bahagian yang tidak disempurnakan'). Pada lewat 2008, perayu telah membuat lagi satu permohonan kepada responden untuk kebenaran merancang ('permohonan KM terkini') untuk memperoleh kebenaran responden untuk mengubah jenis bangunan yang ingin dibangunkan di atas bahagian yang tidak disempurnakan, iaitu dua blok rumah pangsa untuk rumah teres dan rumah berkembar dua ('pertukaran tersebut'). Responden meluluskan pertukaran dan memberikan permohonan KM ini, tertakluk kepada, antara lain, syarat-syarat yang berikut: (i) bahawa perayu hendaklah menyimpan sekurang-kurangnya 30% daripada unit yang dicadangkan olehnya untuk dibina kepada pembeli Bumiputera, dengan harga jualan lima peratus lebih kurang daripada pembeli yang lain ('syarat lot-lot Bumi'); dan (ii) perayu perlu menyediakan plot tanah yang dikenal pasti berukuran sekitar 4,500 meter per segi ('tapak surau') dan hendaklah memindah milik tapak surau kepada Majlis Agama Islam Negeri Pulau Pinang ('MAINPP') untuk amaun nominal sebanyak RM1. Perayu juga perlu membuat sumbangan sebanyak RM54,120 kepada MAINPP sebagai ganti untuk pembinaan surau ('syarat surau'). Perayu membuat rayuan terhadap pelaksanaan kedua-dua syarat. Perayu berhujah bahawa permohonan KM ini bukanlah permohonan baru untuk kebenaran merancang dan justeru responden tidak layak untuk mengenakan syarat yang baru atau tambahan. Perayu juga berhujah bahawa ia telah 'in spirit' memenuhi syarat lot Bumi kerana apabila membangunkan bahagian yang telah disempurnakan, ia telah menjual kepada pembeli-pembeli Bumi lebih daripada 30% unit yang telah dibina dan yang masih belum dibina jika dicampurkan bersama.

Diputuskan, membenarkan rayuan dan mengarahkan responden untuk menyingkirkan syarat lot Bumi dan syarat surau daripada kebenaran merancang:

(1) Permohonan KM ini bukanlah 'the original KM application'; mahupun satu 'old application'. Ia secara fakta 'new application'; dan sesuatu yang perlu dipertimbangkan dan diputuskan oleh responden; *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1 dibezakan (lihat perenggan 10).

(2) 30% daripada unit-unit rumah pangsa tidak boleh disamakan dengan 30% unit-unit rumah teres. Selanjutnya, perkara tersebut berkenaan kelulusan berhubung dengan permohonan baru. Perayu tidak boleh dengan suka hati menggunakan apa yang ia telah lakukan beberapa tahun yang lalu berkenaan dengan bahagian tanah yang lain, terutamanya yang telah dilakukan tanpa mengambil kira memenuhi syarat yang mana pada masa itu tidak wujud (lihat perenggan 15).

(3) Untuk menjadikan ia sah, syarat merancang yang dikenakan oleh pihak

berkuasa tempatan hendaklah memenuhi kriteria berikut: (a) ia hendaklah secara wajar dan berpatutan berkaitan dengan pembangunan yang dibenarkan. Pihak berkuasa tidak mempunyai budi bicara bebas untuk mengenakan syarat sesuka hatinya; (b) syarat yang dikenakan hendaklah berpatutan (dalam erti kata *Wednesbury*); dan (c) pihak berkuasa tidak boleh melaksanakan budi bicaranya untuk tujuan tersembunyi, meskipun betapa menarik tujuan tersebut (lihat perenggan 19); *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 dirujuk.

(4) Bahagian kedua syarat lot-lot Bumi adalah ultra vires (tidak mengira objektifnya). Mengawal selia harga hartanah bukanlah dalam skop perancangan bandar. Ia tidak boleh dikatakan tepat atau secara berpatutan berkenaan dengan pertimbangan perancangan. Yang sama juga digunapakai kepada bahagian pertama syarat lot Bumi, iaitu keperluan untuk perayu menyimpan 30% daripada hartanah sebagai lot Bumi yang mana ia berniat untuk dibina di atas bahagian yang tidak sempurna. Ini juga tidak secara tepat dan berpatutan berhubung kait dengan pertimbangan perancangan (lihat perenggan 20–21); *Cayman Developments (K) Sdn Bhd v Mohd Saad bin Long & Ors* [2000] 7 MLJ 659; *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 diikut.

(5) Syarat lot-lot Bumi telah melanggar dua prinsip perundangan yang lain. Yang pertama, ia telah gagal dalam ujian kemunasabahan *Wednesbury*. Diskriminasi terhadap seseorang atas dasar warna kulit (atau DNA) adalah tidak berpatutan. Kedua, dengan menggunakan bangsa sebagai kriteria untuk layanan baik atau tidak baik, syarat lot-lot Bumi bercanggah dengan peruntukan kesamaan di bawah perkara 8 Perlembagaan Persekutuan. Perkara ini tidak terangkum di bawah mana-mana pengecualian yang dicipta di dalam perkara 8 atau perkara 153. Justeru, syarat lot-lot Bumi tidak dapat dikekalkan (lihat perenggan 25–26 & 29–30).

(6) Lingkungan s 21(3)(g) Akta Perancangan Bandar dan Desa 1976 adalah luas, tapi terbatas. Perkara berkenaan dengan arahan yang boleh diberikan hendaklah perkara yang 'necessary for the purposes of planning'. Arahan yang diberikan hendaklah mematuhi prinsip perundangan, termasuk sebagai contoh kriteria *Wednesbury* (lihat perenggan 37).

(7) Peruntukan surau-surau (seperti peruntukan tempat beribadah yang lain) adalah perkara relevan untuk pertimbangan perancangan, dalam konteks kehidupan bandar dan negara di dalam Malaysia. Walau bagaimanapun, adalah tidak boleh dikatakan bahawa responden berhak untuk mengenakan apa-apa syarat yang diingini olehnya berkenaan dengan peruntukan tempat beribadah. Responden hanya berhak untuk

mengenakan syarat-syarat yang perlu, berpatutan dan memadai dalam keadaan sesuatu kes. Dalam kes ini, keterangan responden sendiri menunjukkan bahawa satu lagi surau tidak diperlukan berdekatan. Dengan mengenakan syarat apabila keperluan tidak wujud, ujian berpatutan *Wednesbury* telah gagal (lihat perenggan 38–39).]

Notes

For a case on application for planning permission, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) para 200.

For cases on equality before the law, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2447–2472.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1947] 2 All ER 680, CA (folld)

Cayman Developments (K) Sdn Bhd v Mohd Saad bin Long & Ors [2000] 7 MLJ 659; [1999] 3 AMR 3382, HC (folld)

Hall & Co Ltd v Shoreham-by-Sea UDC [1964] 1 WLR 240, CA (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan [1999] 3 MLJ 1, FC (distd)

Newbury District Council v Secretary of State for the Environment [1981] AC 578, HL (refd)

Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (folld)

Rethina Development Sdn Bhd v Majlis Perbandaran Pulau Pinang [1990] 2 MLJ 111, HC (refd)

Legislation referred to

Constitution of the State of Penang art 28

Federal Constitution arts 8, 96, 153

Town and Country Planning Act 1976 ss 3, 21(3)(g), 23(3)

Rethinasamy (Faridah Ahmad with him) for the appellant.
Ahmad Fuad (Zakaria Ismail with him) for the respondent.

Yeo Yang Poh CH:

[1] This appeal was heard over two sittings. At the end of its hearing, the board required both parties to supplement their oral submissions by filing further written submissions, paying particular attention to the issues posed by the board. Accordingly, the board reserved its decision (initially) to September.

[2] Since then, the appellant had handed in its written submissions (in mid June), and addressed the issues it had been invited to canvass. However, the

respondent did not file its written reply within the stipulated time, despite having been requested and reminded to do so. It was not until the end of August that the respondent submitted its reply, by which time an earlier draft of this decision had already been prepared. Nevertheless, rather than ignoring the respondent's last minute reply, the board chose to consider the same, which necessitated a postponement of decision. Thereafter, the appellant was given the opportunity to in turn reply; followed by a further exchange of submissions between the parties regarding one question of fact. The board has considered all these submissions before arriving at this decision.

THE BRIEF FACTS

[3] The appellant owns seven pieces of land in Mukim 7, Daerah Seberang Perai Utara (collectively called 'the land'). In 1986, it had obtained a planning permission ('the original KM') to develop the land. The development was to comprise four blocks of five-storey walk-up flats ('the original development'). The original KM resulted from an application made by the appellant to the respondent in 1986 ('the original KM application').

[4] Pursuant to the original KM, the appellant has so far completed the construction of only two blocks of flats totalling 135 units ('the completed portion'). In other words, the original development has only been partially carried out. The portion of the land upon which the remaining two blocks of flats were supposed to be built remains vacant and unbuilt. I shall refer to this remaining unbuilt portion of the land as 'the uncompleted portion'.

[5] In late 2008, the appellant submitted another application to the respondent for planning permission ('the present KM application'). The purpose of the present KM application is to obtain the respondent's permission for the appellant to change the type of buildings to be erected on the uncompleted portion, ie from two blocks of flats to 25 units of three-storey terrace houses plus two units of three-storey semi-detached houses ('the alterations').

[6] On 11 September 2009, the respondent approved the alterations and granted the present KM application, subject to several conditions. The appellant is unhappy with two of the conditions imposed by the respondent; and has therefore appealed against their imposition. The two conditions appealed against are to have the following effect:

(a) the appellant is required to reserve for bumiputera buyers, at least 30% of the units it proposes to build, with a sale price at 5% less than that for other buyers ('the bumi lots condition'). Such reserved lots are commonly referred to as 'bumi lots'. The bumi lots condition is not found in the

prescribed Form C(1) that was served on the appellant. It is however stated in a letter dated 16 September 2009 from the respondent to the appellant (see p 14 of the rekod rayuan). There are two parts to the bumi lots condition: ie (i) 30% of the units to be built are to be reserved as bumi lots; and (ii) the sale price of bumi lots must be 5% less than that for the other units. There will be procedures for unsold units to be 'released' from being bumi lots. But this detail is not material to the issues raised in this appeal, and so need not concern our present discussion; and

(b) the appellant is required to provide an identified plot of land measuring about 4,500 sqft (within the uncompleted portion), to be used for the purpose of a surau ('the surau site'). The surau site is to be transferred by the appellant to the Majlis Agama Islam Negeri Pulau Pinang ('MAINPP'), for a nominal sum of RM1; and the appellant is additionally required to make a contribution of RM54,120 to MAINPP, in lieu of its constructing the surau ('the surau condition'). The surau condition is the condition numbered 5 in the Form C(1): see p 6 of the rekod rayuan. There are similarly two parts to it: ie (i) the appellant must provide the surau site free of charge (for all practical purposes, discounting the RM1); and (ii) the appellant must contribute a sum of RM54,120.

THE APPELLANT'S OBJECTIONS TO THE BUMI LOTS CONDITION

[7] The appellant raised three main grounds in objecting to the *Bumi* lots condition.

[8] The appellant contends that the present KM application is not a new or fresh application for planning permission. The appellant argues that it is merely an application to amend a planning approval that was granted as a result of the original KM application; and that it ought not to have been treated by the respondent as a fresh application. The reason why the appellant wishes to take this argument is that, if it succeeds, then the appellant can argue that at law the respondent is not entitled to impose a new or additional condition on an old approval, when there is no 'new application' needing the respondent's consent. For this last proposition, the appellant relies on the case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1 ('the *Gelugor* case').

[9] At the hearing, the appellant devoted a great deal of energy to advancing

the above argument. But it is in truth a point of no substance. It is an argument invoking an unwarranted twist of simple language and an abandonment of basic common sense.

[10] It is precisely because the appellant cannot utilise the original KM to carry out what it now wishes to do at the uncompleted portion, and it is because the appellant wants to substantially depart from the original KM, that it has made the present KM application. The present KM application is certainly not 'the original KM application'; nor is it an 'old application'. It is factually a 'new application'; and one that needs to be considered and decided upon by the respondent. Its approval is not automatic. That being the case, what can this application be, if it is not a 'new application'?

[11] The appellant's answer, apparently, is that it is an 'amendment application'. But this is just a play of words. It begs the same question of whether the application is an old one or a new one. Can an amendment application (one that asks for something new) be described as an 'old application' or 'the original application'? Surely it cannot be. Surely it is a new application; and I so hold.

[12] The *Gelugor* case has no application in this aspect, in our situation. The *Gelugor* case involved a renewal or extension of an expired planning permission. In that case, the applicant for the renewal was not seeking to change anything in the planning permission earlier granted. It was only in those circumstances that the holder of a planning permission could in some instances be said to have a legitimate expectation that its renewal (without amendment) would not be subject to new conditions. The factual situation in this appeal is quite the opposite.

[13] Neither is ours a case where an applicant wishes to make an amendment to his pending application that has yet to be approved (or rejected) by the planning authority. That would have been a different situation altogether.

[14] Next, the appellant argues that it has 'in spirit' fulfilled the *Bumi* lots condition; because it claims that, when it developed the completed portion, it had already sold to *Bumiputera* buyers 107 out of the 135 units of flats constructed. This works out (numerically) to be much more than 30% of the developed units and the yet unbuilt units put together. The appellant says that the uncompleted portion is part of the same development as the completed portion, and so the appellant ought to be treated as having already fulfilled the 30%) requirement under the Bumi lots condition.

[15] This argument illustrates a lot of desire to avoid the bumi lots condition, but very little logic. If the bumi lots condition is a proper and

reasonable condition, then it must be fulfilled in respect of each and every phase of a development. The appellant is trying to compare apples with pears. 30% of units of flats does not equate with 30%) of units of terrace houses. Further, we are concerned with a new approval in relation to a new application. The appellant cannot conveniently make use of what it had purportedly done years ago in respect of a different part of the land, especially that which was done not in contemplation of the fulfillment of a condition not then existing. Accordingly, I also find against the appellant on this score.

[16] Initially, the appellant's counsel said that he was not questioning the validity, propriety or reasonableness of the bumi lots condition. However, midway through the hearing, he had apparently changed his mind. I then drew his attention to the case of *Cayman Developments (K) Sdn Bhd v Mohd Saad bin Long & Ors* [2000] 7 MLJ 659; [1999] 3 AMR 3382 ('the *Cayman* case'). In his subsequent written submissions, he has relied on the *Cayman* case to supplement what he had orally submitted at the hearing.

[17] There are indeed similar features shared by the *Cayman* case with this appeal. In the *Cayman* case, a condition was imposed on the developer there to sell its low cost houses to *Bumiputera* buyers at a 5% discount from the normal price. The court held that the condition was ultra vires, because it went beyond planning matters and beyond the powers of the authority concerned in that case. Similarly, in our context a general power to impose such conditions as the local authority 'may think fit' does not mean that the authority can stipulate any condition it pleases. To be valid, a condition must fairly relate to planning. A price fixing condition does not.

[18] The respondent, on the other hand, seeks to distinguish the *Cayman* case, by pointing out that the authority concerned in that case is not the same as the authority in our case. But that is missing the point. No one is saying that the facts of the two cases are identical. It is the principle culled from the *Cayman* case that is helpful to the appellant's argument that an authority (be it a planning authority, state authority or otherwise) cannot impose a condition that goes beyond the scope of its statutory power. In the case of a local planning authority, this means that only conditions reasonably relating to planning can be validly imposed by it. That this is so is put beyond doubt by our highest court in the case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135.

[19] The Federal Court in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 expresses in stronger terms the principle that I have just mentioned. To be valid, a planning condition

imposed by a local authority must satisfy the following criteria: A

(a) it must fairly and reasonably relate to the permitted development. The authority does not have an unfettered discretion to impose whatever condition it likes;

(b) the condition imposed must be reasonable (in the *Wednesbury* sense of the word, infra); and B

(c) the authority must not exercise its discretion for an ulterior object, no matter how desirable that object may be.

C

[20] Applying these two authorities, namely *Cayman* and *Sri Lempah*, it becomes clear that the second part of the *Bumi* lots condition is indeed ultra vires (regardless of its objective). Regulating property prices is not within the purview of town planning. It cannot be said to fairly and reasonably relate to planning considerations. Even if it is done in furtherance of a good housing D policy, it will remain invalid as a planning condition: see *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 at pp 607–608, adopted by our Federal Court in the *Gelugor* case (at p 49 of the report).

[21] The same would apply to the first part of the *Bumi* lots condition, E namely the requirement for the appellant to reserve as *Bumi* lots 30% of the properties it intends to develop at the uncompleted portion. This, too, does not fairly and reasonably relate to planning considerations. The desirability or otherwise of such a policy (that has social and political dimensions) may be a subject for debate at a different forum. But it does not come within the scope F of the matters that a planning authority can properly take into account when exercising its statutory duty. Its objective (sound or otherwise), as both the House of Lords and our Federal Court have explained, is irrelevant.

[22] I have not overlooked the fact that the *Bumi* lots condition is quite G commonly imposed on developers all over the country. But something that is commonly done of course does not necessarily make it right, proper or lawful (for otherwise a wrong or an illegality repeated enough times will become right or legal). Of course, there is nothing wrong if a KM applicant raises no objection to complying with a common condition, practice or policy that H could upon closer analysis be open to question. That would be a matter of voluntary compliance. It is different when a condition, practice or policy is challenged, such as here, in which case it is the duty of an adjudicating body to examine the same with judicious candour.

I

[23] In its submission, the respondent places repeated reliance on s 3 of the Town and Country Planning Act 1976 ('the Act'), saying that the *Bumi* lots condition is one of those directions the state authority gives to the respondent (as a local planning authority) under the section, and thus it is a direction that

binds the respondent. There are two short answers to this contention. First, it begs the question as to whether or not a direction so given is in the first place intra vires and valid (which is a question that has come before this board). For it to be valid, a direction given under s 3 must reasonably and fairly relate to planning (see paras 19–20 above). The *Bumi* lots condition may have elements of social, economic and political dimensions, but it does not fairly and reasonably relate to planning. Second, a direction (right or wrong) under s 3 may be binding on a local authority; but it does not (and cannot) tie the hands of the Appeal Board when determining the very question of its validity or otherwise, just as it cannot preclude the courts from reviewing the same. The board has to examine the question afresh.

[24] The respondent further makes reference to *dasar sektoral* DS28 L7. This does not carry the respondent very far. First of all, the *dasar sektoral* contain general vision statements and statements of intention. They are not binding regulations. They are not specific conditions that have to be imposed by local planning authorities. Secondly, the *Bumi* lots condition cannot fairly be said to have been imposed pursuant to DS28 L7, because it differs crucially from the true intent of DS28 L7 itself. In this regard, it is important to note that DS28 L7 makes specific reference to needs, and not just to ethnicity. The *Bumi* lots condition carries no such content.

[25] Apart from the reasons and the authorities cited above, it appears to me that the bumi lots condition further runs foul of two other principles of law.

[26] First, it fails another limb of the '*Wednesbury* reasonableness' test. In planning law and administrative law, the 'reasonableness' of a decision or condition is often measured against legal principles enunciated more than half a century ago in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1947] 2 All ER 680 ('the *Wednesbury* case'), and that have since been further developed. There are, broadly speaking, three categories of decisions or conditions that will be considered unreasonable:

(a) one that is made without taking into account all matters that are required to be taken into consideration;

(b) one that is made by taking into consideration matters that ought not to have been taken into account; and

(c) one that is so clearly absurd, wrong, unreasonable, unjustified or arbitrary, that no reasonable decision-maker could have come to.

[27] In the *Wednesbury* case (at p 683A of the report), Lord Greene used as an illustration of an absurd decision the case of a red-haired teacher who was discriminated against and dismissed because she had red hair. That is

considered to be a decision so absurd that no reasonable decision maker could or should have made (and hence is 'unreasonable' in the legal sense of the word).

[28] In my view, the *Bumi* lots condition flows in the same vein. If discriminating against a person on the basis of her hair colour is unreasonable, then *a fortiori* discriminating against a person on account of the colour of her skin (or her DNA) must be doubly so. What could be more absurd, more regressive and more objectionable in a free and democratic society than dividing its people according to something over which none of them has a choice (and something that bears no inherent reflection on their respective needs, means, abilities, rights and obligations)?

[29] Second, by using race as the criterion for favourable or unfavourable treatment (and not having regard to objective, reasonable or justifiable factors such as financial means), the *Bumi* lots condition appears to me to contravene the equality provisions under art 8 of the Federal Constitution. The matter does not fall under any of the exceptions created in arts 8 or 153. In planning law as in all other areas of the law, the provisions of the Constitution must of course be observed.

[30] For the reasons explained above, I hold that the *Bumi* lots condition (not being based on objective criteria) is unsustainable at law.

THE APPELLANT'S OBJECTIONS TO THE SURAU CONDITION

[31] To recap, the *surau* condition will require the appellant to do two things: (a) to give up or donate an identified plot of land measuring approximately 4,500 sqft; and (b) to contribute a sum of RM54,120 in lieu of constructing the proposed *surau*.

[32] The respondent called a representative from MAINPP, En Fakhruddin Abd Rahman, to testify on the requirement of the surau condition. The testimony of the respondent's witness included the following:

(a) MAINPP was the department that had advised the respondent regarding imposition of the *surau* condition. MAINPP has guidelines concerning requirement of *masjids*, *suraus*, etc, in development projects ('the MAINPP guidelines'). The imposition was based on the MAINPP guidelines;

(b) the MAINPP guidelines are not *gazetted*. The witness was unable to say pursuant to what statute the guidelines were made;

(c) during cross-examination, the witness was referred to a letter dated

13 January 2009 (found on p 99 of the appellant's bundle). The letter was from the Pejabat Agama Daerah Seberang Perai Utara to MAINPP. Among other things, the letter states that Masjid Daerah Seberang Perai Utara is about 500 metres from the *surau* site, and that at a mere 100 metres from the *surau* site there is already an existing *surau* (at Taman Senangan) that is unused or abandoned ('terbiar'). The letter concludes that there is no need for a *surau* at the appellant's development site; and that if one were to be built, it will likely be abandoned or left unused as well. Subsequently, it transpired that the distance of the existing *surau* at Taman Senangan is probably not 100 metres away, but between 300 and 700 metres away. However, this does not affect the general implication of the evidence;

(d) the witness admitted that currently there is no need for another *surau* at that vicinity (what with one already left unused). Nevertheless, he maintained that the appellant should still be required to donate the *surau* site, for 'possible future use';

(e) when asked whose responsibility it is to build *suraus*, the witness answered that it is not the responsibility of the government, but the responsibility of developers who wish to undertake housing projects; and

(f) when asked whether the monetary contribution required of the appellant will be reserved for use to build a *surau* in the future, the witness answered that it will not be so reserved. Instead, the money will be put into a general wakaf fund that can be used for various purposes (including for the payment of salaries and administrative expenses of the department concerned).

[33] The appellant seeks to have the *surau* condition waived or removed, on the following grounds:

(a) that no local authority can legally impose and collect contributions without an express statutory power or mandate for it to do so;

(b) that the MAINPP guidelines have no legal effect; and there is no legal basis for the imposition of the *surau* condition;

(c) that the imposition of the *surau* condition is an unreasonable and unjustifiable requirement in the circumstances of this case, when the respondent itself has conceded that there is in fact no need for another *surau* at that vicinity; and

(d) that, in any event, the responsibility of providing *suraus* rests on the government, and not on individual developers.

[34] The first point, on the levying of monetary contributions, can be dealt with rather easily. Judicial pronouncements have consistently held that no form

of revenue or involuntary contribution (however named) can be levied and collected, unless the same is expressly provided for by statute. It is understandable that the appellant has been quick to point this out, since the appellant was involved with the same respondent in one such case 20 years ago. This is the case of *Rethina Development Sdn Bhd v Majlis Perbandaran Pulau Pinang* [1990] 2 MLJ 111; where the court struck down attempts to collect monetary contributions (in lieu of performance of certain conditions) because of the absence of any empowering law. Indeed, faced with legal precedents at the hearing, the respondent's counsel conceded the point that there must exist statutory power before contributions can be levied or imposed (and that none exists in our case). Hence, there is no need for me to go into the numerous other authorities enunciating the same principle; except to add that, in Malaysia, this principle of 'no taxation without authority of law' has been entrenched in art 96 of the Federal Constitution. For Penang, it is repeated in art 28 of the Penang State Constitution. Taxation, in these contexts, includes all forms of revenues and levies by whatever name called. The point could hardly have been more clearly made. The levy of contribution imposed by the respondent (without express statutory power) cannot stand.

[35] While conceding that the appellant cannot be compelled to make a contribution, the respondent's counsel argues that the appellant must nevertheless fulfill the *surau* condition by building the proposed surau instead. He will be right if, but only if, the *surau* condition itself is valid. That is the question to which I must now turn.

[36] Therefore, the last issue to be determined in this appeal is whether or not the requirement for the appellant to contribute an identified plot of land for a proposed *surau* is itself a proper and reasonable condition for a planning authority to impose.

[37] The respondent had laid down that condition based on the MAINPP guidelines. But the respondent has not established the source of power pursuant to which the MAINPP guidelines were made. These guidelines are also admittedly not *gazetted*. The appellant is therefore right in saying that the MAINPP guidelines are not law and do not have the force of law. That, however, may not be the end of the question where planning is concerned. It is not per se improper for a planning authority to take into consideration relevant matters even though there is no express law regarding them. The respondent's counsel helpfully points to s 21(3)(g) of the Act, which empowers a planning authority to give an applicant for planning permission directions on 'any other matter that the local planning authority considers necessary for purposes of planning'. The ambit of s 21(3)(g) is wide, but not unlimited. The matter in respect of which directions may be given must be a matter 'necessary for the

purposes of planning'. The direction given must comply with legal principles, including for example the *Wednesbury* criteria.

[38] I hold the view that the provision of *suraus* (just as the provision of other places of worship) is a relevant matter for planning consideration, in the context of town and country living in Malaysia. It is a subject closely related to our way of life. However, that is not to say that the respondent is entitled to impose any condition that it wishes regarding the provision of places of worship (whether on its own volition or upon the advice of another department). The respondent is only entitled to impose conditions that are necessary, reasonable and proportional in the circumstances of a particular case: see the *Wednesbury* case and the *Gelugor* case.

[39] In the present case, the respondent's own evidence shows that another *surau* is not needed at that vicinity. The reasons are given in the letter dated 13 January 2009 from the Pejabat Agama itself. The inference that can be drawn from the letter is that not only will it be unnecessary to build another *surau* in that area, but to do so and to have another unused or abandoned surau will not have a positive effect on the promotion of religious worship. The respondent's own witness agreed with the views expressed in that letter, admitting that there is no plan to build another *surau* there. That being the case, how would the need for the *surau* site reasonably arise, when in the first place there is no need for a *surau* there? No doubt the respondent has argued that it is for a 'possible future use'; but the respondent has produced no evidence to show when, why, how and in what manner that future possibility may occur. It is for he who asserts to prove, and not for the opposite party to disprove. Most future possibilities cannot be disproved for the moment, without a magical crystal ball. Thus, the mere assertion of a 'possible future use' cannot form a reasonable basis for a sound planning decision. In our instance, one cannot claim that the *surau* condition is 'necessary for the purposes of planning' (the words of s 21(3)(g)), when it has been shown (and admitted) that a surau is not necessary at the site. Imposing a condition when the need does not exist fails the *Wednesbury* reasonableness test.

[40] That leaves the final point argued by the appellant, namely that, even if assuming the provision of a surau is necessary or desirable in the circumstances of this case, its responsibility should lie with the government (or the relevant department of the government); and that such responsibility cannot be involuntarily transferred to (and be at the expense of) individual developers. For this proposition the appellant relies on the *Gelugor* case, where (at p 50 of the report) the Federal Court described the decision in the case of *Hall & Co Ltd v Shoreham-by-Sea UDC* [1964] 1 WLR 240 (*Hall & Co*) as a 'striking example of an invalid planning condition'. In *Hall & Co*, the landowners were required to construct a strip of roadway along the frontage of their land and to

give public right of passage over it. This condition was struck down by the English Court of Appeal, on the ground that it did not fairly and reasonably relate to the development itself. Although the court found that the objective of road-widening was wholly reasonable in itself, the condition was held to be ultra vires because it was an abuse of power for the planning authority to transfer onto the landowners the burden of carrying out that otherwise noble objective.

[41] There are similarities between *Hall & Co* and this appeal. I am inclined to agree with the appellant's submissions on this issue, bearing in mind that there are other cases that have expounded the same principle. However, in view of the conclusion to which I have come (ie that the *surau* condition ought not to have been imposed in the circumstances of this case, where there is no need for another surau in the area concerned), it becomes unnecessary for me to presently pronounce a decision on this intricate issue. Because of its importance and its wide implications, the determination of this question is best reserved for another occasion, when the board may invite more thorough and more detailed submissions from the parties, before embarking on a careful deliberation of the matter and rendering a decision thereon.

THE CONCLUSION

[42] Pursuant to s 23(3) of the Act, this board allows the appellant's appeal, and directs the respondent to forthwith remove (from the planning permission granted) both the *Bumi* lots condition (stated in the letter dated 16 September 2009, on p 14 of the rekod rayuan) as well as the *surau* condition (ie condition numbered 5 attached to the planning permission, found on p 6 of the rekod rayuan). The remaining parts (and conditions) of the planning permission granted on 11 September 2009 shall remain valid and effective.

Appeal allowed and respondent directed to remove Bumi lots condition and surau condition from planning permission.

Reported by Kanesh Sundrum