

NEGOTIATING DEVELOPMENT THROUGH PLANNING AGREEMENT: MECHANISM TO PROMOTE VOLUNTARY COMPLIANCE OF GREEN TECHNOLOGY AND SUSTAINABLE DEVELOPMENT INDICATORS

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ABSTRACT

Construction industry is moving towards adopting sustainable construction practices based on green practices. Sustainable construction practices does not only refer to the materials used but covers the innovation in design to reduce wastage and harmonise with the natural environment. This is to ensure that the negative impact from the construction industry will be eliminated. Green Building Index is the foundation of sustainable construction practices. However, to date, there is no specific law making it compulsory for the developer to comply with green building standards. Only certain developers chose to adopt the green building technology and design in the housing construction. However, the local planning authority has the power to impose conditions and approve development which adhered to the rules and regulations pertaining to sustainable construction. This paper analyses the practice of negotiating development through planning agreement in ensuring that the proposed development should be in line with the objective of sustainable development. The practice of finalising the negotiation between the developer and the local planning authority through planning agreement is an alternatives mechanism from planning conditions.

Keywords: sustainable innovation design, sustainable construction, planning conditions, negotiating development, planning agreement.

1. INTRODUCTION

The Malaysian construction industry has assumed a major role in generating wealth. The industry provided employment opportunities for almost 1.03 million people which represented 8% of the total workforce. The industry growth at the rate of 5.3% and contributed for almost 6% of the country's GDP in 2008 [1]. About 30-40% of the total natural resources used in industrialised countries are exploited by the building industry. Almost 50% of this energy flow is used for weather conditioning (heating and cooling) in buildings. Almost 40% of the world's consumption of material converts to the built environment and about 30% of energy use is due to housing [2]. In construction, one of the areas that sustainable development researchers have concentrated on is energy consumption of buildings [3]. The other aspect of sustainability within construction is the idea of making buildings producers of energy using solar, wind and other non-conventional sources of energy that can be produced on the building itself [4].

Thus, it is imminent for the industry to adopt sustainable construction practices based on green technology which can eliminate the negative impact resulted from the construction industry [5]. In line with the decision to promote sustainable development, the 10th Malaysian Plan, the blueprint that outlines the Malaysian national budget has allocated funding amounting to RM1.5 Billion to encourage investment in green technology and innovation for the period between 2011-2015. The 10th Malaysian Plan reiterates that houses need to incorporate green building technology and design in order to meet the government's overall agenda of promoting sustainable and environmentally friendly environment. There is no specific legislation to regulate compliance with green technology or green construction practices. However, there are various policies for reference on the Malaysian environmental protection and

conservation aspects especially the National Policy on the Environment 2002, National Green Technology Policy 2009, National Climate Change policy 2009, Green Index Malaysia to promote environmentally sustainable development, in line with the National Housing Policy. Since there is no specific law making it compulsory for the developers to comply with green building standards, the project proponents are free to choose whether to adopt the green building technology and design in carrying out construction activities.

2. GREEN TECHNOLOGY AND SUSTAINABLE DEVELOPMENT

Green technology for sustainable development of human beings is an essential requirement in the present era. Green technology is a broad term and it defines more environment friendly solutions. It is known as environmental healing technology that reduces environmental damages created by the products and technologies for peoples' conveniences [6].

2.1 Green Building Index

Green Building Index (GBI) can be considered as the foundation of sustainable construction. The Green Building Index is an environmental rating system for buildings developed by the Malaysian Institute of Architects or Pertubuhan Arkitek Malaysia (PAM) and the Association of Consulting Engineers Malaysia (ACEM). The idea of developing Malaysian Green Building Index is due to the increasing demand from building end-users for green-rated building that would not adversely contribute to the destruction of the environment [7]. This is also in line with the objective of many companies today which has incorporated "environmentally friendly" initiatives as part of their Corporate Social Responsibility including their office premises [8]. A development project which has been rated as green building by the Green Building Index will help add credibility to the property development companies practices which can boost their business.

The Green Building Index is Malaysia's first comprehensive rating system for evaluating the environmental design and performance of Malaysian buildings based on six main criterias namely energy efficiency, indoor environment quality, sustainable site planning and management, materials and resources, water efficiency and innovation. Points will be given to each criteria which have been fulfilled. The GBI rating tools will address the residential and non-residential building. Residential building includes linked houses, apartments, condominium, townhouses, semi-detached and bungalows. From the six

criteria that make up the GBI rating tools, the emphasis is more on sustainable site planning and management followed by energy efficiency [9]. Therefore, developers should take into consideration the element of environmental protection, efficient transportation system and provision for ample public facilities to improve the quality of life of the residents. The non-residential building includes factories, offices, hospitals, universities, colleges, hotels and shopping complexes. In this regards, emphasis is placed on energy efficiency and indoor environmental quality. This is to ensure minimal use of energy and balancing the wellbeing of the occupants [10].

It is interesting to note that some of the elements of the green building provided in this particular criteria are similar to the planning conditions imposed by the local planning authority. This is because the local planning authority also stresses on sustainable development and require the developers to adhere to the conditions which promote sustainable development.

The developer who complies with the listed criteria will score sufficient marks and qualify to be certified as green building. It should be noted that the conditions and guidelines imposed by the local planning authority is also aimed at ensuring that the approved project has certain elements of green building. Even if not exactly similar it will have certain percentage of similarity with the GBI criteria. The developer might not have accepted what has been imposed by the local planning authority in totality. For example in the case where the proposed development is not under the green building project, some of the developers are reluctant to adhere to such kind of planning conditions imposed by the local planning authority. In contrast, when applying under the green building project the developer will voluntarily chooses to construct residential and non-residential building complying with all the green building criterias. Therefore, they are well aware that for a building to be recognized as a "green building" certain specifications must be fulfilled. On the other hand, the local planning authority has not made the requirement to be indexed as a green building by the GBI. At the moment, it is a voluntary action on the part of the developers. To a developer who understands the responsibility towards preserving the environment they will adopt sustainable practices for their project. It may not be the same for other developers who are focused on maximizing profit and neglect the promotion of sustainable development. Since the introduction of the GBI in Malaysia, there are over 420 projects that have applied for GBI certification, out of which only 125 projects that have been certified [11]. These include 66 new non-residential building and 48 new residential buildings as well as five existing building that will be green retrofitted [12].

2.2 The Green-Rating Tools in other Jurisdictions

There are other countries in the world which have applied the green-rating tools system successfully. For example BREEAM [13] in the United Kingdom, LEED [14] in the United State and CASBEE [15] in Japan. In fact, the Green Building Index in Malaysia derived from the existing rating tools including the Singapore Green Mark and the Australian Green Star system [16]. It is interesting to observe the position of green-rating tool in our neighboring country i.e. Singapore. Unlike Malaysia, it is mandatory for all buildings exceeding 2, 000 sqm in floor area to achieve a minimum Green Mark certified rating in Singapore with immediate effect April 2008 [17]. The Green Mark rating system was first launched in 2005. In order to ensure environmental quality and comfort are not compromised the Building and Control Authority has enhanced the power conferred by section 49 of the Building Controls Act by providing the Building Control (Environmental Sustainability) Regulations. The effect of the new regulation is to require a minimum environmental sustainability standard that is equivalent to the Green Mark Certified level for new buildings and existing ones that undergo major renovation [18]. This Regulation came into effect on 15 April 2008. Projects that are submitted for planning permission on or after 15 April 2008 will be subjected to the requirement of the Green Mark Certified level. The Regulations is applicable to any of the following building works in respect of which an application for planning permission is submitted to the competent authority under the Planning Act (Cap 232) on or after 15th April 2008 [19]:

- a) Building works which involve a gross area of 2,000 square metres or more;
- b) Building works which involve increasing the gross floor area of an existing building by 2,000 square metres or more;
- c) Building work relating to an existing building which involve a gross floor area 2,000 square metres or more.

Under the new regulations, buildings are awarded with the Green Mark Certification based on the following five criteria [20]:

- Energy efficiency
- Water efficiency
- Site/project development and management (building management and operation for existing buildings)
- Good indoor environmental quality and environmental protection
- innovation

Green Mark Certification means certification under the Building Control Act Green Mark Certification Standard for new buildings approved by the Commissioner of Building Control and issued by the Building and

Construction Authority [21]. Any person who contravened the Regulations shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$10,000 [22].

3. EMPHASIS ON ACHIEVEMENT OF SUSTAINABLE DEVELOPMENT THROUGH PLANNING SYSTEM

According to McAuslan, there is widespread agreement that law has a major role to play in managing the urban environment [23]. It is highly significant that the Rio Declaration on Environment and Development adopted at the Earth Summit in June 1992 laid considerable emphasis on the role of law in creating the appropriate framework for sustainable development. Thus, urban planning procedures are evolving to include environmental protection aspects.

3.1 Powers of the Local Planning Authority to Impose Conditions

Due to the importance given to the concept of sustainable development, amendment is made to the Town and Country Planning Act 1976 to insert the word 'sustainable development' in two sections. Subsection 2A(2), where it is provided that one of the functions of the National Physical Planning Council shall be 'to promote in the country, within the framework of the national policy, town and country planning as an effective and efficient instrument for the improvement of the physical environment and towards the achievement of sustainable development in the country'.

Apart from that section 8(3)(a) of the Town and Country Planning Act 1976 provides that the draft structure plan for the State shall be a written statement formulating the policy and general proposals of the State Authority in respect of the development and use of land in that State, including measures for the improvement of the physical living environment, the improvement of communications, the management of traffic, the improvement of socio-economic well-being and the promotion of economic growth and for facilitating sustainable development.

Based on the procedures adopted by the Singaporean Building and Construction Authority, the Malaysian government can also adopt similar initiative to impose upon developers to build "green building" to ensure compliance. This will promote incorporation of sustainable development concept in the building construction industry. However, to this end there has been no attempt on the part of the local governments in Malaysia to enforce the green building requirements on development projects. Presumably, the

authorities were worried that the imposition of maximum standards of green building requirement as a condition to obtain planning permission might be caught under the Wednesbury's unreasonableness test. Nevertheless, the Petaling Jaya Municipal Council or Majlis Bandaraya Petaling Jaya (MBPJ) have taken bold actions by making it compulsory for all new developments either commercial or residential to fulfil the requirements set out in the list of green criteria issued by the MBPJ, before planning permission can be granted [24]. This action is not something new as those who apply for planning permission for new development have been advised to adhere to the green requirements since 2010. Prior to the submission of the application for planning permission to the MBPJ's One Stop Centre (OSC), several items must be provided in the development plan namely, a rainwater harvesting system, GBI compliance, use of light emitting diode (LED) lamps, eco-friendly development manual and setting aside area for a landscape area of about 10% to 15% out of their total development area [25]. A reference can be made to "Borang Permohonan Kelulusan Pelan Bangunan Baru (Banglo & Rumah Berkembar)" or Application for New Building Plan Approval Form. The form also includes a checklist for building plan approval which covers checklist for green buildings aspect for example the design and the installation of rainwater collection and utilization system. In order to encourage all individual owner and property developers to incorporate green technology in their development MBPJ had made an offer to the residents to apply for a rebate from the yearly assessment rate. A reference can be made to "Borang Permohonan Rebat Cukai Taksiran Bagi Rumah Kediaman Mesra Alam Hijau Berkarbon Rendah Petaling Jaya Tahun 2015". A panel of independent judges will visit the resident's house and advise on how to apply for the rebate. The points given by the judges will determine the percentage of the rebate which the residents will be entitled to receive on the yearly assessment rate [26]. All these efforts are made by MBPJ in order for the city to be recognized as a "sustainable city". As a result, MBPJ had won the Silver Green Apple Award in June 2013 at the National Self Build and Renovation Centre, Swindon London and the Green World Ambassador last November at London's House of Parliament [27]. The steps taken by MBPJ should be taken as an example by other local planning authorities. In fact, MBPJ is victorious as it is the first local authority in Asia to implement the scheme and the second in the world after a local council in Germany [28]. It is emphasised that at the early stage, it is suitable to promote the adoption of green building concept voluntarily [29]. If self-regulation and government regulation does not work together, the implementation of green building concept to ensure the practice of sustainable development will not be achieved.

3.1 Negotiating Development Through Planning Agreement

Blackhall used the term bargain to describe negotiating development [30]. Bargain or 'to come to terms' is a long-established principle [31]. He further refer the situation to the act of the applicant in seeking advice of the planning officer prior to the submission of a planning application in order to enhance the probability that planning consent will be granted [32].

The understanding reached through the negotiation process will be documented and sealed in a form of planning agreements. The enforcement of the clauses in the planning agreement is similar to the enforcement of contractual obligations. Literature review highlighted that the discussion centered on the issue of what can be negotiated through planning agreement and what can be termed as planning obligations as 'these two are normally negotiated at the same time the application for planning permission is made [33].

In scrutinizing the discussion on the issue of planning agreement, readers should be aware that there are other terms used to refer to planning agreement. For example in the United Kingdom, the term planning agreement is originally used but since the law was amended it is now referred as planning obligation. However, in terms of application planning obligation is always being referred to as "section 106 agreement". Planning gain is the term used to refer to the benefits which can be gained from the planning obligation. In Australia particularly in New South Wales, the term used is planning agreement or voluntary planning agreement. Whereas, in New Zealand the practice is referred to as developers agreement.

As planning agreements are used widely in other countries, it has a strong link to the English planning system owing to its long usage. In the United Kingdom, the trend of the planning system is towards negotiating development or regulation through negotiation. Ever since 1960s, due to financial constraint, the private sector is expected to take the responsibility to fund the physical and social infrastructure projects [34]. Thus, the relationship between developer and local authority in negotiating the infrastructure development within an area through planning agreements is rather strong. By the 1980s, the development plan was no longer the determining factor in making planning decision, rather decisions on project was made through the political and administrative processes [35]. However, in the early 1990s, there were pressure to make the planning system more predictable [36]. Thus, in 1991 an amendment to the 1990 Planning and Compensation Act, Section 54A gave greater weight to the plan. Finally, development plan being the primary source framing the planning decision will co-exist with the negotiative form of regulation.

The practice of negotiating development was legalised by section 106 of the Town and Country Planning Act 1990 (previously Section 52 of the Town and Country Planning Act 1971). When Section 52 was amended by the Planning and Compensation Act 1991, planning obligations replaced the term planning agreements [37]. To this end, planning obligations is also known as section 106 agreements. It is an agreement between local authorities and developers or undertaking offered unilaterally by a developer as attached to a planning permission. Planning obligation can prescribe the nature of development, compensate for loss or damage created by a development or mitigate a development's impact. It is observed that planning agreement was used to achieve specific development control objectives. The purpose at this point is similar to the purpose of imposing planning conditions. Apart from that, planning agreement is also used to procure planning gain. Planning gain is a term commonly referred by a developer as "some additional benefit, not necessarily related to the immediate development, offered to, or more usually requested by a local authority" [38]. Planning gain is a term which has come to be applied whenever, in connection with a grant of planning permission for development, the local planning authority seek to impose on the developer an obligation to carry out works not included in the development for which planning permission has been sought or to make some payment or confer some extraneous right or benefit in return for permitting development to take place [39]. It is also has been defined as the achievement of a benefit to the community that was not part of the original application and therefore not normally commercially advantageous to the developer [40]. The issue of planning gain normally arises when major development is being considered. This means that when applying for planning permission the developers will offer contributions towards the communities and development of the infrastructures. This will certainly effect any decision made by the local planning authority in approving a development project. However, it does not mean that a developer who do not include contributions scheme in their planning application will not be granted planning permission. Their application should be determined based on the merits of the application itself. In other occasion the local planning authority can request from the developers for making some contributions or public amenities for the benefits of the local areas. Certainly, the issue of planning gain has triggered criticisms due to its uncertainties, prone to bribery or known as facilitating purchase of grant of planning permission and lack of transparency [41]. Hence, guidelines were prepared to provide guidance to developers on the requirements for the contributions towards services, amenities and infrastructures that can be generated from certain development proposals.

The approach towards planning agreement in Australia and New Zealand is different. The focus is more towards providing infrastructure funding

rather than to control development activities. There are three models used in providing infrastructure funding and public benefit in the New South Wales namely section 94 contributions, section 94A levy and the Planning Agreement. In New Zealand, planning experts have also highlighted the aspect of developer's contributions and financial contributions provided under the Local Government Act and Resource Management Act respectively [42].

In Malaysia, there is not much discussion about aspects relating to negotiating development or planning agreement. It is not surprising since negotiating development through planning agreement is not a practice governed by the Town and Country Planning Act 1976. However, Harding contended that such practice exists [43]. Bruton [44] also said that the idea of having a negotiated development has long being desired by stakeholders in order to create flexibility in the arrangement for developing their area in partnership with the developers or investors. Despite the fact that the practice has not been supported by the Town and Country Planning Act 1976 it is still done in an informal way. Analysis of four decided cases have shown that negotiating process have taken place to provide for facilities for public benefit by imposing planning conditions to a grant of planning permission. The cases are *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1; *Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd* [1996] 3 MLJ 94; *Rethina Development Sdn Bhd v Majlis Perbandaran Seberang Perai*, *Butterworths* [1990] 2 MLJ 111 and *Bencon Development Sdn Bhd v Majlis Perbandaran Pulau Pinang & Ors* [1999] 2 MLJ 385.

This public benefit may be perceived as planning gain similar to the practice in other countries like the United Kingdom, Australia and New Zealand where planning agreement is accepted. The cases demonstrated that the planning conditions imposed to the grant of planning permission attached does not relate to the development. However, it has not been challenged in court as being unreasonable at the first instance as the developer also benefited from this arrangement. It is pertinent to note that planning conditions imposed by the local planning authority in granting the planning permission is mainly aimed at controlling development. Imposing of condition is subjected to limitation namely the test of reasonableness.

In this regards, the Malaysian courts have accepted the reasonableness test pronounced by Lord Greene MR in the *Wednesbury* case [45] where his Lordship said that what needs to be determined is as to whether the local planning authority in imposing a condition had acted reasonably. In the case of *Pengaruh Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd (Sri Lempah Case)* [46], the court expounded the following principles

could be followed in determining the validity of planning conditions [47]:

- a. The approving authority does not have an uncontrolled discretion to impose whatever conditions it likes;
- b. The conditions to be valid, must fairly and reasonably relate to the permitted development;
- c. The approving authority must act reasonably and planning conditions must be reasonable;
- d. The approving authority is not at liberty to use its power for an ulterior object, however desirable that object may seem to be in the public interest.

Based on the above discussion, it can safely be assumed that the practice of negotiating development through planning agreement is done informally between the local planning authority and the developers.

In a situation where the effectiveness of planning conditions in regulating development activities are inefficient and the implementation of development plan is no longer able to bind the decision of the local planning authority, planning agreement is seen as able to provide alternative solutions. Planning agreement can be promoted as an alternative mechanism to the practice of imposing planning conditions in regulating development activities and thus ensuring the objective of sustainable development are realised.

4. CONCLUSION

Based on the discussion set out above, it can be safely be concluded that negotiating for seeking contributions for amenities for new development is prevalent in Malaysia. When negotiating developers' contribution towards infrastructure development for a new area, the method of creating a planning agreement was highlighted as a means of overcoming the shortcomings. This is principally aimed at overcoming the shortcomings, such as the limited powers of the local planning authority in imposing conditions. The developers' contribution can often go beyond the requirement relating to the proposed development. Therefore, imposing of conditions can be open to challenges on the ground of ultra vires and conditions irrelevant to the proposed development.

Thus, any obligations which cannot be imposed as planning conditions can be negotiated and sealed as an agreement. The discussion also focused on the development in companies undertaking to contribute towards improving amenities and infrastructure as part of their CSR undertakings. This is based on the realization that a company does not only prioritise maximisation of profit but must be prepared to contribute towards the needs of the community. Thus, it can be safely presumed that in order to incorporate the provision on planning

agreements in the planning system in Malaysia, the developer must be the key player in the property development industry to realize about the need to give back to the community. The contributions given to the community should not be limited to the basic amenities only, it also requires the developers to think about conservation of the environment and not to cause grave destruction to the environment when they decide to develop their property. When the developers uphold the concept of sustainable development the advancement of technology in the property development industry will give them benefits. In line with this, another initiative will be to ensure development do not destroy the rights of the future generation which can be protected by incorporating the green technology aspects into the development. Green building index is the foundation of sustainable construction practices. However, to date, there is no specific law making it compulsory for the developer to comply with green building standards. Certain group of developers choose to adopt and adhere to the green building technology in the housing industry. Finally, it can also be concluded that in order to achieve the standard of sustainable development the concept of self-regulation and government regulation should be integrated wisely.

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