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**DEVELOPMENT ON RAILWAY RESERVE LAND: A
PRELIMINARY STUDY**

Najah Inani Abdul Jalil (a)*, Nuarrual Hilal Md Dahlan (b), 'Ain Husna Mohd Arshad (c)

*Corresponding author

(a) School of Law, Universiti Utara Malaysia, najah@uum.edu.my

(b) School of Law, Universiti Utara Malaysia nuarrualhilal@uum.edu.my

(c) School of Law, Universiti Utara Malaysia, ainhusna@uum.edu.my

Abstract

The improvement of railway services in Malaysia demand clarification on the use of railway land as to ensure the greater compliance with law and maximum utilization of land. This paper will focus on the land reserved for railway purposes which is governed under the Federal Constitution 1957 and its utilization in the case of development in the land. It needs to be highlighted as to differentiate its application with other reserved land contained in National Land Code (Act 56 of 1965). As to provide clarification, this paper aims to look into the authorities who have the power to deal with railway reserve lands and its limitation as to the use of the land, and the power of the State Authority in controlling this reserve lands. The problem would arise if the use of railway reserved land contravenes the purpose for which it was reserved and the power of the State Authority in approving any development in railway reserved land. Based on laws and practices, it is very important to have specific guidelines to regulate the application of railway reserved land and its relationship with the power of state authority to ensure the purpose of the reservation is ultimately complied with.

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Keywords: Railway land, Disposition, Lease of reserve land, Planning Law, State Authority.



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1. Introduction

The management of railway assets and operation was under the management of Malayan Railway Administration (MRA) (*Pentadbiran Keretapi Tanah Melayu*) under the Railway Ordinance 1948 (repealed Ordinance) (Ordinance 1948). However, in 1991, Railway Assets Corporation (RAC), a federal statutory body was established under section 89 of the Railways Act 1991 (Act 463), commenced officially as an organization on 1st August 1992. RAC was fully operated on 1st October 1992. In conjunction with the establishment of RAC, MRA, a public entity which existed since 1894 was disbanded as in accordance with section 92(1) of Act 463 and presently known as *Keretapi Tanah Melayu Berhad* (KTMB) as one of the company under Minister of Finance Incorporated. Act 463 vests all property (including immovable property), rights and liabilities of MRA and Federal Land Commissioner (FLC) under Ordinance 1948 into RAC. Under Act 463, railway land comprised of alienated railway land and reserve railway land. The focus of this paper will be on railway reserve land.

A landowner is entitled under section 44 of the National Land Code 1956 (NLC) to the exclusive right of use over his land but the right is not absolute as the land is subject to “lawful use as is reasonably necessary”. Upon alienation of the land, the state authority will impose category of land use (section 52 NLC) and express condition (section 120 NLC) on the document title as they think fit. It is important to note the differences between conditions and restrictions in interest. The former refers to manner upon which the lands shall be utilized and in case of breach of conditions, the land is liable to forfeiture by State Authority.

The latter refers to power of the registered proprietor to amalgamate, subdivide and deal with his land and its violation will render the interest obtained with defeasible title as in the case of *Khatijah bt Abdullah & 8 Ors v Mohd Isa Bin Biran* [2017] 2 MLJ 1 (Federal Court), transfer of land in breach of restriction in interest would be incapable of registration. In *Bellajade Sdn. Bhd. v CME Group Bhd & Anor* [2017] 1 MLJ 92 (Court of Appeal), the effectiveness of change in category of land use will be effective if it is endorsed on the title, while in the case of change of express condition, the endorsement of the new condition on the title does not have any legal effect. It is merely an administrative act which the State Authority is bound to do.

In *Perbadanan Kemajuan Negeri Selangor v Selangor Country Club Sdn Bhd* [2017] 2 MLJ 819 (Court of Appeal), the state authority is vested with the power to alienate land, prescribe a category of land use and express condition. It will entail upon the proprietor with consequent obligations to comply with the terms and conditions under which the category is subject to. The High Court cannot assert the delivery of the document title with category of land use as it is not within the jurisdiction of High Court to do so.

In developing land in Malaysia, the constitutional protection to freedom of property may be interfered due to the legitimate public purpose. Instances can be seen in the application of town planning and acquisition for public purpose as the latter when it is carried out will interfere with the right of ownership in the same vein of non-compliance with the statutory duties and obligation in the document of title (Lee, 2015). For the purpose of land development, the Town and Country Planning Act 1976 (Act 172) (TCPA) empowers the local authority to evaluate planning applications. It will be approved if the category of land use coincides with the zoning. If there is a conflict, then the registered proprietor will be

asked to apply for change of category of land use if for instance he wished to develop his agriculture land into a commercial related development on the land.

2. Problem Statement

In the case of alienated land in Malaysia, Issued Document Title (IDT) or Registry Document Title (RDT) stipulate the condition and restrictions in interest that run together with the land. However, the existing document of railway reserve land by virtue of gazette documents fail to give guidelines on how the land to be used. In the case of railway reserve land in Malaysia, gazette notification only stipulated that the reservation of the land is for the purpose of a Railway. There is no clear provision stating the usage or restriction of the railway reserve land especially in light of freedom given by article 85(4)(a)(b) Federal Constitution which guarantees the use of land reserve for federal purpose for the purpose for which it is reserved, or for any purpose ancillary or incidental thereto or if unable to use the land according to the purpose for which it is reserved, for any purpose other than federal purpose.

The situation above causes hardship and difficulties in case of developing railway reserve land as it can be developed for any railway related purpose or any purpose which is totally alien to railway purposes. To the extreme end, the danger of this situation will expose the railway reserve land to the development which is not related to the railway at all. This issue is relevant now to correspond to the rising of development on railway reserve land which are non-related to railway purposes such for commercial and housing development. Hence in the absence of any restrictions in interest, categories of use, conditions of the railway reserve land, is there any curtailment on the freedom to use railway reserve land?

3. Research Questions

1. On whom rest the authority to approve development on railway reserve land?
2. Is there any safeguarding mechanism in developing railway reserve land?

4. Purpose of the Study

1. To identify authorities approving developing railway reserve land.
2. To identify the safeguarding mechanisms in developing railway reserve land

5. Research Methods

This study adopts doctrinal research methodology adopting library research which is conducted by examining the primary data which are Federal Constitution 1957, National Land Code (Act 56 of 1965), Railways Act 1991 (Act 463), Town and Country Planning Act 1976 (Act 172), and secondary data including but not limiting to scholarly text, decided cases and journal articles. The modes of collection data above will be gathered from library in the form of hard copies, online database, online journals or CD-ROM. The articles then will be written based on the analysis from the above sources. Its qualitative involving legal analysis.

6. Findings

6.1. Approving authority in developing Railway Reserve Land in Malaysia Railway Ordinance 1948 (Repealed)

Railway land has been defined under Section 2 Ordinance 1948 as:

“Railway land” means land vested in or held by the Federal Land Commissioner or any other person for the purpose of the railway and land in occupation, or under the control of the Railway Administration and includes railway reserves”.

Under the same section, railway reserve has been defined as:

Railway reserve means –

- (a) all lands duly reserved whether before or after the commencement of this Ordinance for the purpose of the Federated Malay States Railway or the Johore State Railway or Malayan Railway under the provision of section 24 of the Land Code of the Federated Malay State or under the corresponding provisions in the law of any state; and
- (b) All lands deemed to be railway reserve under the provisions of section 16 or section 17 of this Ordinance”.

By virtue of section 7(1) of the Federal Land Commissioner 1957 (Act 349) all railway land were vested in the FLC. Thus until 1991, all railway lands situated in Peninsular Malaysia were vested in the FLC. Since the vesting of lands to FLC, section 14 Ordinance 1948 stated as follows:

“Federal Land Commissioner may acquire, purchase, take, hold immovable property of any description for the purpose of Malayan Railway and may sell convey, transfer, lease, assign, surrender and yield up, mortgage, charge, re-convey, or otherwise deal with any immovable property vested in or held by him”.

6.1.1. Railways Act 1991 (Act 463)

The functions of RAC *inter alia*, is provided under section 89(8)(a)(i) and (ii) to manage, administer and maintain all property and rights of the MRA which are vested in RAC by virtue of section 92(2) of Act 463 and all property vested in, held or acquired by the FLC which are vested in the RAC by virtue of section 93 of the Act 463.

Under section 92(2) of the Act 463, the effect of dissolution of the MRA has caused all property, rights and liabilities of the MRA under the repealed Ordinance shall upon the commencement of the Act 463, vest in the RAC without any conveyance, assignment or transfer whatsoever and all references to “Malayan Railway Administration”, “Malayan Railway”, or “General Manager, Malayan Railway” in relation to such property in any instrument, deed, title, document or written law shall be construed as if all such references were references to the “Railway Assets Corporation”.

Similarly, under section 93 of the Act 463, all property vested in, held or acquired by the FLC under the repealed Ordinance shall vest in the RAC upon the commencement of the Act 463 without any conveyance, assignment or transfer whatsoever for the like title, estate, or interest and on the like tenure as the same was vested or held immediately before the commencement of the Act 463 and all references to the “Federal Lands Commissioner” in relation to such property in any instrument, deed, title, document

or written law shall be construed as if all such references were references to the “Railway Assets Corporation”.

Based on the above sections, all property, rights and liabilities of the MRA and all property vested in, held or acquired by the FLC were vested in the RAC. This position is supported by the decision in *Railway Assets Corporation v Elmspark Holding Sdn Bhd & Ors* [1997] 3 MLJ 224 (Court of Appeal) where the creation of Act 463 created two important changes, first it created RAC and second, by virtue of section 93, it vested all railway lands in RAC.

Under section 103 of the Act 463 RAC may dispose its immovable property by way of *inter alia*, sale, convey, transfer, lease, assign, surrender and yield up, mortgage or otherwise deal with any immovable property vested in from FLC under section 93 of the Act 463. Section 103 of Act 463 clothe RAC with the power to deal with the land vested in it as in manner as any other registered proprietor under section 340 of the NLC to deal with his land under Part 13,14 and 15 in the NLC. In dealing with railway reserve land, is RAC allowed to deal with the land in the absence of any restrictions as to the usage of the land. In answering the above question, attention must firstly be centred on the concept of reservation of land under the NLC and Federal Constitution.

Table 01: Reservation under section 63 of the National Land Code and under article 85 of the Federal Constitution.

| | Section 63 of the NLC | Article 85 of the FC |
|-------------------------|---|--|
| Reservation requirement | Reserve any state land for public purpose | Reserve any land in a State for federal purpose. Such land will include: any land reserved before Merdeka Day (is defined as 31 st August 1957 under article 160 of the FC) for any purpose under provision of any law in force in a state which has become a federal purpose after Merdeka Day; Any land reserved for any federal purpose after Merdeka day under any provision of law which in force in a State. (c) - (d). |
| | The reserved land shall not be: disposed by the State Authority except in accordance with section 63 (power to lease), Chapter 2 (issuance of Temporary License Occupation), Chapter 3 (Removal of Rock Material) and Chapter 4 (Permit to use Air Space above the land) of the NLC; Used for any purpose other than the purpose for which it is reserved except in pursuance to disposition under the NLC. | The reserved land can be used: for the federal purpose for which it is reserved; Any purpose ancillary or incidental thereto. |
| Approving Authority | The state authority may grant lease. The application shall be made by the officer for the time being having the control of any reserved land. Shall be on the whole or any part of reserved land | Federal government may grant right of occupation, control or management, or tenancy or lease. The reserved land shall be controlled and managed by or on behalf of the Federal Government. Shall be on the whole or any part of reserved land. |
| Period | Not exceeding the period of 21 years | Period will be determined by the Federal government |
| Form | Form 4AA (Circular of Director of Land and Mines Bil. 13/1974, Lease Form for Reserve Land) | n.a. |

Table 1 shows the differences between reservation of land under the NLC and the FC. The differences arise in term of controlling authorities whom are vested with the power to grant lease or

control over the land, the period of grant and the purpose for which the land to be used. The application of reservation of land under article 85 of the FC is cornered on the phrases “reserved for federal purposes”. The definition of federal purpose under article 160 of the FC are as stated:

“federal purposes” includes the purpose of the Federation in connection with matters enumerated in the Concurrent List and with any other matters with respect to which Parliament has power to make laws otherwise than by virtue of Article 76”.

The powers and rights of the parliament to make law are confined in the Federal and Concurrent list as in article 74 of the FC. Reference to Item 10 (b) of the Federal list showed that “transportation and communication, Railways excluding Penang Hill Railway” are matters upon which the Federal government has the powers to make law thus classifying railway matters under the “federal purpose”.

Two notable amendments have been made by parliament dated 17th March 1988 regarding the land reserved for federal purpose under article 85 of the FC. Previously, under article 85 (1) of the FC, if the land so reserved for federal purpose was no longer needed for federal purpose, Federal government is obliged to revoke the land reserved for federal purpose to State authority on payment of compensation made by the state authority under clause (1) of the FC. The current Section 85 (1) FC was due to the Amendment Act A704 in force from 10 June 1988. Should the state government refuse the revocation of reserved land, then the state government is obliged to cause the land be given to federal government in perpetuity without any limitation as to the usage of the land provided the federal government pay premium and any related payments. After that, the federal government can dispose the land without any limitation (Parliamentary Debates, 2nd Session, 1346-1352).

However, for the amended article 85(1) of the FC, the federal government may require the state government to grant the land reserved for federal purpose to be granted in perpetuity provided the federal government shall pay the amount of premium as stated in clause 2 of article 85 of the FC. The spirit of pre-amended article 85 (1) FC was captured in the current article 85(3) of the FC where the federal government may offer to release the land reserved for public purpose to state government on the payment of premium under clause 2 of article 85 of the FC. The differences can be seen in the chosen word where previously the federal government is obliged to revoke the land reserved for federal purpose to state government and currently the federal government may offer to release the said land to the state government. The reason was due to the implementation of privatization policy adopted by the elected government during that time.

As for the amended article 85 (4) of the FC, the land which has been reserved for federal purpose shall not cease to be so reserved though the land is used for other purpose not being the purpose it was reserved, ancillary or incidental purposes. Federal government shall have the power and rights to grant any right of occupation, control or management, tenancy or lease to anybody for any duration upon condition stipulated by the federal government.

Having established the reservation for the purpose of railway is of the federal purpose thus qualifying the federal government to make law on it, section 103 of the Act 463 shall be read together with article 85 of the FC. It is stipulated that the land shall be controlled and managed by or on behalf of the Federal Government. Reference to Circular Director General of Land & Mines Bil.5/2009, Appointment of Public Officer as Controller for Federal Reserve, in compliance of requirement under

section 62(2) of the NLC, the appointment of public officer having control over the reserved land shall be from public officer exercising public office excluding the officer from statutory bodies and local governments. Section 3 Interpretation Act 1948 & 1967 (Act 388) defines Public Office as an office in any of the public service. Article 132(1) of the FC defined public service as listed in article 132(1) (a)-(h).

The RAC, a creation under the Act 463 as a statutory body is disqualified to hold the duty of public officer having control over the railway reserve land. As has been directed based on the circular above, the appointment of statutory body only as authority to supervise and maintain the reserve land but not as a public officer as per requirement under section 66(2) of the NLC. Thus, it is suggested that the authorities approving any development in railway reserve land should be the Federal Government with consultation and conformation with the RAC as it is in line with its function contained in the Act 463.

6.2. Curtailment on the Freedom to Use

The peculiarity of the legal land use in Malaysia is governed by two independent laws that are land law and planning law. In deciding the use of land, state authority under the NLC is not required to take regards or comply with any plans or policies including under the TCPA 1976. Section 108 of the NLC claims priority of land law over town planning policies. It reads as:

“Where any land effected by any by-laws of, or restriction imposed by, any local authority or planning authority becomes subject by virtue of this Act (*National Land Code*) (*emphasis added*) to any condition which is inconsistent therewith, the condition shall prevail, and the by-law or restriction shall, to the extent of the inconsistency, cease to apply to land.”

The problems arise in a situation where a registered owner asserts that his ownership entitles him to develop his land to a much higher value development than the permitted planning scheme. For instance, if planning scheme zoned the land to be green area whilst the registered proprietor asserts that his land is endorsed with the use of commercial and building. With the latest development of law, the court in the case of *Majlis Perbandaran Subang Jaya v Visamaya Sdn Bhd & Anor* [2015] 5 MLJ 554 (Court of Appeal), the assertion that section 108 of the NLC shall not render the provision under TCPA including the zoning made thereupon which is inconsistent with NLC to be held null and void is held to be no merit as the enactment of TCPA in 1976 will prevail as NLC was enacted in 1956. Section 108 of the NLC cannot be applicable to laws enacted subsequently by Parliament. In as much as not to be over zealous on the power of planning authority in dictating the use of land, planning authority will have strong influence on the land use over any development land activities (Lee, 2015).

As for the reserve land for federal purpose, the use shall be as accordance with the purpose of the reservation and shall be controlled and managed by or on behalf of the federal government. The grant of reserve land shall be in the form of right of occupation, control or management, tenancy and lease. In relation to railway reserve land, the gazette notification provides the purpose for which the land is reserved is for “Railway”. Consequently, the use of the reserved land shall be comprised within the definition of railway and in line with the function of RAC contained in S89 (8) (a), (b) and (c) of the Act 463. The reason for the contravention for the use of reserve that its initial purpose is due to governmental economic policy, but it will result not only in the dispossession of the reserve land but also on the loss of the ecosystems (Huntsinger & Diekmann, 2010).

In contrast to other reserve lands created under within the legal framework in Malaysia, internal controlling mechanisms were created alongside the creation of the reserve lands. The example can be seen in the case of Malay Reserve Land where the restrictions on the use and dealings are provided within the enactment. Similarly, regarding the aboriginal reserve where it provides for the protection for its existence within the act itself however fragile the protection is (Abidin & Seow, 2014). The lack of definite safeguarding mechanism in railway reserve land invoking the notion that whether the freedom to use and develop the railway reserve land is without any limitation.

6.3. Safeguarding mechanism in developing Railway Reserve Land

6.3.1. Planning Control Mechanism

The railway reserve land is reserved for the use of railway which has been defined under section 2 of the Act 463. The reading of article 85 of the FC stipulate that the land shall be managed and controlled on behalf of the federal government and can be used for the purpose for which it is reserved or any other ancillary purpose. The weakness foreseen would in the situation in which the use of railway reserve land is compromised, what would be the safeguarding method provided under the law?

The concept of land use control is viable solution to harmonize the use of railway reserve land. It refers to the process by which the authorities are empowered by the law to prescribe the use of the land and the power of enforcement in the case of breach of prescription (Al-Junid, 2006). Under the land law, it refers to State Authority whilst for planning law it refers to local planning authority. The dual land use authorities are premised on two independent acts. It is worth to be mentioned that in terms of alienation of lands and imposition of conditions and restrictions in interest, there is nothing in the NLC which requires the State Authority to make reference and conformation with other technical agencies including planning authority (with the exception to application of sub-division under section 136 of the NLC which requires the State Authority to get approval from the planning authority). Despite the discrepancy between the two, State authority in the NLC in the practical terms, are the members of the State's Meeting Council including the *Menteri Besar*, while under section 4 of the TCPA, a chairman of the State Planning Committee shall be the *Menteri Besar* or the Chief Minister (Md. Dahlan, 2009).

Reserve land document does not provide for imposition of category of land use, express condition and restriction in interest. This otherwise freedom however is not without any limitation as section 19 (1) of the TCPA as with exception to local authority, no person shall carry any development activities unless planning permission over the land development has been obtained. Even if the development proposed would not contravene any development plan, planning permission could be refused on the ground that it will likely to compromise any development plan under preparation or to be prepared, or the proposal relating to those proposals. This position was upheld in *Chong & Co. Sdn Bhd v Majlis Perbandaran Pulau Pinang* [2000] 5 MLJ 130 (*Appeal Board, Penang*). The compliance of land use planning shall not be undermined as it will create "a legal vacuum" which bring the disconnected, chaotic and unplanned land development (Lehmann, 2014).

Planning authority is rightly justified in consulting other related government agencies and statutory bodies to obtain opinion necessary for proper planning approval as the procedure is sanctioned under Section 21(2) of the TCPA. In *Bencon Development Sdn.Bhd v Majlis Perbadaran Pulau Pinang* [1999]

2 MLJ 385 (High Court) planning authority may and should obtain technical advice from the government department to obtain views to arrive at the decision whether to approve or not subject to views obtained without requiring the latter to be made parties to any action should dispute arose. Hence in any development on railway reserve land, though the reserve document does not contain any restrictions to the use of land except for the use of railway, the use of the land is limited to the planning permission imposed by the planning authority. Planning authority shall consult technical government authority in deciding any approval for development on the railway reserve land as not to compromise the use of the land. A broader perspective has been adopted to suggest that even though the local and structure plan have been prepared, analysis and field work need to be executed before any approval to be given as to ensure the suitability of the land to any development proposed (Md. Dahlan, 2009).

6.3.2. International Practices

The international practice on protection and preservation of aboriginal and native lands shall act as guidance in the discussion to safeguarding the railway reserve land in Malaysia. This is to ensure while the need for the land to be developed commercially in accordance with the passage of modernization, the ultimate acknowledgement and protection shall be given to the beneficiaries of the land so reserved (Webster, 2016). In *Mabo and Others v Queensland (No.2)* [1992] 175 CLR 1, the High Court sanctioned the obligation of the developer in dealing with indigenous people before any development take place within the indigenous land. Full appreciation of the reservation concept must be advocated including the recognition of the indigenous to the land and the legal exploitation of the land reserved (Galbraith, 2014).

The same principle could be propagated in the railway reserve land in Malaysia where its development shall not be qualified only related to the traditional and conventional definition of railway development, but it shall be expended to encompass the development which will generate revenue to boost railway industry. In economic efficiency ideas, many believed that land should belong to those who can maximize the economic return of the land. The failure to generate wealth using land and its resources reflects failure to improve general welfare of the society resulting in unfair environment to the society (Huntsinger & Diekmann, 2010). However, the expansion of railway land development must be balanced in line with the objectives of the reservation including not to allow de-reservation for the purpose other than railway related development. The exclusive nature of railway reserve land must be framed within the rights to exclude others from using the land without consent even if the interference come from the government, and the availability of legal and equitable remedies in the event the railway reserve land is compromised (Stephenson, 2002).

In the case of *A Alamu Nagar v State of Tamil Nadu* (Madras High Court) (4 January, 2010), one of the issue arose is whether the de-reservation of land which is reserved for public purpose by the government for other purpose was valid? Although the existence of power of variation, revocation, modification by the government under section 32 of the Tamil Nadu Town and Country Planning Act 1971, the court could not agree with such power to be extended to revoke the use land which is earmarked for public purpose for any other use of land. The state government was not empowered to alter the conditions imposed on the land which is reserved for public purpose. The court was in opinion that de-

reservation of land reserved for public purpose cannot be done even if the purpose is for housing development.

In this regard, the similar recognition and protection shall be addressed to the railway reserve land in Malaysia as the vast quantity of the available railway reserve is for the development of railway industry itself rather than becoming a land bank to any other non-related railway land development. It is suggested that before any non-related railway development on railway reserve land were to take place, the interest of railway industry must first be looked after as any future development involving new acquisition of land is costly. Another innovative alternative is seeking compensation based on the breach of fiduciary duty. This is modelled after the successful litigation on federal mismanagement on reserve land (Alderman, 2013). The compensation shall be based on market-value compensatory damage together foreseeable damage in future due to the loss of reserve land.

The feature of right to negotiate is critical to be exemplified in deciding the future development on railway reserve land. Under the Native Title Act 1993, it provides the right to negotiate with the government on any development prior to the execution of the plan. Although it does not carry the veto rights, it allows for some influence or controls over future development involving the lands (Hunt, 1998; Stephenson, 2002). This process of negotiation can be framed in Malaysia within the context of deciding the development on railway reserve land in Malaysia. As the power to decide vests in federal government, the interest of beneficiaries and stakeholder of the railway reserve land should be protected as not to allow abuse of power in changing the status of reserved land for railway purpose to any other use which is detrimental to the railway industry (The Star Online, 2016).

7. Conclusion

Reading from the provision in article 85 of the FC and Act 463 on the question of dealing by the RAC on railway reserved land, section 103 of the Act 463 shall be read in reference to power of federal government to deal with reserved land for federal purpose to such person as it deems fit for any purpose ancillary or incidental hereto. The rights to deal or use of the land however shall not be without limitation as with the new development of law, planning control over use of land has been given precedence. The importance of land use planning shall not be undermined as its function is to ensure a rational and orderly land development with the objectives of creating sustainable human settlements. Its twin functions are land use planning and development control. Hence, the power to deal with the railway reserved land shall be made with the approval from the federal government in line with the requirement in article 85(4) of the FC and within the ambit of railway usage as per requirement in the Act 463 and planning law.

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