ABANDONED HOUSING PROJECTS IN MALAYSIA: LEGAL ISSUES RELATING TO THE HOUSING DEVELOPER'S ADVERTISEMENT AND SALE PERMIT

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ABSTRACT

The issue of abandoned housing projects is still an unsettled issue in Malaysia. Even though, there are numerous housing policies and laws having been promulgated by the Malaysian government, yet the problem of abandoned housing projects is still occurring and has not yet been fully addressed. The victims in the abandoned housing projects are the purchasers themselves. One of the reasons leading to the occurrences of abandoned housing projects is the weaknesses and loopholes of the provisions under the Housing Development Act (Control and Licensing) Act 1966 (Act 118) ('Act 118') that have allowed the problem to occur. This paper discusses the issues that arise from the provision under Act 118 relating to the housing developer's advertisement and sale permit. The aim of this paper is to highlight the lacunae in the said provisions that have contributed to the occurrence of abandoned housing projects. This paper finds that there are some lacunae and issues in the provisions of Act 118 relating to housing developer's sale and advertisement permit that need to be adequately addressed to avoid the occurrences of abandoned housing projects in Malaysia.

Keywords: Housing Developer's Sale And Advertisement Permit; Housing Development (Control And Licensing) Act 1966 (Act 118); Abandoned Housing Projects In Malaysia; Legal Issues.

INTRODUCTION

Pursuant to regulation 5(1) of the Housing Development (Control and Licensing) Regulations 1989 (P.U.(A) 58/89) ('the Regulations'), all housing developers who wish to market, advertise and sell their housing accommodation must possess the advertisement and sale permit issued by the Ministry of Urban Wellbeing, Housing and Local Government ('MUWHLG'). The advertisement and sale and its contents shall be in accordance with the advertisement and sale permit as approved by the Housing Controller (Regulation 5(1A)).

The particulars that to be included in the advertisement other than those conveyed by means of broadcast sound receivers or through television receivers must include the particulars as prescribed by regulation 6(1)(a)-(j) of the Regulations. Among the particulars are as follows:

- 1) the housing developer's licence number and validity date;
- 2) the advertisement and sale permit number and validity date;

- 3) the name and address of the licensed housing developer and his authorised agent, power of attorney holder or project management company if any, as approved by the Controller;
- 4) the tenure of the land if the land is leasehold, its expiry date, restrictions in interest and encumbrances, if any, to which the land is subject; and,
- 5) the description of the proposed housing accommodation.

However, there are a list of particulars that an advertisement shall not contain. These are prescribed under regulation 8 of the Regulations. Regulation 8 also states that any name in any language by which any site forming part of a housing development is proposed to be called or any emblem used in connection therewith shall not contain anything which suggests or is calculated to suggest, among others, the patronage of the Yang di-Pertuan Agong or of any member of his family and the patronage of the Head of State of any State in Malaysia or of any member of his family.

Failure of the developer to obtain this sale and advertisement permit in accordance with the terms prescribed by the Housing Controller and the regulations, the developer shall be considered as having committed an offence under regulation 13(1) of the Regulations and shall be liable on conviction to a fine not exceeding twenty thousand ringgit or to a term of imprisonment not exceeding five years or to both (regulation 13(1)).

OBJECTIVES

This paper aims to highlight the problems in the law and practices in the issuance of advertisement and sale permit by the MUWHLG which have led to the occurrences of abandoned housing projects in Malaysia. The case study, social and legal research methodologies were used to extract the data and analyze it. This paper elaborates two case studies of abandoned housing projects occurring in Malaysia. The abandoned housing projects are Taman Harmoni, Lot 82, Mukim of Cheras, District of Hulu Langat, Selangor and Taman Lingkaran Nur, Km 21, Jalan Cheras-Kajang, Selangor at P.T. 6443, H.S. (D) 16848, Mukim of Cheras, District of Hulu Langat, Selangor. The data sources were from the accessible files of the MUWHLG. In respect of legal methodology, the author focused on analyzing the legal provisions in Act 118 governing the advertisement and sale permit. The purpose of focusing these provisions is to identify the problems and loopholes in the law and the practice involving advertisement and sale permit which evidently affect the smooth flow of housing development projects and which lead to the occurrences of housing abandonment. At the ending part of this paper, the author suggests certain proposals to overcome the problems faced in respect of advertisement and sale permit.

RESEARCH QUESTIONS

The research questions that this paper will highlight are as follows:

- 1) What are the problems in the current law and practices governing advertisement and sale permit that have led to the occurrences of abandoned housing projects in Malaysia?
- 2) How to improve the law and practices governing the advertisement and sale permit?
- 3) What are the proposals that can improve the law and practices governing the advertisement and sale permit?

GENERAL ISSUES ON ADVERTISEMENT AND SALE PERMIT

To start with the discussion of this paper, it is noteworthy that, an unwarranted situation has evidently arisen where the advertisement and sale permit had been issued and approved by MUWHLG, even though

the developer had yet obtained the approved building plan. If this practice were to continue, it will cause a problem. The problem is that, if the application for building plan approval is not later approved by the local authority/building authority, the developer might abandon the project. Otherwise if the developers still insist to resume the development of the project, they would be liable for an offence *viz* carrying out building works without possessing approved building pelan as required by section 70(1) and (2) of the Street, Drainage and Building Act 1974 ('SDBA') and by-law 3(1) of the Uniform Building By-Laws 1984 ('UBBL'). If convicted, the developers can be punishable under section 70(13)(c) of the SDBA.

The above problem can be seen in Taman Temiang Jaya, Seremban, developed by AMA Construction Sdn. Bhd. In this case, the building works had been carried out albeit without obtaining the approved building pelan. The application for obtaining approved building plan was rejected as the developer had not met all the requirements imposed by the technical agencies. Consequently, even though, the advertisement and sale permit having been obtained from MUWHLG, but as the building plan had still not been approved, in contravention of the provisions in the SDBA and UBBL, the developer was penalized by the local authority and this had caused the project to be abandoned (MUWHLG's file no. KPKT/08/824/2732-01).

A further problem is--where there had been a joint venture project between the land-owner (land proprietor) and the developer. The joint venture agreement stipulated that the joint venture parties were allowed to accept booking fees from purchasers and to enter into sale and purchase agreements with them, even before the finality of the applications for conversion of land, subdivision of land and approval of layout plan. This happened in *Chooi Siew Cheong v. Lucky Height Development Sdn. Bhd & Anor* [1993] MLJU 449. The problem is this--if these applications were rejected by the land authority and the building authority or the projected plan for the housing development could not be proceeded with, due to the default of the developer and the project site subsequently becomes subject to a prohibitory order or a foreclosure order favourable to the creditors, resulting in the impossibility of carrying out the purported housing development, the purchasers would certainly become the aggrieved parties.

There were also evidences showing that, certain abandoned housing developers had sold the purported units to purchasers, albeit, even when the advertisement and sale permits had not yet been issued by the Housing Controller. Unfortunately for the purchasers, not even a single development or only the preliminary small portion of the development stage had been carried out by the developer. After the developer had collected substantial deposit from the purchasers, they absconded and could not be contacted, leaving the purchasers in the lurch. This problem happened in Taman Universe, Lot 1556, Mukim 13, North East District (NED), Pulau Pinang (developed by Cariwang Properties Sdn. Bhd.), Taman Hamilton, Lot 163 and 2156, Bandar Jelutong, Section 2, NED, Pulau Pinang (developed by City & Country Development Sdn. Bhd.) and Taman Bandar Bukit Bayu, Masai, Johor (MUWHLG's file no. KPKT/08/824/3595 & KPKT/08/3013/E).

The First Case Study: Taman Harmoni, Lot 82, Mukim of Cheras, District of Hulu Langat, Selangor

The project—Taman Harmoni at Lot 82, Mukim of Cheras, District of Hulu Langat was divided into two (2) phases—Phase I consists of single-storey-medium-cost-terraced houses, while Phase II involved the development and erection of the low-cost flats. The development for Phase I was fully completed, albeit delayed, by the defaulting developer (K&T Development Sdn. Bhd. (K&T)), whilst Phase II had not been commenced at all, except for the preliminary, piling, and levelling works done by the defaulting developer. Thus Phase II was considered an abandoned housing project. This project was a joint venture between K&T, Perbadanan Setiausaha Kerajaan Negeri Selangor (State Secretary of Selangor Incorporated (SUK (Incorporated)), being the land proprietor and Permodalan Negeri Selangor Berhad (PNSB). The major reason leading to the abandonment of the project was the financial difficulties faced

by K&T. These difficulties arose due to the lack of skills, experience, and expertise of the defaulting housing developer company (K&T), and the inappropriate selling prices for the units compared to the costs of construction and unforeseen costs (earth works and piling works) faced by K&T (MUWHLG's file no. KPKT/08/824/6037-1).

This project (Taman Harmoni) was also a joint venture (JV) between K&T, SUK (Incorporated) being the land proprietor, and PNSB. This JV was made effective by a Management Agreement and Power of Attorney (PA) dated 24 June 1992, a JV agreement dated 9 November 1992, a PA dated 9 November 1992, and a Supplementary Agreement dated 4 November, 1993 (MUWHLG's file no. KPKT/08/824/6037-1).

Fortunately, the project had been revived by the land proprietor—SUK (Incorporated) through their project manager, PNSB—until full completion and Certificate of Fitness for Occupation ('CF') were obtained on 1 July 2005. However, the rehabilitation was a loss making venture for PNSB and SUK (Incorporated). Nevertheless, the rehabilitation had proceeded, bearing on the reason that this project was for the social welfare of the low-income group in Selangor. Furthermore, the rehabilitation undertaken was not without difficulties. Among the problems were the civil suit initiated by K&T against the rehabilitating parties, and the problem of getting the required consent from Syarikat Bekalan Air Selangor Sdn. Bhd. (SYABAS), which is the water authority in the state for connecting the temporary water supply while pending on the completion of the final water supply that could take about one (1) year to complete, after which this would enable the purchasers, who had been awaiting for the delivery of vacant possession and occupation of the units for the last 10 (ten) years since the signing of the sales and purchase agreements to obtain vacant possession, to move into the completed units (MUWHLG's file no. KPKT/08/824/6037-1).

On the part of the purchasers, the difficulties that they had to bear were the inability to occupy the purported units on time, having to incur other costs such as rents, and inability to get any late delivery compensation from K&T. Pursuant to a resolution passed in the Selangor State Executive Council (EXCO) dated 2 October 1991 on the application of the SUK (Incorporated) to alienate a piece of land formerly known as Lot 82, Mukim of Cheras, District of Hulu Langat, Selangor (the said land) and based on the layout plan as approved by the Selangor State Department of Town and Country Planning, the Council had agreed on the proposal of alienating the said land to SUK (Incorporated). Prior to the application for such alienation, the EXCO had once approved an application for the said land to be developed into a Low-Cost-Housing-Special-Programme on 21 September 1988 (Hulu Langat Land and District office file no. P.T.D. U.L 1/2/520-91 & Kajang Municipal Council file no. MPKj PB/KM 2/41-99).

Advertisement and Sale Permit

Similarly, the application for advertisement and sale permit was also approved by MUWHLG, valid from 27 October, 1994 until 26 October, 1995. Later, a permit was issued, valid from 2 November 1995--1 November, 1996. An advertisement and sale permit, was again issued, vide the application of the developer dated 30 November, 1996. This permit was valid from 4 April, 1997 until 3 April, 1998. The same permit was also renewed and valid from 28 April, 1999 until 27 April, 2000 on the application of K&T on 25 September, 1995. After this date, there was no new permit issued (MUWHLG's file no. KPKT/08/824/6037-1 & KPKT/BL/19/6037-1).

Analysis

The developer for Taman Harmoni (K&T) had no housing development experience prior to the application for housing developer's licence and advertisement and sale permit. Based on the financial

reports, prior to the approval of the licence and the permit, there was no business activity, no housing development project or other construction experience undertaken by the developer or the directors. Nevertheless, the application for licence was approved by the Housing Controller.

The problem is that, there is no provision in the Housing Development (Control and Licensing Act) 1966 (Act 118), which specifically requires the applicant developer to show to the satisfaction of the Housing Controller their financial position particularly the assets, the liabilities and the liquidity of their business prior to the application for advertisement and sale permit. Similarly, there is no provision emphasising the need of the applicant developer to have a certain degree of experience before their application for the permit.

In the application for the permit, based on the observation and file review, in the duly filled in application form for advertisement and sale permit, there was no copy of the approved building plan submitted, as required by Schedule D.

In respect of the previous Schedule A, there was no requirement for submitting a copy of the planning permission and the approved building plan, together with the application for licence. It is opined that, these matters have to be submitted to MUWHLG to ensure the legality of the housing development activities and construction to be undertaken by the developer as being in accordance with the provisions in the TCPA, SDBA and UBBL. Similarly, for the previous Schedule D, the planning permission should also be submitted, not only the copy of the approved building plan. It is opined, by submitting these documents, this would avoid any problem to the progress of the purported housing development. This can happen, where after permit has been issued, the developer could not proceed with the development or the development is rendered illegal because the application for planning permission and other requirements may have yet been fulfilled or might be rejected by the local planning authority and the local authority. Otherwise, to carry out the purported development and building works without the planning permission and the approved plans would contravene the TCPA, UBBL and SDBA.

It is opined, with the deletion of both Schedules A and D in 2007, the above situation is further worsened. With the new amendment in 2007, the requirements as prescribed by the previous deleted Schedules A and D, may not currently be required by the Housing Controller. With this new amendment, the Housing Controller has a full discretion to impose conditions or not to impose conditions for the applications. This may mean, the Controller may not require proof of conversion, subdivision of land and other documents, for approving the advertisement and sale permit, as formerly prescribed in Schedules A and D.

Further, there is no statutory requirement in Act 118, for the Controller to refer to the property experts, economic experts and other relevant bodies when determining the applications of the applicant developers. Due to this, the number of advertisement and sale permits, housing developer's licences and the housing development projects may not commensurate and tally with the economic conditions of the country. This can lead to a property glut and abandonment due to insufficient purchasers and demands.

It may be argued that, the above suggestion would curtail the 'efficiency' of the Housing Controller in determining the applications for advertisement and sale permit and would affect the speedy and smooth flow of the housing delivery machinery and thus cause bureaucratic hassles. Thus, these shortcomings could impair the overall objectives of the various Malaysia Plans in producing sufficient housing units and could discourage the massive and robust influx of the local and foreign investments in the housing and banking industries. However, the objectives in the Malaysia Plans and investment objectives should also consider the problems of abandonment of housing projects and the possible miserable plights of purchasers consequent to the housing abandonment, if effective measures are not sufficiently taken by the Housing Controller, for example, by subjecting the applications for advertisement and sale permit to stringent requirements to ensure that the applicant developers are being qualified and eligible persons and

the housing development projects purportedly to be undertaken are suitable for implementation bearing on the contemporary situations of the national economy and the property market.

The Second Case Study: Taman Lingkaran Nur, KM 21, Jalan Cheras-Kajang, Selangor At P.T. 6443, H.S. (D) 16848, Mukim of Cheras, District of Hulu Langat, Selangor

Taman Lingkaran Nur, Kajang, Selangor above was a result of a privatization project between Saktimuna Sdn. Bhd. (the defaulting developer) (Saktimuna) and the Selangor State Government. The latter was the proprietor of the project land, who later alienated the land to Saktimuna for it to develop into a housing project subject to certain terms and conditions. However, in the course of the development of the project, the project failed and was abandoned as Saktimuna faced serious financial problems due to insufficient sales and revenues generated through sales, and their inability to meet the development and construction costs, which persisted from 1992 to early 2000 (MUWHLG's file no. KPKT/08/824/4275).

Later the project was taken over by one Syarikat Lingkaran Nur Sdn. Bhd. (SLN)—the first rehabilitating party with the consent of the Selangor State Government and the defaulting developer. Unfortunately, SLN also suffered the same fate, i.e. it was also unable to complete the project due to financial constraints (MUWHLG's file no. KPKT/08/824/4275).

On the instruction of MUWHLG and numerous appeals from the aggrieved purchasers, Syarikat Perumahan Negara Berhad (SPNB) had taken over part of the project, i.e. Phase 1A from SLN, with the consent of the Selangor State Government and Saktimuna. Being a government linked company (GLC), SPNB obtained funds from the Ministry of Finance (MOF) to revive the project. The rehabilitation succeeded. However, this rescue was a welfare service, in that the available moneys in the hands of the end-financiers were insufficient to meet the rehabilitation costs. MOF had to top-up funds to ensure the completion of the rehabilitation. During the course of the rehabilitation, there were several problems faced by SPNB, and one of them was the refusal and failure of certain purchasers to give consent to SPNB to carry out the purported rehabilitation works. Thus, not all the units in Phase 1A had been fully rehabilitated and obtained CFs. The remaining phases (Phase 1B and 2), except for Phase 3 which SLN had a joint-venture with Tanming Sdn. Bhd. and it was developed into a completed housing project now known as Taman Cheras Idaman, have as yet been revived. These phases (Phases 1B and 2) are still in the course of negotiation and study for rehabilitation, both by Saktimuna, the OR (being the Kuala Lumpur Department of Insolvency—Jabatan Insolvensi, Kuala Lumpur) and the new chargee (Idaman Wajib Sdn. Bhd.) (MUWHLG's file no. KPKT/08/824/4275).

Saktimuna was wound up on 11 March 2005 upon application of the Inland Revenue Board (Lembaga Hasil Dalam Negeri – LHDN) for failure of the developer company (Saktimuna) to settle corporate tax to LHDN. On 11 March 2005, the Official Receiver (OR) being KL JIM, was appointed as the provisional liquidator for the developer company. Later OR was also appointed as the liquidator for the developer company on 12 May 2009 (MUWHLG's file no.KPKT/08/824/4275 & Kuala Lumpur Department of Insolvency file no. JIM(WP)14/2005/A).

Phases 1B and 2 at Taman Lingkaran Nur were vested in Singesinga Sdn. Bhd. (Singesinga) by the chargee lender—Messrs CIMB Bank Berhad (CIMB) in settlement of the outstanding unpaid loan of Saktimuna to CIMB (the chargee lender), through a court's vesting order (MUWHLG's file no.KPKT/08/824/4275 & Kuala Lumpur Department of Insolvency file no. JIM(WP)14/2005/A).

As at 31 December 2010, there is no rehabilitation or resumption of the housing development project for Phases 1B and 2 at Taman Lingkaran Nur. Nonetheless, recent news is that there is an interested party to buy the whole housing development area at Phase 2 and settle all the damage of the Phase 2's purchasers. The interested party is Messrs Idaman Wajib Sdn. Bhd. (IWSB), the developer responsible for erecting a housing development project adjacent to Taman Lingkaran Nur (MUWHLG's file no.KPKT/08/824/4275).

As at 15 April 2008, Phase 1B which consisted of 52 units had been fully sold to public purchasers. The completion stage for Phase IB is between 0% and 35%, while Phase 2 consists of 108 units where 98 units had been sold to the public. However these 98 units have not been constructed at all (i.e. the project has as yet to commence, abandoned, and the land on which the project is to be erected is still barren and vacant land filled with bushes and scrubs) (MUWHLG's file no. KPKT/08/824/4275).

As of today, there is no plan to rehabilitate Phase 1B. However, with respect to Phase 2, there is an interested buyer, namely IWSB, to purchase the land in settlement of the redemption sum as prescribed by Sinesinga (the chargee). In this project (Phases 1A, 1B, and 2) the OR, as the liquidator to the wound up housing developer company (Saktimuna Sdn. Bhd), does not rehabilitate the project (Kuala Lumpur Department of Insolvency file no. JIM(WP)14/2005/A & PPT(WP)141/2005/A).

Advertisement and Sale Permit

The first advertisement and sale permit was number 4275/406/8916 valid from 14 June, 1988 until 13 June, 1989. This permit had been renewed and enforced until 26 May, 2000. This permit was issued for the advertisement and sales of the 233 units of medium-cost-houses, 138 units of double-storey-low-cost houses, 40 units of double-storey-high-cost-houses and 160 units of five-storey-low-cost-flats. Later, after the expiry of the above permit, new permits were issued by the Housing Controller and the last one was No. 4275/761/2000(5) for the period between 27 May, 1999 until 26 May, 2000 (MUWHLG's file no.KPKT/08/842/4275 & KPKT/BL/19/4275-1 Jld. 2).

Analysis

Based on the case study, it is found that the developer had no sufficient housing development experience prior to the application for the advertisement and sale permit. Due to this, the developer faced management problems in the course of the development which finally had resulted in the abandonment of the purported project.

Even though the Housing Developers (Control and Licensing) Regulations 1982 (P.U.(A) 122), through the previous deleted Schedule A (Application for A Housing Developer's Licence) required a copy of an approval for the sub-division of the purported project land be submitted to MUWHLG, the developer at the time of the application did not submit the required copy as they had as yet received the approval for the same. Despite this failure, MUWHLG still approved the application for licence. Thus, this problem involves the issue of enforcement of the law by MUWHLG and might open certain abuse to the detriment of the purchasers' interests in the project.

Other than the above, the author would like to repeat the points as raised and discussed in the above Taman Harmoni, regarding:

- 1) the legal requirement of the developer to have sufficient assets, experience and capability before venturing on the purported housing development project;
- 2) the problems due to the deletion of Schedules A and D in 2007; and,
- 3) the absence of the requirement on part of MUWHLG to refer to certain experts before approving the purported application for license;

FINDINGS

The findings of this research paper are as follows:

- 1) In both case studies, it is proven that there was a failure of the applicant developers to fully submit the required supporting documents for advertisement and sale permit but MUWHLG (Housing Controller) still approved the applications;
- 2) There is no legal requirement imposed on the applicant developers to have and show sufficient assets, experience and capability before venturing on the purported housing development projects; and,
- 3) Ccrtain problems may arise due to the deletion of Schedules A and D in 2007. With the new amendment in 2007, the requirements as prescribed by the previous deleted Schedules A and D, may not currently be required by the Housing Controller.

RECOMMENDATIONS

It is a good practice that before applying for the advertisement and sale permit, it is proposed that the applicant developer should first obtain the planning permission and approved building plan and other approved plans from the local planning authority and local authority. It is perceived that, these matters are incumbent bearing on the fact that the intended housing development must have the necessary planning permission and approved plans before it can be permitted to proceed. Otherwise, without the permission and approval, any irresponsible developer can easily sell the purported units by fraudulent means, collecting deposit from purchasers, whereof there might have not been any application made for planning permission nor plans' approval or alternatively, if there were applications, these applications might have been rejected. Thus, in these situations, advertisement and sale permit though having been granted, and issued remain valueless, unless the planning permission and the required approved plans have first been granted.

For this purpose, Schedule A (Application For A Housing Developer's Licence)-- Regulation 3(1) to Regulations 1989, should insert these two (2) matters--copies of planning permission and approved building plan and other approved plans, if any, as the additional required particulars to be submitted to the Controller for the grant of licence. While Schedule D (Application For Advertisement and Sale Permit)-- Regulation 5(2) to the Regulations 1989, must add and require a copy of the planning permission.

Regulation 5(2)(a) to Regulations 1989, too would require amendment as follows:

Amendment to regulation 5(2)(a) of Regulations 1989:

'a copy of <u>the planning permission and</u> the approved building <u>and other approved plans, if</u> <u>any</u>'(emphasis added).

Regrettably, with the new amendments made in December, 2007, the requirements as provided in the previous Schedules A and D had been abolished. It follows that, the Housing Controller has a full discretion whether to impose conditions or not to impose such conditions for the applications. This may also mean, the Controller shall not require proofs of conversion and subdivision of land, for approving the housing developer licence's application and other documents as formerly prescribed in Schedules A and D. It is suggested, the previous Schedules A and D be restored but with certain amendments as suggested above.

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