IN THE COURT OF APPEAL, MALAYSIA

CIVIL APPEAL NO. W-01(A)-712-12/2018

Perbadanan Pengurusan Trellises & 9 Others V Datuk Bandar Kuala Lumpur & 3 Others

Summary of Decision

[1] The principal issues in this appeal concern the question of *locus standi* to initiate judicial review proceedings against the local authority in matters concerning planning and development of an area falling within the purview of the local authority; and the ambit of challenge. The respective parties have made extensive oral and written submissions and the Court records its appreciation for the assistance rendered.

[2] The appellants' application for judicial review was for the following orders–

i. orders of certiorari to quash a Conditional Planning Approval dated 28.2.2017 and a Development Order dated 13.7.2017 issued by the 1st respondent in relation to a proposed development of a piece of land known as HSD 119599, PT 9244, Mukim Kuala Lumpur, Tempat Bukit Kiara, Daerah Kuala Lumpur [the Land];

ii. an order of mandamus directing the 1st respondent to adopt the draft Kuala Lumpur Local Plan 2020 and to thereafter publish the adoption in the Gazette pursuant to section 16 of the Federal Territory (Planning) Act 1982.

[3] As summarized by the learned Judge, the appellants contended that the two impugned decisions dated 28.2.2017 and 13.7.2017 ought to be quashed for the following broad reasons:

i. the decisions are tainted with illegality, irrationality and procedural impropriety;
ii. the appellants have a legitimate expectation that the subject land will remain as a public open space, recreational and sports area, green area and city park.

[4] On 28.11.2018, the application was dismissed by the High Court, principally on the ground that:

i. the appellants lack *locus standi*;
ii. the impugned decision was not tainted with any illegality, irrationality or procedural impropriety.

[5] On the issue of *locus standi*, the respondents had submitted that for the appellants to be entitled to mount a challenge, rule 5(3) of the Planning Rules required them to show that they are the registered owners of lands adjoining to the subject land. His Lordship agreed after "having perused the affidavit evidence and all the relevant documents exhibited in the application" and finding that "there is nothing to show that the 3rd to 10th applicants are the registered owner of the lands adjoining to the subject land".

[6] In respect of the 1st to the 4th appellants which are management corporations established under section 39 of the Strata Titles Act 1985 with duties as specified under sections 59(1) and (2) of the Strata

Management Act 2013 [Act 757], the respondents contended that these appellants had no power to file the judicial review application. The same goes for the 5th appellant who is a joint management body established under Act 757. It was argued that these bodies only had duties and powers confined to the common property located within the respective properties. In this regard, the learned Judge also agreed with the respondents after perusing the relevant laws, that their "duties and powers are only in relation to the common property"; citing this Court's decision in ***Amber Court*** [2016] 2 MLJ 85. His Lordship was of the view that on this ground alone it would have been sufficient to dismiss the application for judicial review.

[7] As to the merits of the application, the learned Judge found that since the appellants did not have the requisite *locus standi*, the provisions of the Planning Rules requiring the affected persons to be informed of the decision of the Commissioner, was inapplicable. In any case, the 1st, 2nd and 6th appellants had been informed of the decision to grant the Development Order *vide* letter dated 20.7.2017. The learned Judge further found that since judicial review "pertains to the decision making process as well as its legality, rationality and reasonableness in arriving at the said decision", rule 5(8) of the Planning Rules did not apply as it relates to an act after the decision had been made.

[8] On the duty to give reasons, the learned Judge found that both the Federal Territory (Planning) Act 1982 [Act 267] and the Planning Rules do not impose any statutory duty to give reasons. The only occasion would be under section 22(5) of Act 267 where the planning permission is granted with conditions or, if it was refused. Since that was not the case

here and since reasons had been given, the complaint was found to be without merit.

[9] The learned Judge also rejected the appellant's contention that the Datuk Bandar's decision contravenes section 22(1) of Act 267 when it failed to consider the Kuala Lumpur Structure Plan and the Kuala Lumpur Local Plans. Under the earlier, the subject land has been demarcated as a public open space, recreational and sports area, green area and city park while under the latter Plan, Taman Rimba Kiara has been demarcated as a city park and public open space with zero development intensity.

[10] His Lordship also did not find section 22(1) read together with section 22(4) of Act 267 infringed. In His Lordship's view, having perused the facts in totality and the steps taken before the planning permission was granted, the Datuk Bandar had "considered all pertinent matters including the KL Structure Plan and adhere to it as practicable as can be for the proposed development"; that the words "to have regard to" in section 22(1) did not mean "to adhere strictly or slavishly", as interpreted by the Federal Court in ***Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama Serbaguna Sungai Gelugor Dengan Tanggungan*** [1999] 3 MLJ 1; that the KL Structure Plan contains "general policies to guide the development of Kuala Lumpur" but it does not contain "any detailed physical planning for specific area and more importantly this instrument is not binding and subject to changes when the need arises".

[11] As for the draft Local Plan, it had not come into effect as it was yet to be finalized or adopted under section 16(1) of Act 267. The issue of its non-compliance thus did not arise. His Lordship added that the Datuk

Bandar had to “balance the adherence to the KL Structure Plan and the welfare of the original settlers of Bukit Kiara Longhouses Community which has stayed there for 35 years and have been waiting for a new house in this proposed development”.

[12] On the question of conflict of interest, the appellant had contended that there exists a conflict of interest because the Datuk Bandar is a member of the Board of Trustees of Yayasan and the application for planning permission was made in the joint names of Yayasan and Memang Perkasa. The application was actually made by Memang Perkasa under a Power of Attorney granted by Yayasan.

[13] This argument was also rejected by the learned Judge on the basis that whilst the Datuk Bandar is one of eight members of the Board of Trustees of Yayasan, the Development Order was not signed by Tan Sri Haji Mohd Amin Nordin bin Abdul Aziz, the Datuk Bandar. He also did not sit in any of the meetings in relation to the application; neither was he involved in the decision making process to approve the application. The learned Judge found “more importantly here, the issuance of the Development Order was in accordance with the procedures and requirements under the FTA 1982 and the Planning (Development) Rules 1980”.

Our decision

[14] The same issues were canvassed before us with the respondents urging this Court to dismiss the appeal on the ground that the threshold for appellate intervention had not been fulfilled.

[15] In our view, this objection is without merit. The application before us is an application for judicial review wherein the provisions of Order 53 of the Rules of Court 2012 apply. The Rules of Court 2012 are made pursuant to the Courts of Judicature Act 1964 [Act 91] which expressly provide for the supervisory jurisdiction of the Court to judicially review decisions of inferior or subordinate bodies and the executive such as the 1st respondent, the Datuk Bandar.

[16] Order 53 rule 2(4) expressly allows persons who are adversely affected by the decision made by a public authority to initiate judicial review applications.

[17] It is not in dispute that the impugned decision is made by the 1st respondent, the Datuk Bandar who is a public authority. What is in dispute is the appellants' right to challenge that impugned decision, that Order 53 rule 2(4) merely provides for a threshold *locus standi* and that the appellants must further establish substantive *locus standi*; and substantive *locus standi* is as provided under rule 5(3) of the Planning Rules.

[18] In our view, this line of submission is without merit. Order 53 rule 2(4) does not make any distinction between threshold and substantive *locus standi*. Order 53 is the written manifestation of the Court's power on supervisory jurisdiction through judicial review and as to how that jurisdiction may be engaged. Consequently, we should not read into Order 53, any requirements which are not simply not there. The approach of requiring two thresholds of *locus standi* as expressed in ***Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals*** [1997] 3 MLJ 23 has since been rejected and was in any

case, the position under the old Order 53 of the Rules of the High Court 1980.

[19] This was made clear by the Federal Court in ***Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor*** [2014] 3 MLJ 145. In our view, this decision has put to rest the argument that there must be established both threshold and substantive *locus standi*. This decision also sets the test for all judicial review applications regardless of the subject matter so long as the decision may be ascribed to a public authority. It would be wrong to attempt to artificially distinguish it as only binding for judicial review in trade union cases.

[20] Rule 5(3) of the Planning Rules is relevant to the question of *locus standi* at hearings or inquiries conducted by the Commissioner under the Planning Rules. Rule 5(3) provides for registered owners of the lands adjoining the land to which the application relates to be notified and to be heard at the time the planning permission is under consideration. For the purposes of service of notice and the right to be heard, only those persons who fall within the terms of rule 5(3) are to be notified of any proposed development and of their right to object to the proposed development.

[21] In our view, the requirements of rule 5(3) have already or ought to have been attended to at the hearing of 29.8.2016 because it is at that hearing that the Commissioner will or should decide whether the objectors are the proper persons under rule 5(3) to attend and place their objections to the proposed development. Rule 5(3) is not relevant for the purposes of determining *locus standi* in relation to the application for judicial review; and we agree with the appellants that the respondents must not conflate the two separate *locus standi* requirements.

[22] Order 53 rule 2(4) further does not require such persons to further establish their right under specific law before they are entitled to initiate judicial review proceedings. There is only one single test, that is, whether the appellants are adversely affected by the impugned decision. This is apparent from the decision where the Federal Court expressly approved the wider and more flexible approach that was adopted in ***Sivarasa Rasiah v Badan Peguam Malaysia & Anor*** [2002] 2 MLJ 413, agreeing with the Court of Appeal that the previous position was too narrow and restrictive and that the amendments to Order 53 rule 2(4) [as it stands today] was to cure that mischief of its "precursor" which had resulted in unfairness and injustice. As judicial review proceedings are brought in the area of public law, to attend to grievances of abuses or complaints of wrongs by public authorities including the Datuk Bandar, in order to offer redress of public injury, rules of Court must be read more liberally and with greater flexibility. We have no intention of reading otherwise and regressing with this appeal. We must not attempt to reset that bar or test for judicial review which unfortunately the learned Judge unwittingly, did.

[23] Having regard to the underlying facts, we are also in no doubt that all the appellants before us have real and genuine interests in the subject matter of the judicial review, and that is, the effect the impugned decisions have on them. In our view, the appellants have amply shown that they are adversely affected by the impugned decision in that they are residents, owners and/or occupiers of the properties located within the immediate vicinity of the proposed development, and are users of Taman Rimba Kiara, where the subject land is located. It is undeniable that the proposed development will, both directly and indirectly impact the appellants in the multifarious ways described by them in the affidavits filed; from the use of

their properties, value of such properties, to the traffic or egress and ingress in relation to their properties; and the simple matter of use of Taman Rimba Kiara; more so given the magnitude of the proposed development that impacts directly on the density of population in their area. All these effects are unquestionably irreversible, permanent and far-reaching.

[24] Even if for a moment, any of the appellants before us did not qualify to be notified of the proposed development under the terms of rule 5(3), we are of the opinion that these appellants nevertheless have a right to bring the judicial review application. The 1st respondent, Datuk Bandar, as a local authority owes a duty "at common law to notify and hear objections from adjoining landowners in order to be regarded as having acted fairly in making its decision." This was expressed by Mahadev Shanker J in ***Lee Freddie v Majlis Perbandaran Petaling Jaya*** [1994] 3 MLJ 640 where His Lordship opined that the practice of notifying adjoining landowners as set out in section 21(6) of the Town and Country Planning Act 1976 giving affected persons the right to object to local plans and development plans "were merely declaratory of what good administration practice is".

[25] We agree with that view and hold that it applies equally in the context of Act 267, an Act "to make provisions for the control and regulating of proper planning in the Federal Territory, for the levying of development charges, and for purposes connected therewith or ancillary thereto". There can only be proper and effective planning in the area of the local authority if the owners or residents of properties in the vicinity of the proposed development are consulted or heard before such application for planning permission is decided one way or another. Where these

persons have been kept in the dark, it cannot be denied that they have been adversely affected.

[26] As for the issue of having only limited powers to take legal proceedings by reason of what the first six appellants are, with respect, we also do not agree. Section 39(3) of the Strata Titles Act 1985 [Act 318] expressly cloaks the first five appellants with the legal capacity to sue and we note that these appellants have narrated that their action is representative for the proprietors of the respective properties for which they are the management corporations or joint management corporation, as the case may be. This representative action is permissible under the Rules of Court 2012 [see Order 15 rule 12]; otherwise all the owners of the units would have to be named as applicants.

[27] It is clear from the cause papers that the 1st to the 5th appellants, and even in the case of the 6th appellant, have initiated the judicial review proceedings in the character and capacity of a representation action. These appellants were and are not seeking to enforce some 'personal' right of action. All these appellants and the persons they represent have a common interest and grievance and they seek the same reliefs in which case the conditions under Order 15 rule 12 of the Rules of Court 2012 are met. See the Federal Court decision in ***Malayan Banking v Chairman of Sarawak Housing Developers' Association*** [2014] 5 MLJ 169 where it was held that Order 15 rule 12 should be seen as a "flexible tool of convenience in the administration of justice and not to be applied in a rigorous sense". Order 15 rule 12 is "designed to avoid multiplicity of proceedings"; and we find that judicial review proceedings are not excluded from its application. On the contrary, it can only be of practical beneficial to have recourse to Order 15 rule 12 in such circumstances.

[28] We are further of the view that the decision in ***Amber Court*** is of no application to the particular facts in this appeal. The management corporation in ***Amber Court*** was seeking damages in relation to a defamation action and it was in this respect that the Court of Appeal held that the management corporation lacked the requisite *locus standi,* that since the allegation was that the management corporation had been personally defamed, the action should then have been initiated in the personal capacities of the individual members of the management corporation.

[29] We note that the 1st, 2nd and 6th appellants were served notices to attend the hearing on 29.8.2016 under rule 5(3). The Datuk Bandar treated and accepted them as objectors, and their presence was not objected to at the hearing.

[30] We agree with the appellants that the Datuk Bandar cannot now approbate and reprobate. In this regard and following the decision in ***YAM Tunku Dato Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor*** [2003] 5 MLJ 128, the issuance of the notice under rule 5(3) is sufficient evidence of *locus standi* in respect of the application for judicial review; that these appellants are not mere busybodies but have very real and genuine interests in the proposed development which they say will adversely affect their lives and properties.

[31] Aside from these appellants, there were many others including the remaining appellants who attended and participated at the hearing without incident. Thus, it would be unjust to now allow the Datuk Bandar's objection that these appellants lack *locus standi*.

[32] The calling of the hearing and the attendance of the appellants at the hearings have real implications in that amongst others, the appellants were under the impression and in fact, are under rule 5(8) of the Planning Rules, entitled to expect to be informed in writing of the outcome of the hearing, and of the Commissioner (Datuk Bandar)'s decision in relation to the application for planning permission application which they had all objected to and/or expressed concerns. We will return to this issue later when dealing with the merits but suffice for the purpose of this issue of *locus standi*, that the respondents' objection is bad in law and on the facts, and is thus over-ruled.

[33] Even if the first six appellants lack *locus standi* for the reasons relied on by the respondents, we cannot see how the same may be raised against the individual appellants who are residents in the immediate vicinity of the proposed development and/or are users of the Taman Rimba Kiara. We have no hesitation in finding that their interests are real and genuine and are indeed adversely affected by the proposed development on the subject land. The learned Judge ought to have treated, at the very least, these appellants separately.

[34] A final point in this regard is the matter of the Development Order being granted in respect of private titled land; that in such circumstances, Yayasan and Memang Perkasa are entitled to develop the subject matter in the manner as they see fit; more so when the development is not prohibited by the category of land use as appearing in the title.

[35] The circumstances on how the subject land came to pass into the hands of Yayasan; the JVA and its terms, and how the subject land and

its development is treated under the Comprehensive Development Plan [CDP] which is to be found in plans Nos.: 1039, 1040 and 1041 in the "City of Kuala Lumpur (Planning) Act 1973 [Act 107], the KL Structure Plan and any local plan, are also not matters in any serious contention.

[36] This is because it is beyond dispute that the subject land was originally State Land. It was not private land bought and sold between two entities. The subject land was alienated and title in the name of Yayasan was issued. The JVA clearly discloses that Memang Perkasa paid the premium of RM60,800,152.00 for its alienation. It is also beyond dispute that the subject land of just over 12 acres is carved out of a larger area where the Taman Rimba Kiara is located, leaving around 13 acres for 'future development'.

[37] We remind ourselves that Yayasan, Memang Perkasa and the 4th respondent chose to intervene in the judicial proceedings; they were not cited by the appellants. In our view, the issue of ownership of land and the use of the land as governed by the National Land Code 1965 actually does not alter the views expressed. This is because it is the Development Order issued by the 1st respondent, Datuk Bandar that is under scrutiny of the Court through the powers of judicial review; whether the Datuk Bandar has complied with the relevant laws and procedure; and whether such decision is tainted with impropriety, illegality, unreasonableness, irrationality for the reasons complained of by the appellants; not the validity of the alienation or even the JVA. The status of the land does not *ipso facto* remove the impugned decision from the Court's scrutiny. Neither does it mean that the Development Order thus cannot be challenged.

[38] Moving next to the substantive complaints of the appellants which were all rejected by the learned Judge. The appellants had alleged that there was procedural impropriety and that the decision was, amongst others, irrational.

Procedural impropriety

[39] The appellants had alleged that there was procedural impropriety in that rule 5(8) of the Planning Rules had not been complied with; and that no reasons were given for the Datuk Bandar's decision. Rule 5(8) requires the Datuk Bandar to convey to the relevant persons a written decision on the application and the objections raised.

[40] To recapitulate the learned Judge's views on rule 5(8), His Lordship found that this did not arise since the appellants lack *locus standi*. The learned Judge further found that in any event, the Datuk Bandar had informed the 1st, 2nd and 6th appellants *vide* letter dated 20.7.2017. As for the duty to give reasons, there was no prescription for such duty and so there was no question of dereliction or non-compliance.

[41] With respect, we disagree. Judicial review pertains to reviewing the decision reached by examining if the relevant law and procedure have been complied with without any breach of the rules of natural justice; that there has been fair play and that the parties concerned have been given an opportunity to be heard and to address the relevant matter under consideration before the decision is reached. The review does not stop at the door of decision; it extends to the decision itself and how or whether that decision was ever communicated to the persons affected by the

decision, adversely or otherwise. It goes without saying that in the process, the contents of the decision will come under scrutiny.

[42] The Court must not artificially draw an imaginary line restricting our powers to judicially scrutinize the administrative decision of the Datuk Bandar. These powers are exercised in the public interest and for public good and insofar as the Datuk Bandar is concerned, for better administration of duties and powers conferred by the relevant legislation; in this case Act 267, the Planning Rules, to name a few. The burden, in public law, would be on the Datuk Bandar to thus show how the process has been adhered to and not, the other way round.

[43] Putting aside the purported notification of decision *vide* letter dated 20.7.2017 which we will examine shortly, the Datuk Bandar's submission is that there is no duty to inform due to lack of *locus standi*. Let us put the appellants into two categories – the first comprised the 1st, 2nd and 6th appellants who the Datuk Bandar notified of the hearing and later sent its decision on 20.7.2017; the second comprised the rest who though not notified, attended the hearing.

[44] Both categories are alleged to lack *locus standi*, yet the facts show that the Datuk Bandar took no issue at any time until the judicial review proceedings were filed. This makes the Datuk Bandar's position quite inconsistent, more so when we factor in the Datuk Bandar's failure to notify some of those who attended the hearing the outcome of their objections raised at the hearing. Since we have found that His Lordship has plainly erred in the appreciation of the law on *locus standi* under Order 53 and had thus misapplied it to the facts, His Lordship's interpretation and conclusion on rule 5(8) is also erroneous.

[45] In any event, given our views earlier that there is a common law duty to inform the adjoining landowners of a hearing and of their right to attend and express their concerns at the hearing, it makes sense that there is a corresponding duty on the Commissioner, that is, the Datuk Bandar, to inform those who attended of the decision made, the outcome of the hearing and the response to their objections and/or concerns. The presence of rule 5(8) amplifies this requirement especially in relation to the applicant for planning permission and to those who objected. Since these other appellants were not informed of the decision, there is clearly procedural impropriety in the decision reached which renders the development order granted, liable to be quashed.

[46] We find support for this view on the need for the procedural requirements of Act 267 and the Planning Rules to be strictly adhered to, in the decision of ***Datin Azizah Abdul Ghani v Dewan Bandaraya Kuala Lumpur & Ors & Anor Appeal*** [1992] 2 MLJ 393.

Duty to give reasons

[47] Then, there is the matter of duty to give reasons. We would have thought that the law on this issue is fairly clear and settled from the early years of ***Rohana bte Ariffin & Anor v Universiti Sains Malaysia*** [1989] 1 MLJ 487 where it was ruled that a "*reasoned decision can be an additional constituent of the concept of fairness*" and where the reasons have to be given so that the right of appeal may be properly and meaningfully exercised; to ***Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan*** [1999] 3 MLJ 1 [***MPPP***] where the Federal Court extensively reasoned on

why there must be this duty to give reasons even if there is no express provision for such duty. According to the Federal Court, this duty to give reasons emanates from the concept of fairness.

[48] The absence of an express provision in any statute requiring the decision–maker to give reasons does not mean that the duty does not exist unless and until the statute specifically states so. Even then, the case law has developed progressively to instill an innate will on public authorities to explain their decisions. The Federal Court in ***Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd*** categorically held that "*The absence of such a provision ought not to be regarded as a cloak under which the decision maker can hide his rationale for making the decision, privy only to himself but a mystery to the interested parties or the public at large*".

[49] We cannot see how the instant appeal is any different; on the contrary, there can only be responsible and proper planning if the Datuk Bandar who approves or rejects any planning permission explains its reasons to all concerned, especially the appellants in this appeal.

[50] We add that there is even more reason to say that there is a duty to give reasons without it being expressly provided in Act 267 or the Planning Rules due to the presence of an elaborate mechanism for notification of hearing, invitation to a hearing to express concerns or views before a decision is made on a planning application, as we have in the case of the Planning Rules under Act 267. It makes no sense to have such a procedure, statutorily provided, yet, not adhered to. The procedure tells the public, including the appellants this is how it will act where there is an application. Having held out to the appellants the procedure to which they

respond, the Datuk Bandar cannot sit back, fold its arms and say that it is not required to explain or honour its practice, unless, of course, there is good reason not to do so.

[51] As explained by the Supreme Court in ***Mandalia v Secretary of State*** [2016] 4 All ER 189 at page 199, the appellants' right to the determination of Yayasan and Memang Perkasa's application for planning approval according to Act 267 and the Planning Rules "is now generally taken to flow from a principle, no doubt related to the doctrine of legitimate expectation but free standing". The better administration of local government in such a critical area of planning and development impacting both directly and indirectly on the daily lives of the residents under that local government calls for every responsible local government including the Datuk Bandar, to account for its actions and decisions by providing reasons for them.

[52] Giving reasons without being compelled, is not just grounded in fairness but "a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public". This results in better decision-making, or better informed decision-making and it reflects the 'democratic principle at the heart of our society' as expressed in ***R (on the application of Moseley) v Haringey London Borough Council*** [2015] 1 All ER 495.

[53] Furthermore, for the duty to give reasons to have any meaning, the decision ought to have been communicated at the time when it is made. The timing is material for the recipient of the decision to make an informed decision as to the next course of action or conduct.

[54] Another significant factor that seems to be overlooked is that it is the reasons, if any, stated or proffered at the material time which forms the basis of examination; not the explanations that are penned in the affidavits filed in response. Any explanations found in the affidavits of reply should be treated as merely elucidatory.

[55] In short, the Court should be examining the reasons which were given contemporaneous with the communication of the decision. The Court should not be looking elsewhere. Thus, it is what the letter of 20.7.2017 states that forms the reasons under examination and not the clarifications or elucidations that subsequently emerge in the affidavits filed. If the reasons stated in the letter are manifestly flawed, it should only be in very exceptional cases that the Court would refuse the relief sought.

[56] In any event, having examined the letter of 20.7.2017 which was sent to the 2nd appellant, we do not find that it meets the terms of rule 5(8).

[57] It is obvious from the opening paragraph of the above letter that it was written in response to the 2nd appellant's letter dated 27.6.2016. It is not and neither does it purport to be a letter written pursuant to the statutory requirements of rule 5(8) of the Planning Rules, that is, to inform the 2nd appellant of its decision following the hearing on 29.8.2016, a hearing which was held pursuant to rule 5(6) and what the Datuk Bandar's responses are to the objections raised at the hearing. We further note that the appellants had raised many issues at the hearing, [see paragraph 23 above].

[58] From the contents of this letter, while the Datuk Bandar is not obliged to accept or reject the objections, the objections must nevertheless be addressed. It makes no sense if it was construed otherwise, and it would go against the entire intent of Act 267 and the Planning Rules, to have notices sent out, to hold hearings, and then, silence and no explanation.

[59] The fact that not all the matters as raised by the appellants are addressed lends weight to the appellants' submission that this letter of 20.7.2017 is indeed, not a written response issued under rule 5(8) of the Planning Rules. Consequently, the failure to adhere to its own Planning Rules renders the decision reached liable to be quashed.

KL Structure Plan & KL Local Plan

[60] We deal next with the matter of the KL Structure Plan and the KL Local Plan and this is where section 22 of Act 267 needs to be examined in fair detail as the essence of the appellants' complaint is that there is irrationality, unreasonableness in the non-adherence to these plans.

[61] In ***Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur*** [2008] 6 MLJ 704, the Court of Appeal rejected the proposition of the appellant there that the KL Structure Plan "is a legally binding instrument"; and instead agreed with the respondent that "it is a document merely stating the policies of the first respondent and thus not legally binding on anyone"; that it is "also not a piece of legislation which imposes a public duty upon the first respondent to perform any specific act".

[62] With respect, we find it hard to agree with that conclusion, in particular, that the KL Structure Plan is not legally binding on anyone.

[63] A useful elucidation of how the Comprehensive Development Plan [CDP] which is to be found in plans Nos.: 1039, 1040 and 1041 in the "City of Kuala Lumpur (Planning) Act 1973 [Act 107] came to pass can be found in the Court of Appeal decision ***of Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin*** [1997] 2 MLJ 17 at pages 24 to 27. The three gazetted plans in the CDP mark out the different areas of the city of Kuala Lumpur comprising initially 93 square kilometers or 36 square miles to later to 243 square kilometers or 94 square miles; and that this CDP is actually a long term plan for the urban development of Kuala Lumpur.

[64] Development plans thus comprise the CDP, structure plan and local plan. Each differ in terms of details and objective or purpose of the plan. The effort, time, labour, cost and expense, not forgetting the huge public input after the draft plans have been publicized and feedback from the public gathered from public inquiries etc., that go into the preparation of each of these plans is extensive to say the least. These plans are prepared under command of law, Act 267 [in particular section 10] and also the Town and Country Planning Act 1976 [Act 172] where it can be seen that structure plans are also required to be prepared at State levels. None of these plans can be passed and be of any force unless and until the time-consuming and pain-staking process of preparing drafts; publication of those drafts through the requisite mediums; consultation and public hearings on the drafts; adoption, adaptation, repeal, replacement of drafts from the results of the consultation; consent of the Minister in charge, all elaborately set out in Act 267 have been complied with.

[65] We agree with the submissions of the appellants that the development plan in the form of the KL Structure Plan is a carefully drafted and considered statement of policy. After all, it concerns the capital city of the Nation, not just about the planning of its development, but its **proper** planning. This is in line with the vision envisaged for the capital city that is consistent with the national vision of Kuala Lumpur – World Class City. That vision "encapsulates the ambition to make Kuala Lumpur a city that will assume a major global and sub-global role for the benefit of all its inhabitants, workers, visitors and investors" – see page 2441 of the record of appeal.

[66] There are 18 parts in the KL Structure Plan with details of "relevant separate components that make up the City". Those separate and discrete components are "its economic base and population, land use and development strategies, commerce, tourism, industry, transportation, infrastructure and utilities, housing, community facilities, urban design and landscape, environment and special areas". The Structure Plan alerts the reader or user that the separate components "are interrelated and mutually contingent". Consequently, "policies and proposals for each of these components are therefore, directed towards their composition into an integrated whole, that is, the efficiently functioning, progressive and felicitous city" – see page 2430 of the record of appeal.

[67] The KL Structure Plan thus guides the Datuk Bandar in how a decision on any application for planning permission to develop any area in the capital city will be approached, considered and dealt with in the many respects of those components in the Structure Plan; and it is reasonable to say that the public or at least the residents of KL would be

entitled to expect that to be the case. If the Datuk Bandar, the 'authorized producer' so to speak, of these plans does not consider these plans material considerations, it is of great worry who then will.

[68] While the KL Structure Plan may contain visions, goals, policies and proposals, these same visions and policies serve as guides upon which development and use of land and buildings are dependent on and undertaken. The uniqueness of the KL Structure Plan and for that matter any structure or local plan is that it is dynamic, given that it is prepared *in futuro*, for the future. But, at the same time, it recognizes that it needs to be adaptable to be adoptable; that it may need to be amended from time to time due to change of use or development, change of policies, economic-socio changes, migration of population and so much more. It is not rigid but its adaptability and flexibility and how the Commissioner is to take and execute or implement it in its consideration of applications for planning permission cannot and does not render the KL Structure Plan, local plan or even the CDP, any less legal. The amendments which are really in the nature of updates are however, not rampant; neither are they as frequent as one imagines them to be. The KL Structure Plan 2020 has been around for over 20 years and its significance gains sharper focus when a draft local plan is also prepared.

[69] Ultimately, the object of all these plans are for proper control and regulation of planning of the development and use of all lands and buildings in the area of the local authority. Offices, both private and public, schools, factories, recreational areas, commercial areas, homes and everything else that is conceivable in the use of lands and buildings are, directly or indirectly affected by the KL Structure Plan. Lives and economies, the way of living, are all planned around this KL Structure

Plan, whether of long or short duration. The residents of Kuala Lumpur, including the appellants relied on these plans such that it would be fair to say that there is a certain measure of holding out by the Datuk Bandar to confer a legitimate measure of expectation that the details in the KL Structure Plan, in particular the use of the lands as demarcated will be honoured. And, that if there is to be any change, there will be full consultation, clarification or explanations, and accountability.

[70] The use of land or building which is otherwise than in conformity with the development plan or the planning permission granted under Act 267 actually carries penal consequences. This is set out in section 26 of Act 267 and other implications are as found in sections 27 to 29 of the same. From the terms of section 22(4) read with section 22(1), the KL Structure Plan as is the case with the CDP and the local plan cannot be disregarded by anyone, least of all, the Datuk Bandar. It forms the basis for approval or rejection of any application for planning permission, or to impose conditions for such decisions of approval.

[71] In ***Dato Mohamad Yusof bin A Bakar & Anor v Datuk Bandar Kuala Lumpur*** [2019] 1 LNS 1494, the Court of Appeal described the KL City Plan 2020 as mapping "out the city area and its specific land use. The purpose of zoning laws is to determine what type of business or residence can be placed in different parts of the city or a residential area". The Court of Appeal found the inquiry prescribed under rule 5 of the Planning Rules "is an essential and important process as the main objective of the aforesaid Rules is to assist the respondent in determining whether the proposed development is proper or inappropriate for the purpose of proper planning. The respondent as the Commissioner, regulates, controls and plans the development of all lands within the

Federal Territory and the use of such lands and buildings has an obligation to exercise it reasonably and in accordance with the terms of the relevant statute that confers the power or discretion. As a planner and regulator, the respondent must ensure that the interests and wellbeing of the residents have been duly considered before approving or rejecting any application for planning permission in particular where the proposed development which involves an increase in residential density or change of use of land".

[72] We add that that responsibility and duty can only reasonably and properly be discharged if the CDP, structure plan and the local plan, were compendiously referred to as the source, reference or basic legal document upon which any planning permission is to be evaluated at the time the application is being considered. This reference must, at the very least, be apparent from the terms of the decision under challenge.

[73] The legal status of a structure plan was in fact recognized by the Federal Court in ***MPPP***.

[74] In our view, section 22(4) confers the Datuk Bandar, as the Commissioner, a discretion in relation to whether an application for planning permission ought to be favourably or otherwise considered, with or without terms and the nature of those terms to be imposed. This discretion is not unfettered. In the context of section 22(4), and this is recognized in section 22(1) itself and expressly reserved by His Lordship in ***MPPP***, the expression used is "shall" - the Datuk Bandar is directed to take into consideration such matters as are expedient or necessary for the proper planning of the development, and the local area.

[75] Even in that regard, it is not open-ended. Once again in mandatory language of "shall", the Datuk Bandar is specifically directed to have regard to the provisions of the development plan and where the local plan has not been adopted, the Comprehensive Development Plan; and any other material consideration. Clearly and quite obviously, the CDP, structure plan and local plan are material considerations – see ***Bath Society v Secretary of State for the Environment & Others*** [1992] 1 All ER 28. So, if these plans were not taken into regard at the material time, the decision reached is invalid; and no reason or explanation given later at the judicial review proceedings can change that as it must be apparent from the decision communicated to the appellants how the concern about the KL Structure Plan was addressed.

[76] The *proviso* to section 22(4) is even more telling. It provides that where there is no local plan for the area, the Commissioner may, in the interest of proper planning, decide not to consider any application for planning permission until the local plan has been prepared and adopted. Meanwhile, until then, the application may be suspended or even rejected.

[77] Understood in all that light, it is difficult to see how the KL Structure Plan can be said to have no legal binding effect on anyone. The Commissioner, the Datuk Bandar is bound to have regard to the CDP, structure plan and local plan in its consideration of any application for planning permission. These plans are, in our view, in any event, not only specific requirements of the law but are material considerations against which the application for planning permission had to be assessed. The requirement of taking the Plans and material considerations into account is a question of law but what weight the Datuk Bandar choses to give to each of the matters in the Structure Plan etc. is a matter of planning

judgment. But, if the Datuk Bandar does not explain this aspect carefully, or to merely assert that it has been taken the Plan into account without more, the Court is entitled to reach the reasonable conclusion that there has been no proper compliance of the law.

[78] In our view, it is actually imperative on the part of the Commissioner, the Datuk Bandar, to ensure that the application for planning permission is consistent with such plan and to decide what conditions to impose if it is not, or even to reject or suspend such application where there is no such plan. What really is to be avoided is the 'slavish compliance'; but even then, it is excluded in the context of section 22(4) where compliance is paramount or key to the consideration of the application for planning permission. Any departure from the structure plan must be for good reason and such reason has to be properly explained in writing at the material time of decision. And, it is these reasons that are the subject of scrutiny when challenged in judicial review proceedings.

[79] Once again we bear in mind the elaborate consultative process that we mentioned earlier when discussing the preparation and formulation of the structural and local plans, that all these were with statutory backing, that if the local authority is to depart from its own prescripts as evidenced in those plans, there must be very good reasons before the departure is endorsed. A proper explanation must be presented for the Court to know whether the authority, the Datuk Bandar has properly fulfilled its statutory obligations.

[80] This was the approach of the House of Lords in ***Nzolameso v Westminster*** [2015] 2 All ER 942, and we adopt the same.

[81] It is not in dispute that the subject land was demarcated as a public open space, recreational and sports area, green area and city park while under the Local Plan, Taman Rimba Kiara was demarcated as a city park and public open space with zero development intensity. It is apparent from the proposed development that both status would be permanently affected. How the Datuk Bandar proposed to address this aspect which was also raised by the appellants in their objections, is not at all clear from the decision reached and from the letter dated 20.7.2017.

[82] The appellants submitted that the learned Judge erred in accepting the Datuk Bandar's bare averments in the affidavit filed that the KL Structure Plan and/or Local Plan had been adhered to as far as practicable for the proposed development. No evidence was produced in support, whether in the form of minutes of meetings, consultation papers or any written documentation.

[83] We have examined the Datuk Bandar's letter of 20.7.2017 once again, to see if it will yield the conclusion reached by the learned Judge. The contents of this letter was set out earlier.

[84] Having examined it anxiously and closely, we cannot find any reference, direct or indirect, to the KL Structure Plan or even to the Local Plan or CDP. With the serious concerns and objections raised by the appellants under these plans, and having given the appellants and other residents a hearing on 29.8.2016, and being fully aware of those concerns, we would have expected, at the very least, the Datuk Bandar addressing these concerns and allaying them in the written reply. As opined in ***Dato Mohamad Yusof bin A Bakar***, the Datuk Bandar, "as planner and regulator" must ensure that the interests and well-being of the

appellants as residents have been duly considered before the Development Order was issued. We do not see that role and duty fulfilled in the facts of this appeal at all.

[85] We are further of the opinion that the words in section 22(4) requiring the Datuk Bandar "shall as far as practicable have regard to" the provision of the development plan and where the local plan has not been adopted, the Comprehensive Development Plan, mean that these plans must be considered or taken into account and that there must be clear, objectively proper or legitimate reasons for any departure from the plans, including draft local plan, that the Datuk Bandar itself had prepared with such labour and effort under the law.

[86] We must add that it is not enough to merely advert to the plans. More is required. In ***Zhang v Canterbury City Council*** (2001) 51 NSWLR 589, it was held that the phrase 'have regard' calls for "sufficient information, an understanding of the matters and of the significance of the decision to be made, and a sufficient process of evaluation sufficient to warrant the description of the matters being taken into consideration".

[87] There is, however, no need for the Datuk Bandar to provide 'compelling reasons' as was held in ***R (on the application of Governing Body of the London Oratory School) v School Adjudicator*** [2015] All ER (D) 113; 'objectively proper reasons, or legitimate reasons' suffice. Unfortunately, even at this level, the test is not met for the reasons already discussed.

[88] The Datuk Bandar as have the other respondents sought to cite the relocation or housing of the Bukit Kiara Longhouses as reason for the

grant of the Development Order; that it was in their interest and for their welfare.

[89] With respect, we cannot see how the matter of Bukit Kiara Longhouses is a planning issue. It is a legacy or political issue which has no place in the considerations that the Datuk Bandar is required to take into account in exercising discretion under section 22 of Act 267.

[90] In any event, we agree with the submissions of the appellants that the Development Order granted with such extensive change to or contrary to the KL Structure Plan where Yayasan and/or Memang Perkasa were required to put in an application for change of category of land use, required strict compliance of the procedure as set out in Act 267 and the Planning Rules. The Development Order granted was also disproportionate to the purported resolution of the matter of the Bukit Kiara Longhouses. This proposed development was and is, in truth and in reality, a pure business and commercial joint-venture between two entities, that is, Yayasan and Memang Perkasa, as evidenced by the clear terms of the JVA.

[91] The fact that the application for planning permission was based on titled land is irrelevant. We agree with the appellants that for planning purposes, the category of use as specified in the title documents is not the paramount consideration here; what is relevant is the development to which Yayasan and Memang Perkasa proposed to make in relation to the subject land and how it is regulated by Act 267. This was clarified in the Court of Appeal decision in ***Majlis Perbandaran Subang Jaya v Vismaya Sdn Bhd & Ano***r [2015] 5 MLJ 554.

[92] Thus, we find that the learned Judge was plainly in error in failing to hold that the Datuk Bandar had not exercised discretion in accordance with the law when making the impugned decision. For this further reason, the impugned decision must be quashed.

[93] While on the matter of the decision of 20.7.2017, there is this other complaint – that the Development Order was not made by the Commissioner but by the Pengarah Jabatan Perancangan Bandaraya thus rendering the Development Order to be *ultra vires* and/or improper. There were two letters, both of the same date of 10.4.2014, delegating powers first to the Timbalan Ketua Pengarah (Perancangan dan Kawalan) and later to Timbalan Pengarah.

[94] Having had sight of the Development Order dated 13.7.2017, it is evident to us that it was issued on behalf of the Datuk Bandar Kuala Lumpur in which case, we find the issue to be of no merit. Section 22 is clear in that the power is vested on the Commissioner to approve or reject the application for planning permission. Where it is approved, a development order is issued. So long as the Development Order is issued in the name of the Datuk Bandar, the order remains valid until successfully impugned. This however, does not answer the complaint that there is a conflict of interest.

Conflict of interest

[95] The substance of the appellants' argument here is that because the Datuk Bandar is a member of Yayasan's Board of Trustees, the Datuk Bandar is conflicted.

[96] We prefer the approach taken in ***Steeples v Derbyshire County Council*** and ***Lower Hutt City Council v Bank***, an approach which was also taken by the Supreme Court in ***Anderton & Others v Auckland City Council & James Wallace Pty Ltd*** [1978] 1 NZLR 657. This Court's decision in ***Dato Mohamad Yusof bin A Bakar & Anor v Datuk Bandar Kuala Lumpur*** [*supra*] accords with that approach.

[97] While we understand and appreciate that an 'administrative impasse' may result, that is no answer to the larger principle that there must be compliance to the procedural requirements of law, to the rule of law; that no one is above the law; that the law favours no one; that the rules of natural justice requires not only must justice be done but be seen to be done. These principles are of particular importance in public law where there is a substantial element of public trust reposed on public authorities such as the Datuk Bandar.

[98] From the terms of the JVA, we agree with the submissions of the appellants that there are more than sufficient terms contained therein to fetter the discretion of the Datuk Bandar when it comes to considering the application for planning permission of the proposed development and in securing a Development Order – see for instance clauses 5.6.1, 5.6.2, 8.1, 9.1.1(a), 10.1(c). These clauses clearly indicate that Yayasan's interests, commercial and financial, were entirely dependent on the proposed development being approved. Without such approval, there would be no joint venture, nothing to develop and no financial gain. Although the JVA was a conditional contract, vacant possession was in fact immediately given to Memang Perkasa upon execution of the JVA, even before the title was issued.

[99] The chronological records of how the Development Order came to pass, how the process and circumstances of the grant of the Development Order was facilitated, the details of the JVA and the involvement of the Datuk Bandar, are amongst the paramount reasons why we find further evidence of the existence of conflict of interest in addition to the findings of procedural irregularity. No matter how the Datuk Bandar attempts to separate or distance itself from the JVA and also from the impugned decision and now claiming in the affidavits filed that the development was to relocate the Bukit Kiara Longhouses, it is undeniable that the terms of the JVA, looked at as a whole, all point inexorably to the existence of a conflict of interest. The obligation or responsibility to relocate the Bukit Kiara Longhouses has nothing whatsoever to do with Yayasan. As said earlier, it is a political issue or legacy, and it is not the Datuk Bandar developing the subject land to attend to this issue. It is a development by private parties, as claimed by Yayasan and Memang Perkasa.

[100] Yayasan, a company registered under the Companies Act 1965, in relation to the occupiers of the Bukit Kiara Longhouses is purely in a contractual relationship with them *vide* Master Resettlement Agreement, entered by virtue of the fact that it is a registered landowner wanting these persons to vacate the subject land for the proposed development. Memang Perkasa then proceeded to apply for the planning permission using the Power of Attorney given to it by Yayasan. Thus, when the Datuk Bandar claimed that the Development Order was granted for the sake of relocating the Bukit Kiara Longhouses, it actually lends weight to the allegation that there is a conflict of interest in the terms complained of.

[101] For this added reason, the Development Order of 13.7.2017 therefore must stand impugned and be set aside.

Conclusion

[102] We are thus convinced for all the reasons deliberated above that there is appealable error in this appeal warranting our intervention.

[103] The appeal is therefore unanimously allowed with costs. The decision of the High Court dated 28.11.2018 is hereby set aside.

[104] We further allow the Originating Summons in terms of prayer 1.2 in that we hereby issue an order of certiorari quashing the decision of the 1st respondent, the Datuk Bandar granting the Development Order dated 13.7.2017 in relation to the proposed development on the piece of land known as HSD 119599 PT 9244, Mukim Kuala Lumpur, Tempat Bukit Kiara, Daerah Kuala Lumpur.