

RECONCILIATION OF RIGHT TO EASEMENT BETWEEN SURFACE AND STRATUM OWNER IN UNDERGROUND DEVELOPMENT IN MALAYSIA

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ABSTRACT

The scarcity of land has resulted in the construction industry to be creative in maximizing the available land by building it underground. The construction of underground development is not new as Malaysia has embarked on this journey by the construction and completion of shop lots below Merdeka Square, The Stormwater Management and Road Tunnel, The Light Rapid Transit, Petronas Twin Tower and the completion of Mass Rapid Transportation in Klang Valley. A comprehensive public transportation shall become a focal agenda and in doing so, the construction of public transportation must be in line with the available land and technology. Nevertheless, there are issues with regards to the implementation of underground development which warrants explanations to ensure the viability of this approach as a solution to the scarcity of land. One of the issues is the concept of easement and protection of neighbours in underground development. National Land Code 1956 (NLC 1965) allows different ownership and usage of land to surface land owner and underground land owner. Hence, it shall expose these two owners (or more) to forcible conflicts and disputes as between neighbours occupying the same plot of land only at different level. With this in mind, we consider the interaction between the surface and stratum owner regarding the provision of easement and right of access. It is within this context that the current research attempts to examine the current legal framework with the aim to strengthen the land administrative policy and spur the growth of underground development. The research reveals that the alienation of stratum land does not automatically create the provision of access or easement to the stratum owner. Based on laws and practices, it is very significant to have a refined law to reconcile the rights of easement between the surface and stratum owner in Malaysia.

Keywords: Stratum Title, Underground Development, Easement.

INTRODUCTION

The traditional view on horizontal surface development has been shifted as the force of scarcity of land has pushed the vertical underground development to be of practical solutions especially in urban area (Jamalludin et al., 2016). Global urbanization and growth of population are the two factors which accelerate the development hence increase the use of urban underground space (Lonegrass, 2013). Underground space is available to be used for various functions within the urban development. It is not restricted for the use of tunnels for transportation only as it will dampen its true potential. It must be exploited effectively while it must be safely constructed.

The common law principle in which the right of support is founded is based on the 19th century cases. Its interpretation on the proprietary right has been quiet narrow, unresponsive to

the reality of current urban development and was formulated prior to the establishment of Torrens system and the law of negligence. The protection afforded by the common law seems to be arbitrary. The question arises is not on the existence of the statutory protection for adjoining landowners, but the anomalies lies on the application of the apportionment of liability and accountability of the parties based on the existing statutory provisions. The results that follow from this situation are the victim will have insufficient redress from the application of presently archaic law. The maxim of "*cujus est solum esy usque ada coelum et ad inferos*" has been the first authority to analyse in the discussion involving ownership of land above and below the surface. Most jurisdictions restrict the right of the land owner over the use of airspace above their land. The archaic law has been challenged on its viability in today's commercial activities.

Legal Consideration for Underground Land in Malaysia

The exclusive rights, use and enjoyment of airspace, surface and land below surface in the NLC 1965 provide that such rights must be exercised subject to the limitations and restrictions. Under the modern Malaysian land tenure system, a person will not have absolute right, only exclusive right on his lands against the third party. The exclusivity enjoyment of column of airspace and land below the surface under section 44 (1) (a) NLC is subjected to reasonably necessary to the lawful use and enjoyment of the land and other written law (Kaliampakos & Benardos, 2008). This does not mean that the owner does not have right at all on his land. The owner would have a dominant right of occupancy incidental to his ownership of property and he has right to prevent unreasonable interference with his enjoyment over his property.

The common law provides right to landowner to extend his right downright to prevent trespass by tunnelling under the surface land and the right to minerals. As compared to the aboveground space, the technology which makes the development of underground feasible is considered rather slow (Belyaev, 2016; Lavagno, 2016; Stones & Heng, 2016). Underground space can provide solution for land-constrained urban problems, but its development must be utilized in response to the demand of community with proper planning and legal framework rather than as a test for technology experiment. Underground development should be pursued as there is no feasible surface solution exist hence the harmonization of all laws will encourage and safeguard the underground development as it will benefit the community (Barker, 1991).

Hence, in maximizing its true potentialities, the use of underground land was introduced by National Land Code (Amendment Act) Act A752/1990. The insertion of Part 5 has made it possible for different uses of land at different level of its depth. It means the surface land can be used for residential purposes and its underground space can be used for another function. The function for underground space can be divided into two main categories: functional infrastructures, which comprises of utility pipelines, storage facilities and energy exploitation systems. These functions work as a support to urban daily activities and to maintain the smooth running of deliveries of resources within the cities. The second functions are on passing and living spaces where it will be used as transport network and sub-surface recreational centers. This function of underground land is only to cater for human activities which are usually passing-through activities or short time stay without interfering with the outer environment.

PROBLEM STATEMENT

The amendment to Acquisition Act 1960 through Land Acquisition (Amendment) Act 2016 empowers the State Authority to acquire private underground land thus making it in line with Part Five (A) NLC 1965. However, the present's statutory provision with regards to underground land development is centralized on the creation of underground land known as stratum and its disposition. NLC 1965 does not provide for the governance of rights and duties between the owners of the surface land and the underground land giving rise to the problem of provision of access from underground land to the surface land should the owners of these two plots are not the same person. While the law allows the myriad ownerships involving a piece of land, the problem is alarming on the issue of enjoyment of the right and use of the underground land. The law is silent on the right of passage to the underground owner to the surface land, the right to do maintenance and constructions.

FINDINGS AND DISCUSSION

As the functions of underground land has been expended, the issues become demanding especially on the right of surface and underground owner notably on the issue of access to the underground land from the surface land (Zaini et al., 2015; Kamal, 2011; Sharidan, 2011; Zaini et al., 2017). The readiness of owner to include another person in their property is a vital attribute to the system of private property. The importance is seen in aligning economic activities and social interactions. This right to private property may be seen within the context of using the property to create social circle and secondly, by owning a property, it will shoulder the owner with social obligations to include another person (Zaini et al., 2013). Historically, under William Blackstone's concept of property, a right to a thing against the world indicates the inclusiveness of ownership of a person without the acknowledgment of right of others. As time evolved, the right of inclusiveness has emerged to be beneficial as inclusion can take form in lease, license, and trust over the property. This can be done with the protection of law to deter against opportunism (Kelly, 2014). In the underground development, the question often arises as to what extent the surface land regulations should be applied (Barker, 1991; Kaliampakos & Benardos, 2008).

Based on the NLC 1965, the provision of easement is not automatically created by the alienation of stratum to the landowners. The acquisition of underground land does not automatically grant the stratum private purchaser/owner the right of access, right of provision of services and right of support of the existing building (if any) (Zaini et al., 2017). These rights are considered as an acquired right, and once created it can be used by the holder against another third party. Hence the adjoining landowners have to negotiate the terms of easement between them, executed in a contract and validated by consideration (Kadouf, 2003; Teng, 2011). In Malaysia, an easement can only be created by express grant, must be registered and executed using specific instruments provided for by the NLC 1965 (Mei, 2005). In an underground development, the right of access and service easement must always be established and maintained as to facilitate the construction process and for the ongoing purpose such as maintenance and service (Zaini et al., 2015). The provision of easement must be negotiated while the agreement needs to be formalized and endorsed in the grant title. An easement is a right given to the dominant landowner to use the land belonging to servient land owner. In other words, the stratum owner must negotiate with the surface owner to obtain access to the surface

land. This is in line with section 282(1) NLC 1965. This situation has been exemplified by MRT Corp's experience (the developer of the Klang Valley Mass Rapid Transit (MRT) Project) in dealing with the surface land owner in constructing Sungai Buloh-Kajang MRT's line and Sungai Buloh-Serdang, Putrajaya MRT's line. In allowing the surface land owner to retain the ownership of their land, mutual agreement has been executed with the surface owner of the effected land to allow the co-existence of surface and underground's development (MRT Corp, 2017).

Since the relationship is based on the concept freedom of contract, it may create a problem where the parties to the contract did not stand in the foot of equal bargaining. This problem is acute especially if the parties are desperate to use or to have access to the properties even though the terms of the agreements is not wholeheartedly agreed upon (Alias, 2012; Lonegrass, 2013; Trakic, 2016). Unrestricted freedom to contract will increase the transactions costs that transpire prior to the execution of the easement agreement dampen the very intention of negotiation between the parties. Hence, they resort to typically standardized agreement (Arnott, 2013). There are possibilities of contingencies that may arise out of which cannot be foreseen during the execution of the contract, resulting in the incomplete contracts. In addition, the owners who are better informed in relation to the terms of the law and the method of interpretation by the court will enjoy a relatively higher advantages compared to the desperate owner looking for access. In dealing with this issue, it is also been suggested that the law on compensation for the use of easement or holding rights shall be established due to the nature of underground development itself such as the risks and its considerable effect to environment, and the difficulties in mortgaging the underground land and spaces (Narvi et al., 1994).

CONCLUSION

Based on this situation, it indicates the law and remedies governing the underground development on matter of right to access between the surface and stratum owner is based on contractual arrangement between the parties as the provision of access must be privately negotiated and agreed between the parties. In aspiration towards moving into accessible justice to the citizens within the context of Malaysian land law, responsive steps must be taken to regulate and reconcile the right of the surface and stratum owners. It is suggested that a holistic legal procedures and mechanism must be enacted to balance the rights of both parties as its failure will compromise the sustainability of underground development. A comprehensive solution must combine the advance of construction technology with the legal aspects and planning policy relating to the development of underground land.

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