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Does the state government have power

RECENTLY, the Negeri Sembilan government announced that it will control the price of houses to be built within its state. Menteri Besar Datuk Seri Mohamad Hasan said this is one of the fundamental keypoints of the new state housing policy, which will be finalised soon.

"In this new policy, 15% of houses built must be worth RM80,000 and below, 15% must cost RM250,000 and below, another 20% must be priced below RM350,000, with 50% left to the developer to sell at whatever price they choose," the Chief Minister said.

He added that developers will be required to reserve 50% for bumiputera allocation in any housing scheme, compared to the previous requirement of 30%.

With that, many have asked if this means that the state government has an unfettered discretion to impose any condition that the state authority may think fit, since land is a state matter?

Power of the state

This power of the state authority was first brought into question in the leading Federal Court case of Pengarah Tanah dan Galian, Wilayah Persekutuan vs Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 FC. Below are the facts.

In this case, the applicant company was the registered proprietor of a piece of land held in perpetuity.

The land was in the Federal Territory and the applicant applied to the Federal Government for sub-division of the land, plus conversion to have the express condition relating to the user of the land amended, to allow the applicant to put up a hotel for which planning permission had been granted.

It also applied to surrender part of the land to the government for use as service roads, side and back lanes.

The matter was referred to the Land Executive Committee and subsequently the Director of Lands and Mines, Federal Territory, who informed the applicant that the application would be approved on condition that on surrendering the land, the applicant was to receive back, in respect of the part to be retained by him, not the title in perpetuity but a lease of 99 years.

The state authority argued that Section 124(5)(c) is wide enough for the Land Exco to impose such a condition.

The question arises whether Section 124(5)(c) is wide enough to curtail the exercise of those rights by the imposition of a new condition, which has the effect of changing the very character of the grant the appellants now hold.

There can be no doubt that per se, a perpetuity title is more valuable than a 99-year lease.

Tun Suffian's view

"If the Committee is right, it would mean that it can unreasonably impose a condition that is irrelevant to the permitted development, such as, to take an absurd example, that the applicant should wear a beard for the rest of his life or that he should fly once around the moon.

In my judgment, the Committee must act reasonably and may only impose conditions relevant to the permitted development and does not have the drastic right to make the applicant give up the title in perpetuity and receive in place of it only a 99-year lease."

He added: "The local planning authority is empowered to grant permission to develop land 'subject to such conditions as they think fit'. But this does not mean that they have an uncontrolled discretion to impose whatever conditions they like."

"Applying these principles to the present case, it is plain, in my judgment, that the Committee does not have the power it claims to have. The condition which the applicant objected to:

1) does not relate to the permitted development;
2) is unreasonable; and
3) is used for an ulterior object, the object being to bring developed land into line with newly alienated land as to which, we are told, since the law only leases, not titles in perpetuity, are granted. However desirable this object may seem to the Committee, it has no power under the law, to achieve it in the way used here."

Landmark observations

Sitting with Tun Suffian was another imminent jurist, the late Raja Azlan Shah AG CJ (Malaya) who made these landmark observations.

"Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint, where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defense of the liberty of the subject against departmental aggression."

"In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen, so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place."

"For the above reasons, it does not seem to me that the decision of the Land Executive Committee can possibly be regarded as reasonable or as anything other than ultra vires. It had exceeded its power and the decision was therefore unlawful, as being an unreasonable exercise of power not related to the permitted development and for an ulterior purpose that no reasonable authority, properly directing itself, could have arrived at it. The Committee, like a trustee, holds power on trust and acts validly only when acting reasonably."

Price control

The issue of price control of houses is not new and has been discussed previously in the highest courts of law in the country. One such case is the landmark case of Majlis Perbandaran Pulau Pinang vs Syarikat Berkerjasama Serbaguna Sungai Gelugor [1999] 3 CLJ 65.

to set prices of houses?

In this case, the dispute was whether the Penang City Council had the power to impose the disputed condition that 30% of low-cost houses have to be built and sold at a cost not exceeding RM25,000 per unit in accordance with the council guidelines on low-cost housing".

The society agreed at its AGM that the selling price of a two-bedroom flat, measuring an average of 500 sq ft, shall not exceed RM32,000 and a three-bedroom flat, measuring an average of 650 sq ft, shall not exceed RM45,000.

In a dilemma due to the ceiling price stipulated in the guidelines on low-cost housing, the developers sought the intervention of the courts as they were of the view that the council had no such power to impose such conditions relating to prices of houses.

The case, described as a "veritable legal porcupine bristling with interesting and complex points of law" went on appeal to the Federal Court. It was a landmark case in the field of Planning Law and Judicial Review in this country and counsel on both sides put up very convincing arguments for six days.

At the end, Edgar Joseph Jr FCJ (Federal Court judge) made no apologies for the acres of paper and streams of ink devoted to the preparation of the unanimous judgment by the Federal Court.

He held that it was axiomatic that local authorities are creatures of statute and their qualities and powers can only be derived by reference to what is expressed or implicit in the statutes under which they function (see for example, Lord Wilberforce in Bromley L.B.C. vs G.L.C. [1983] 1 AC 768, 813).

The statutory scheme of the Local Government Act confers upon local authorities a distinct political function, to which the courts, by application of ordinary principles of statutory construction should give effect.

"Taken at its full face value, the above provisions would appear to confer unlimited power on the planning authority to impose any condition it wishes, for example, because it considers the condition to be in the interest of the housing policy of the state government. But, the matter must be probed further."

On probing deeper, the Federal Court concluded that the whole of the decision of Majlis Perbandaran Pulau Pinang was wholly null, void and of no effect and stated that the Majlis had no power to impose conditions relating to prices at which the houses have to be sold by the developer.

Next issue

The next question was: Can developers be forced to give discounts as part of the planning approval process?

In Cayman Development (K) Sdn Bhd vs Mohd Saad Bin Long [1999] MLJU 290, Cayman was a housing developer who wanted to develop a piece of land in the Mukim of Alor Merah, Alor Setar, into a low-cost housing scheme and the state authority of Kedah imposed a condition.

It stated: "*Menjual rumah-rumah yang dibina dengan harga kurang lima peratus daripada $25,000 ($23,750 – bumiputera discount).*" [Translation: "To sell the built houses with 5% discount off $25,000 ($23,750)."]

When the developer sold the houses without the stipulated discount, the purchasers sued the developer to enforce the discount as imposed by the state authority of Kedah.

At the High Court, Hishamuddin J. (as his lordship then), held that the state authority had no power to fix the requirements regarding the price of each of the units to be sold to the public, as well as the discount of 5% as these are not the kind of requirements envisaged by the National Land Code.

Hishamuddin then held: "I have no doubt whatsoever of the good intention of the state authority, and that in prescribing the price and the discount, it certainly had in mind the interest of the low income section of the general public, who would constitute the potential buyers of the low-cost units. Yet, with the greatest respect, I do not think that Parliament, in enacting subsection (5)(c), had in mind to confer on the state authority such a wide power, so as to empower it to even fix the price of the low-cost units for the purpose of sale to potential buyers, let alone to prescribe any discount."

"Such requirements, as imposed, are commercial in nature. The state authority, being a regulatory body on matters pertaining to land, in determining the nature of the requirements to impose (if any) when approving a conversion, should avoid entering into the commercial arena. Instead, it should only confine itself to matters directly pertaining to the usage of the land and the imposition of rent and premium (consequential to the conversion)."

All these cases illustrate the point that both the state authority and Majlis have no unfettered power to impose any condition relating to prices of houses and discounts as these are considered to be commercial aspects that they should avoid entering into.

Being mere regulatory bodies, they should only confine themselves to regulatory matters such as prescribing the usage of land and the imposition of rent and premium consequential to the conversion (of usage of the land). Furthermore, any imposition of penalty on developers for failing to comply with unlawful conditions may itself be unlawful.

All these cases remain unchallenged and continue to be good precedents as there have not been any legislative amendments to overturn these decisions.

No doubt that the intention of the state authority may be noble but **the law, as it stands, only allows the state authority to impose conditions "relating to the permitted development only" and not in relation to price of houses and discounts that ought to be given.**

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