



International Journal of Law, Government and  
Communication (IJLGC)

Journal Website: <http://ijlgc.com/>  
eISSN: 0128-1763



## A REVISIT ON THE APPEALS HEARD BY THE SELANGOR APPEAL BOARD: IS JUSTICE HEARD A JUSTICE SERVED?

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### Article Info:

#### Article history:

Received date: 28.01.2020  
Revised date: 04.02.2020  
Accepted date: 05.02.2020  
Published date: 10.03.2020

#### To cite this document:

Bakar, N. A., & Sulaiman, S. S.  
(2020). A Revisit on The Appeals  
Heard by The Selangor Appeal  
Board: Is Justice Heard A Justice  
Served? International Journal of Law,  
Government and Communication, 5  
(18), 12-18.

DOI: 10.35631/IJLGC.518002.

### Abstract:

This study tries to review the roles and functions of the Selangor Appeal Board in disposing of appeal cases registered at the tribunal. It is imperative to ascertain that the right of appeal provided under the Town Country and Planning Act 1976 (TCPA 1976) is carried out in order to serve justice to the aggrieved parties whose application for planning orders have been rejected by the Planning Authority at the local level. The decision of the Appeal Board is final and can only be brought to the High Court for judicial review. Thus, the tribunal should be independent and fair in disposing of any appeal. The study employs a combination of doctrinal and empirical research. In the doctrinal analysis, the study analyses the primary and secondary data that include the TCPA 1976 and analysing the statistics of appeal cases from 1991 until 2019. Interviews were carried out in order to examine the law in reality. Accordingly, it can reflect the impartiality of the tribunal in the disposal of the appeals. In brief, the Selangor Appeal Board has proven its ability to hear appeals according to the rule of law since in recent years lesser appeals have been filed that indicate fewer grievances of the public against the decision of the local planning authority.

### Keywords:

Planning Order, Appeal, Impartiality, Grievances, Local Planning Authority

### Introduction

The primary objective of the Appeal Board is to provide avenue to the aggrieved parties to appeal against the decision made by the local planning authority. In order to understand the powers of appeal board in deciding an appeal, it is important to understand the planning process. The Town and Country Planning Act 1976 (TCPA 1976) provides that all persons except the local planning authority are required to apply for planning permission prior to commencing or carrying out development as a means to control development. There are

activities exempted from applying for planning permission mainly those involving only the improvement in the interior of the building and activities of government agencies listed in section 19 of the TCPA 1976. At the planning permission approval stage, the local planning authority shall have the power to set the conditions which must be followed by the applicant or developers.

Apart from the requirement to obtain planning permission with the submission of layout plan and development proposal report, the project proponent is required to obtain approval for various other plans such as earthworks plan, building plan, road and drainage plan and the environment impact assessment report. The Street, Drainage and Building Act 1974 and the Uniform Building By-Laws 1984 will complement the provisions in the TCPA 1976 to ensure all other aspects of development control is taken into consideration. In practice, when the application for planning permission is submitted at the One Stop Centre (OSC) counter established at the local planning authority, reports and comments from all relevant agencies will be obtained. Planning applications should be submitted to the one OSC of the local planning authority to obtain approval. Planning permission will be granted to development proposals which fulfils all the required technical and non-technical conditions. However, the Town and Country Planning Act 1976 provides for the aggrieved party who is dissatisfied with the conditions imposed on a grant of planning permission or in the case where planning permission was refused to make an appeal to the Appeal Board (Section 23 TCPA 1976). At the end of the hearing, the Appeal Board may 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 condition (section 23(3) TCPA 1976).

### **Research Methodology**

This research uses a mixed approach of doctrinal and empirical study. The doctrinal research includes primary and secondary sources. The primary sources include the TCPA 1976, the Street, Drainage and Building Act 1974 and the Uniform Building By-Laws 1984, Kaedah-Kaedah Lembaga Rayuan 1999 and Kaedah-Kaedah Mahkamah 2012. The secondary sources include Hansard, relevant reported cases, documents collected during the fieldwork, books and journals, conference papers, project and research reports and thesis.

This research also adopts an empirical approach as it provides a deeper understanding of the law in reality. A semi-structured interview is conducted to investigate the practical aspect of the appeals conducted at the Selangor Appeal Board. In order to conduct the semi-structured interview, the respondents are chosen based on the direct involvement of the respondents with the appeal process. Four respondents are chosen for this purpose including the Registrar, the Chairman of the Appeal Board and two members of the Appeal Board. The statistics of the appeal cases together with the decisions of the Appeal Board inadvertently reflect the impartiality of the Board.

### **Literature Review**

The primary objective of the Appeal Board is to provide avenue for the aggrieved parties to appeal against the decision made by the local planning authority. Planning permission is a tool utilised by the local planning authority to control land development activities in the local authority areas (Ainul Jaria Maidin, 2012; Ainul Jaria Maidin, Bashiran Begum Mobarak Ali, 2009; MJ Bruton, 2007); Goh, Ban Lee, 1991; Lee, LM, Abdul Mutalip Abdullah and Alip

Rahim,1990). When a developer applies for planning permission, the local planning authority is empowered to restrict and control the development based on the provisions and guidelines provided in the Town and Country Planning Act 1976 and other related legislation and by-laws related to it. In order to secure the planning permission, all conditions and requirements must be fulfilled by the applicants (A.R Thirilogachandran Shanmugasundaram 2017). After taking into consideration the whole aspects particularly the matters provided in section 22(2) of the Town and Country Planning Act 1976, the local planning authority may, subject to subsection (4), grant planning permission either absolutely or subject to such conditions as it thinks fit to impose, or refuse to grant planning permission (Section 22(3) TCPA 1976). The local planning authority is empowered to impose conditions on a grant of planning permission for ensuring proper planning. Even though it may appear that the local planning authority has the power to determine the conditions to be imposed on the developer, however, such conditions imposed must be reasonable and relate to the planning activities. Otherwise, party aggrieved with such conditions has been given rights to make an appeal to the Appeal Board.

In *Rethi Development Sdn Bhd v Majlis Perbandaran Seberang Perai [2013]10MLJ 916*, the Pulau Pinang Appeal Board had directed the respondent to remove the imposition of condition on the allocation of Bumi quota and to build a surau in the approval of planning permission. The appellant was required to reserve at least 30% of the total units proposed to build under Bumi quota with a sale price at five per cent less than for other buyers and to provide an identified plot of land measuring about 4,500sqft (the surau site) and to transfer the surau site to the Majlis Agama Islam Negeri Pulau Pinang (MAIPP) for a nominal sum of RM1 upon completion. The appellant was also required to make a contribution of RM54, 120 to MAIPP in lieu of its constructing the surau. The condition to reserve Bumi lot failed the Wednesbury test as it was interpreted as unfair and did not reasonably relates to the planning consideration. With regards to fixing a special price for the lots reserved for Bumi quota, it was clearly against the principle decided in the case of *Cayman Development (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*. Regulating property prices does not fall within the jurisdiction of the local planning authority. Another matter to be resolved in this case is whether the requirement to build surau is a proper and reasonable condition to be imposed. The Appeal Board concurred that the provision of surau or other places of worship is a relevant matter for planning consideration in the context of town and country planning in Malaysia. However, this alone is not the sound reason for the local planning authority to impose such condition. In this case, evidence to show that another surau was not needed within the area was produced. Therefore, the imposition of condition when the need does not exist fails the Wednesbury reasonableness test.

The first Respondent who is the Chairman of the Selangor Appeal Board, emphasizes that the Planning Authority shall use its discretionary power as provided under the TCPA 1976 in deciding any application for the Planning Approval. He states that the local authority as the development controller under the Local Government Act 1976 must ensure that the ameliorate principle within its class is exercised alongside with the law. This view is in tandem with the case of *Driving Sentral Sdn Bhd v Majlis Perbandaran Klang [LR Sel (447)MPK/01/2018]*, where in this case the application for planning approval is seek for the operation of a commercial driving school and driving license test to be conducted by the Jabatan Pengangkutan Jalan (JPJ). The location is left idle by the Ministry of Education. In allowing the application under Section 22(5) of the TCPA 1976, the Appeal Board used the ameliorate principle within its class in granting a planning approval that is temporary in nature.

The Appeal Board is established under Section 36 of the TCPA 1976, where the appointment of the Chairman and the Deputy Chairman together with the members of the Appeal Board not exceeding 12 members. The formation of the Selangor Appeal Board was done under the Kaedah-Kaedah Lembaga Rayuan Negeri Selangor 1999. Even though the Selangor Appeal Board has been in operation since 1999, most of the members of the society perceived that planning appeal is not widely known to the public. (Adilah Jamaludin, 2019) It is the main duty of the Appeal Board to ensure that the principles of *Audi Altrem Partem* is given to the Applicant and no hidden facts that may tarnish the decision of the appeal (Saifudin Marsuk, 2012). The Appeal Board shall evaluate the evidences and witnesses brought before the Board as to whether the Appellant is given a right to be heard during the application process before the Local Authority besides reviewing compliance of the planning law (Dato Abu Bakar 2018). Under Rule 8(2) Kaedah-Kaedah Lembaga Rayuan 1999, the place where the hearing is conducted is deemed to be an open court where the public may attend. Before the hearing date, the Applicants and the Respondents including the presiding Appeal Board Chairperson and the two Members shall fix a date for a site visit at the relevant area related to the appeal. The site visit may provide a practical understanding of the related issues and undoubtedly may assist the presiding Appeal Board members a clearer version of the relevant issues that caused the grievances.

In order to understand the powers of appeal board in deciding an appeal, it is important to understand the planning process. The TCPA 1976 provides that all persons except the local planning authority are required to apply for planning permission prior to commencing or carrying out development as a means to control development. There are activities exempted from applying for planning permission mainly those involving only the improvement in the interior of the building and activities of government agencies listed in section 19 of the Town and Country Planning Act 1976. At the planning permission approval stage, the local planning authority shall have the power to set the conditions which must be followed by the applicant or developers. Apart from the requirement to obtain planning permission with the submission of layout plan and development proposal report, the project proponent is required to obtain approval for various other plans such as earthworks plan, building plan, road and drainage plan and the environment impact assessment report. The Street, Drainage and Building Act 1974 and the Uniform Building By-Laws 1984 will complement the provisions in the Town and Country Planning Act 1976 to ensure all other aspects of development control is taken into consideration. In practice, when the application for planning permission is submitted at the One Stop Centre counter established at the local planning authority, reports and comments from all relevant agencies will be obtained (Abdul Aziz Abdullah, Zakaria Harun, Hamzah Abdul Rahman 2011).

Planning applications should be submitted to the one stop centre (OSC) of the local planning authority for approval. Planning permission will be granted to development proposals which fulfils all the required technical and non-technical conditions. However, the Town and Country Planning Act 1976 provides for the aggrieved party who is dissatisfied with the conditions imposed on a grant of planning permission or in the case where planning permission was refused to make an appeal to the Appeal Board (Section 23 TCPA 1976). At the end of the hearing, the Appeal Board may 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 condition (section 23(3) TCPA 1976). The town

and country planning system is designed to regulate the development and use of land in the public interest and it has a positive role to play in guiding appropriate development to the right place as well as preventing development, which is not acceptable. (Mohd Sukuran bin Mohd Taib and Ho Chin Siong 2008). However, such a noble role must not deprive the rights and privilege of the public within the local area to embrace exclusive enjoyment of land. In balancing the planning system and rights to be heard, the Appeal Board shall play its role in ensuring that the policy shall fulfil the environmental protection and the public interest agendas (Dr Lee Lik Meng 2002, Salleh Buang 2018)

### Analysis of Empirical Study

Four respondents were interviewed relating to the functions and the appeals conducted at the Appeal Board. In consensus all the respondents were in agreement with the principle of Audi Altrem Partem as the backbone of the appeals. Both parties are given opportunity to express their views but shall be based on evidences adduced to the Appeal Board in the Bundle of Pleading and witnesses (if any). Majority of the Respondents were satisfied with the site visits conducted prior to the hearing because they view this process is able to provide the actual location and better understanding relating to the facts of the appeal for all parties including the presiding Appeal Board members. It could help both parties to review and clarify the facts. In consensus the Respondents strongly urged the public to use the Appeal Board because it is a valid channel to voice any dissatisfaction against the decision of the local authority that is cheap and affordable. They also concurred with the facts that at the Appeal Board, not only the planning law is reviewed but the humanitarian aspect in particular the discretionary power under the administrative law is utilised extensively such as the ameliorate principle and the principle of *ejusdem generis* in ensuring justice is served.

The statistic of the appeal board is presented in table 1. It shows that the number of cases brought to the Appeal Board increasing since year 2001 and escalated to the highest peak from 2009 until 2013. This implies several indications which are, public or developers are now aware of their rights and exercise that right. Secondly, more project proponents are not satisfied and aggrieved with the decision of the local planning authority. However, in recent years, the trend shows a decreased in number of appeals. Presumably, the local planning authority has a strong reason and being reasonable in rejecting such planning permission thus, the project proponent resort to adhere to the conditions imposed on them. It is also indicated from the statistic that for each year, few cases have been withdrawn. Perhaps a full and clear description have been obtained during the site visits that prompted the Applicant to withdraw because of the glaring violation of the planning law.

**Table 1: Statistics on Record of Appeals at Selangor Appeal Board**

Sources: Selangor Appeal Board

Year	Cases	Completed Cases	Appeals Withdraw	Site Visits
2001	4	3	1	1
2002	1	0	1	0
2003	9	5	4	3
2004	3	2	1	0
2005	18	15	3	8
2006	17	12	5	8
2007	21	17	4	15
2008	33	28	5	10

<b>2009</b>	45	34	11	20
<b>2010</b>	50	30	20	10
<b>2011</b>	52	38	14	12
<b>2012</b>	54	31	23	8
<b>2013</b>	41	17	24	2
<b>2014</b>	23	8	15	5
<b>2015</b>	33	19	12	4
<b>2016</b>	20	8	12	3
<b>2017</b>	10	3	4	1
<b>2018</b>	9	4	5	9
<b>2019</b>	16	14	5	15
<b>TOTAL</b>	<b>443</b>	<b>270</b>	<b>159</b>	<b>97</b>

### Conclusion

The planning law in Malaysia provides avenue for aggrieved party to appeal in the Appeal Board. Even though the local planning authority is given wide power to control and regulate development activities but the TCPA 1976 still provide rights to the aggrieved parties to made an appeal. This will ensure check and balance on the power exercise by the local planning authority. In line with the rights provided to the public to appeal, the Appeal Board should also provide a fair trial and rights to be heard to ensure justice is sustained. Accordingly, the statistics of appeal cases brought to the Selangor Appeal Court inadvertently reflect a decreasing trend in the recent years that indicates the level of satisfaction of the public have increased towards the planning decisions of the local planning authorities in Selangor.

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