

Access to Public Participation in the Land Planning and Environmental Decision Making Process in Malaysia

Ainul Jaria Maidin, PhD

Associate Professor

Public Law Department, International Islamic University Malaysia

Advocate and Solicitor High Court of Malaya (Wales, UK)

E-mail: ainulj@iium.edu.my

Abstract

This article seeks to examine the role of the public in contributing towards land planning decision making process in Malaysia. The Malaysian land planning process incorporates avenues for enabling all interested parties to have an informed input into the decision making process in order to produce a just and fair decision. Thus, participation in the planning system is not limited to the planning authorities, project proponents and other related government agencies but is also extended to the ordinary citizens. The involvement of ordinary citizens in the formulation of policies and strategies, which affects land planning and development is essential to ensure that the development plans prepared by the planning authorities are in agreement with the wishes of the people. Thus, ensuring a higher degree of public compliance with the plan. Participation can also instil a greater sense of belonging in the urban dwellers as they can influence the development of the environment in which they will be living and working.

Introduction

Despite the existence of statutory provisions for ensuring public participation in the planning decision making process, such rights are rarely utilised. For instance in the *Bakun Dam*¹ case, the public was denied the right to participate in the environmental impact assessment approval process. This was achieved by excluding the application of the Environmental Quality Act 1974 (a federal legislation) to the state of Sarawak.² The statutory rights guaranteeing public participation in planning decision making, is the principal means in developed legal systems to incorporate the opinion of the public whose environment can be affected by a particular development. This is largely absent in the Malaysian planning system.

The public interest groups or Non Governmental Organisations (“NGOs”)³ has however tried to ensure some form of public participation is achieved. An example is the Penang Hill public protest in which the Penang State Government decided to refuse to consent to development project, which has the potential to harm the environment after a state wide public protest organised by the NGOs. This chapter seeks to examine in the context of the Penang Hill public protest the rights of public participation and the problems posed to the public and the role of the NGOs in assisting the public in enforcing good planning practise by ensuring the incorporation of all relevant considerations including environmental information in the land planning process in Malaysia.

The Importance of Public Participation in Planning Decision Making

The term public participation is used interchangeably with public consultation. Consultation denotes, arrangements made to consult interests and organisations that may be affected by the policies in the development plans or who can contribute to the formulation of the plans.⁴ In Malaysia, the term ‘consultation,’ is used to give the planning authority the desired flexibility.⁵ The TCPA 1976 also has failed to specify the manner of consultation as such it is within the discretion of the planning authority to determine the method of consultation.⁶ The planners often prefer to take the mid-way approach, wherein they can limit the publicity as required by law. Planning decisions are recognised as ‘political’, thus implying that any democratic government should grant the right to participate in planning decision making.

¹ *Kajing Tubek & Ors v Ekran Bhd & Ors*. [1996] 2 MLJ 388 and on appeal to Court of Appeal see *Ketua Pengarah Jabatan Alam Sekitar v Kajing Tubek* [1997] 3 MLJ 23.

² Environmental Quality Act 1974 (Amendment) Act 1995.

³ In Malaysia, public interest groups are referred as Non-Governmental Organisations (“NGOs”).

⁴ Healy, P., *Local Plans in British Landuse Planning*, (Britain, Pergamon Press, 1983) at p.52.

⁵ Kamalruddin Shamsudin, “Towards Effective Public Participation at the Report of Survey Exhibition Stage” (Unpublished, Federal Department of Town and Country Planning, Malaysia, 1990).

⁶ *Ibid.*

The cooperation between the government, which formulates the policies and the public, is essential to ensure a democratic planning system that empowers the public to participate effectively in the process.⁷ The TCPA 1976 is silent as to what it means by public participation. Thus, it would be useful to refer to others especially the English law on the meaning of public participation. The Skeffington Committee in UK defined public participation as:

“... the act of sharing in the formulation of policies and proposals. Clearly, the giving of information by the local planning authority and of an opportunity to comment on that information a major part in the process of participation, but it is not the whole story. Participation involves doing as well as talking and there will be full participation only where the public are able to take an active part throughout the plan-making process.”⁸

This definition essentially defines the importance of public participation in the planning process from the time of formulating and implementing the policies and proposals. Arthur Skeffington MP, suggested in his report that planning might reflect public interest better if the public were consulted.⁹ Norton Long, an American planning theorist articulated the political nature of public participation.¹⁰ He said that plans are in reality political programs that will reflect the values of the planners. Plans are in reality represent political philosophies, ways of implementing differing conceptions of the good life.¹¹ The Oregon’s Statewide Planning Program describes citizen or public participation in planning as participation by non-professional planners or government officials.¹² It is a process through which everyday people takes part in developing, administering and amending local comprehensive plans and land use regulations. Citizens participating in the planning decision making process that affects their community is very useful. Citizen is said to encompass corporations, government agencies, interest groups and individuals. The reason for the wide interpretation is to ensure that public interest groups which are gaining prominence in contributing towards the land planning process is given ample opportunity to participate. Furthermore, the present generation prefer to participate in the planning process by getting involved in an organisation that can represent their collective interest. Principle 1 of the Stockholm Declaration emphasised the importance of public participation in environmental protection as follows:¹³

“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”¹⁴

Whatever, the method used the importance of public participation in contributing towards planning decision making is universally accepted. What differs is the extent and degree of participation from country to country. According to Chee and Phang,¹⁵ participation can take many forms and levels of involvement and the term covers at least four general features that are by no means exhaustive, but seem to imply a system of representative or participatory democracy in local governance:

- a. Consultation, where the council identifies an issue and seeks public response;
- b. Direct involvement or power sharing, where the community is a full member in the decision making body;
- c. Community action, where groups put forward their own demands; and
- d. Community self-management, where groups have control over facilities and resources.

⁷ Douglas, M., & Friedmann, J., *Cities For Citizens*, (United Kingdom, John Wiley & Sons, 1998) at p.86.

⁸ Ministry of Housing and Local Government, *People and Planning* (“The Skeffington Report”, HMSO, 1969), cited in Healy, P., *Local Plans in British Landuse Planning*, (Britain, Pergamon Press, 1983) at p.52. The Skeffington Committee was commissioned in 1968 to study public participation in the structure plan system in Britain.

⁹ Greed, C., and Roberts, M.(eds.) *Introducing Urban Design - Intervention and Responses*, (United Kingdom, Addison Wesley Longman Limited, 1998) p.188; See also Miller C., *Environmental Rights –Critical Perspectives*, (Routledge, London, 1998) at p. 48-49.

¹⁰ Cited in Taylor, N., *Urban Planning Theory Since 1945*, (London, SAGE Publications, 1998) p.83.

¹¹ *Ibid.*

¹² Obtained from the Internet version at <http://darkwing.uoregon.edu>.

¹³ Report of the United Nations Conference on the Human Environment (Stockholm, 1972), UN Doc, A/CONF/48/14/REV 1.

¹⁴ Principle 1 of the Stockholm Declaration, in *ibid.*

¹⁵ Chee, S. and Phang, S.N., *The Role of Residents, Non-Governmental Organizations and Quasi-Public Agencies in Local Government in Malaysia*, Comparative Studies of Public Administration, EROPA Local Government Centre, Tokyo, 1992, pp.65-69.

The concept of community or public participation in the context of the Asian countries have gradually brought about two broad approaches¹⁶ First, it is perceived to be a conscious process of organisation development and empowerment of the disadvantaged people at the grassroots.¹⁷ Through a participatory process, the disadvantaged acquires the means, resources and the capacity to initiate and sustain development. In this process the government's role is minimal, since members of the community act collectively.¹⁸ Action could be through non-governmental initiatives and, in particular, the efforts of activists and social animators to alert the disadvantaged groups.¹⁹ The second approach to participatory development is, essentially focussed on the project and envisages substantive interventions by both government and NGOs external to the community. Participation is perceived in terms of functions of specific groups of project beneficiaries and not the general community.²⁰ Cullinworth is of the opinion that public participation in planning decision making as an essential feature of the system, whereby if citizen participation fails the system will ultimately fail.²¹ Thus, citizens need to be given an influential position within the planning system itself rather than merely being kept informed by the public authorities. Public participation may be successful only in situations where the citizens have power to influence planning decisions effectively.²²

The introduction of participation implies a movement from representative democracy to participatory democracy. Participatory democracy appears at odds with the existing decision making structure and the plan making process in Malaysia, which is very much within the discretionary powers of the planning authorities. In United Kingdom, the practise of public participation was available since 1947 where the Town and Country Planning Act 1947 provided for members of the public to voice their opinions and views on a development. The local planning authorities were required to publicise the submission of development plans to the Minister and members of the public are invited to inspect the plans and make any objections to the Minister. The idea of public participation in United Kingdom was discussed in the report of the Planning Advisory Group in 1965. Initially, the report set out four objectives, the first of which is to 'ensure that the planning system serves its purpose satisfactorily both as an instrument of planning policy and as a means of public participation in the planning process.'²³ In this way, the Planning Advisory Group expected the local level development plans could promote effective planning at the local level and a greater degree of public participation in the planning process. Thus, the report suggested that local planning authorities in preparing the local plans must provide for an opportunity for objections to be made and considered before a plan is adopted.²⁴

Land planning being a democratic process requires the participation of the public who will be affected by the process to provide their input. This is to demonstrate a higher degree of involvement by the public in a system of democratic government where the voices of the people are vital and unavoidable. Public participation in Malaysia was introduced at an early stage when the Town Planning Enactment of the Federated Malay States of 1927 provided for the general town plans to be displayed for the public to make objections and to propose recommendations on how to overcome the objections. The provisions of Cap 137 Part IX also provided for public participation. In the past the practice was to allow the public to participate only after a draft plan was completed and the participation of the citizens were limited to making objections to the planners' proposals.²⁵

Avenues for Public Participation

Avenues for public participation in the land planning decision making process is provided in the Town and Country Planning Act 1976 ("TCPA 1976"). The Environmental Impact Assessment Order 1987 ("EIA Order 1987") a subsidiary legislation made pursuant to the Environmental Quality

¹⁶ Bamberger M., & Khalid Shams, "Community Participation in Project Management The Asian Experience", paper presented at the Regional Seminar organised by the Economic Development Institute of the World Bank and the Asia Pacific Development Center held at Asia Pacific Development Center, Kuala Lumpur on 9th July 1988.

¹⁷ *Ibid*, at p.4.

¹⁸ United Nations Economic and Social for Asia and the Pacific, Local Government in Asia and the Pacific: A Comparative Study, Country paper: Malaysia, <http://www.unescap.org/huset/lgstudy/country/malaysia/malaysia.html>.

¹⁹ *Ibid*.

²⁰ *Ibid*.

²¹ Cullinworth, J.B., *Town and Country Planning in Britain* (1985) at p.65, cited in Goh, B.L., *Urban Planning in Malaysia History Assumptions and Issues*, (Malaysia, Tempo Publishing, 1991) p.101.

²² Goh, B.L., *Urban Planning in Malaysia History Assumptions and Issues*, (Malaysia, Tempo Publishing, 1991) at p.101.

²³ Taylor, N., *Urban Planning Theory Since 1945*, (London, Sage Publications, 1998) at p.86.

²⁴ *Ibid*.

²⁵ Goh, B.L., *Urban Planning in Malaysia History Assumptions and Issues*, (Malaysia, Tempo Publishing, 1991) at p.103.

Act 1974 section 34A ("EQA 1974") provides the public the right to participate in the EIA approval process. The following avenues are available for the public to participate:

- i. Development plans preparation stage;
- ii. Planning permission approval stage; and
- iii. Environmental impact assessment approval stage.

These avenues will be discussed in turn in the following paragraphs to analyse as to whether the rights of public participation in the Malaysian land planning process is real or merely asserted in theory only.

Participation During Development Plans Preparation Stage

There are two types of development plans to be prepared as provided by the TCPA 1976.²⁶ The State Director for Town and Country Planning ("State Director") is responsible to prepare the structure plan for the State. Prior to formulating the plan, he is required to conduct a survey of the areas of the State to examine all the matters that may be expected to affect the development or the planning of development of the State.²⁷ The State Director is required to take such steps as will in his opinion secure that publicity²⁸ is given in its area to draft structure plan.²⁹ The information gathered at the survey will be used to formulate the development plans. They must provide adequate opportunity for the public to make representations that must be taken into account when drawing up the plans. The plans must be exhibited to enable the public to make any objections.

The public is informed about a structure plan that has been initiated by the State Director through press releases. The public is invited to participate in the development plans preparation through advertisements in the newspapers. The State Director is required to advertise the preparation of the structure plan in two daily newspapers of which one must be in the national language for three issues.³⁰ The notice must state the availability of the copies of the plan for inspection and the places where it is exhibited as determined by the local planning authority. The notice must also specify the time within which objections to the plan may be made to the State Director. The State Director must make copies of the plan available for inspection at the places stated in the notice, and each copy shall be accompanied by a statement of the time, within which objections to the plan may be made to the State Planning Committee ("Committee").³¹ The public exhibition is held to highlight the contents of the report of the structure plan and during this exhibition the public will be informed about the planning process and the channels through which they can make representations.

A public exhibition usually lasts for a month and a further period of thirty days is provided for the public to send in their objections in a memorandum.³² The planning authority, have discretion to accept or reject any opinions and objections raised by the public in the memorandum. However, the planning authority is required to justify the exercise of their discretionary powers in accepting or rejecting the public opinion in a report to the Committee.³³ Once a structure plan is finalised in accordance with the manner prescribed by the TCPA 1976,³⁴ the public is provided with another opportunity to participate. At this stage, another exhibition is organised and the policies and strategies contained in the draft plan are highlighted in charts, maps, models and even video presentations. At this stage, the public is allowed to make objections to the policies and strategies and to make alternative recommendations. The objections from the public are directed to the State Director, who will forward the same to the Committee together with the draft structure plan for approval. The Committee will set up a sub-committee to process the objections and conduct hearings.³⁵ This is done pursuant to the Town and Country Planning Act 1976 (Structure and Local Plans) Rules 1985.³⁶ The process to participate in the local plan prepared by the local planning authority is very similar to the participation in the structure plan formulation stage. Local planning authorities have power to draft local plans either concurrently with or subsequent to the approval of the structure plan.³⁷

²⁶ The development plans preparation in the Malaysian land use planning system has been discussed in detail in Chapter Two.

²⁷ S 7(10) of the Town and Country Planning Act 1976.

²⁸ S 9 of the Town and Country Planning Act 1976.

²⁹ S 9 of the Town and Country Planning Act 1976.

³⁰ S 9(2)(a) of the Town and Country Planning Act 1976.

³¹ S 9(2)(b) of the Town and Country Planning Act 1976.

³² S 9(3)(a) of the Town and Country Planning Act 1976.

³³ *Ibid.*

³⁴ S 10 of the Town and Country Planning Act 1976.

³⁵ S 10(3) of the Town and Country Planning Act 1976.

³⁶ The Town and Country Planning Act 1976 (Structure and Local Plans) Rules 1985 is made pursuant to ss 17 and 58 of the Town and Country Planning Act 1976.

³⁷ S 12 of the Town and Country Planning Act 1976.

The provisions of the TCPA 1976 provides for the objections and suggestions to be put forward, to be considered in the formulation of the plans. The State Director is required to consider every representation made. However, the TCPA has not provided the manner of considering the public opinion, as such it is very much within their discretion. For instance in the Kuala Lumpur structure plan, there is a short section stating that the *Dewan Bandaraya Kuala Lumpur* has listened to some comments and views from the public in the process of drafting the Structure Plan.³⁸ The section mentioned the number of objections received and the number of meetings held to address the views. The information on the nature of the comments and how such objections and views affected the plan was not included. As such it is rather difficult to comment on the importance accorded to public views by the planning authorities. It appears that the role of the public in participating in the development plan preparation process in Malaysia has yet to achieve the desired results, i.e. to obtain constructive public opinions and views. Very often the public fails to participate for one reason or other. In the circumstances, it is not fair to suggest that public participation in the land planning system will effectively contribute to the decision making process to ensure promotion of sustainable development.

Participation During the Planning Permission Approval Process

Participation from the public is also invited during the planning permission approval process. This is carried out through the right of the adjoining neighbours to express their complaints over land development projects that may affect them.³⁹ This right of participation is only available if there is no local plan available in respect of a particular area. The TCPA 1976 defines neighbouring land to include:

- a. Lands adjoining the land to which an application relates;
- b. Lands separated from the land to which an application made under this section relate by any road, lane, drain or reserved land the width of which does not exceed 20 meters and which would be adjoining the land to which the application relates had they not been separated by such road land, drain or reserved land;
- c. Lands located within a distance of 200 metres from the boundary of the land to which an application under this section relates if the access road to the land to which the application relates is a cul-de-sac used by the owner of the lands and owners of the land to which the application relates.⁴⁰

This definition, limits the people who can come within the ambit of the adjoining neighbour. Prior to the insertion of the definition of adjoining neighbour, the discretion was with the local planning authority to determine who comes within the ambit of adjoining neighbour. This naturally excludes tenants, squatters, and interested non-governmental organisations ("NGOs"). Therefore, in situations where the registered landowner fails to exercise his right to object to a proposed land development activity, an environmentally hazardous land development project may continue. A caring neighbour who fails to fit in the definition of an adjoining neighbour may not be able to institute any action to prevent an environmentally harmful development. The preliminary complaints with this "right of adjoining neighbours" is firstly the poor publicity with which members of the public are invited to express their opinions. The notices are placed in newspapers, with particulars of the property. The notices merely publicise the lot number of a particular property, which is definitely not familiar to many of the neighbours. However, the particulars of the property do not include the postal address, which is the most essential piece of information. Using postal address makes it easier to identify the proposed development area.

Judicial Position

The position assumed by courts in granting rights to the adjoining neighbour to object to development activities,⁴¹ is unpredictable. In *District Council of Central Province Wellesley v Yegappan*⁴² where Yegappan, as an adjoining neighbour, was invited to attend the meeting of the Municipal Council to voice his objections to the development plan submitted by his neighbour. Despite recognising the rights of the adjoining neighbour to participate in the planning decision making process, the courts, however, rejected his objections on the ground that his objections are irrelevant.

³⁸ Dewan Bandaraya Kuala Lumpur, *Kuala Lumpur Structure Plan*, (Dewan Bandaraya Kuala Lumpur, Kuala Lumpur, 1984) para 1.3.3. at pp.5-6.

³⁹ 21(6) of the Town and Country Planning Act 1976.

⁴⁰ S 21(8) of the Town and Country Planning Act 1976. Subsection 21(8) of the Town and Country Planning Act 1976 was inserted by s 23(b) of the Town and Country Planning (Amendment) Act 2001 (Act A1129), which came into effect on the 1st of March 2002.

⁴¹ S 21(6) of the Town and Country Planning Act 1976.

⁴² *District Council of Central Province Wellesley v Yegappan* [1966] 2 MLJ 177.

In *Tok Jwee Kee v Tay Ah Hock & Sons Ltd and Town Council, Johore Bahru*,⁴³ the adjoining neighbour objected to the approval of the plans for a block of four three-storey buildings. However, the planning authorities rejected his appeal. Hence, he approached the court for a declaration that the land was within the residential zone and the approval was contrary to the provisions of the Johore Town Boards Enactment No. 188 and the Town Board By-Laws 1937. Suffian FJ, allowed the appeal and said that, the duty imposed by section 145 of the Johore Town Boards Enactment on the Johore Bahru Town Council is owed not only to the public generally but to a broad class – a particular definable class of the public of which the plaintiff is one.⁴⁴ This decision confirms the rights of an adjoining neighbour to participate in the planning decision making process.

In *Datin Azizah Bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur & Ors*,⁴⁵ the plaintiff alleged that the defendant infringed Rules 5, 6, and 11 of the Planning (Development) Rules 1970 of the Federal Territory by not allowing her to participate in the planning decision making process. The rules provided that upon receipt of any application for planning permission, the Authority shall inform the registered proprietors of the land adjoining the land to which the application relates, to enable them to exercise their right to object to the granting of planning permission. The plaintiff as an adjoining neighbour applied to the court for an order of *certiorari* to quash the decision of the Mayor on the ground that she was never given an opportunity to object, since she never received the City Hall's notice calling for objections. The defendants argued that the right of hearing for the adjoining neighbour, which had been conferred by statute, had been removed by the amendment to the Federal Territory Planning Act 1982 ("FTPA 1982").⁴⁶ The amendment had also provided for appeal to the Appeal Board by only those landowners whose application for planning permission had been rejected. Therefore, in this case the appellant as an adjoining neighbour was declared to have no *locus standi* to object to a proposed land development activity by the Trial Judge.

However, on appeal, the Supreme Court⁴⁷ recognised the right of public participation in the planning process. The Supreme Court said that despite the FTPA 1982 not incorporating the provision on informing adjoining neighbour about the application for planning permission, the *Datuk Bandar* who is the authority empowered to grant planning permission is required to comply with rules 5 and 6 of the Planning (Development) Rules 1970. The Supreme Court granted an order of *certiorari* to quash the disputed development order granted by the *Datuk Bandar* as he has failed to inform the adjoining neighbour about the application for planning permission. In *Freddie Lee @ Lee Long Kooi & 2 Ors v Majlis Perbandaran Petaling Jaya & Anor*,⁴⁸ the issue before the High Court was whether the local authority has statutory duty to inform the adjoining neighbour of submission plans or to hear objections. Section 21(6) TCPA 1976 clearly provides that if the proposed development is located in an area in respect of which no local plan exists for the time being, then upon receipt of an application for planning permission the adjoining neighbour shall be notified.⁴⁹

The plaintiffs are residents in the immediate vicinity of the disputed land, which was owned by the second defendant. When the second defendant started clearing the land, the third plaintiff and the other members of the Residents Association sent a protest letter to the first defendant claiming that the land was green zone or green lung.⁵⁰ Objections by the plaintiffs to the plans were made via the State assemblyman and the media. A series of events followed, commencing from the first protest in 1985 until an unofficial letter dated January 19, 1993 from the office of the first defendant giving conditional approval to the second defendant's proposed plans. The Residents Association initially sought an injunction to prevent the erection of the building, as the plaintiffs wanted the said land to remain vacant as a recreational area. The court held that the plaintiff's 'nit-picking' objections, even if technically correct, would not confer *locus standi* in an application for *certiorari*. This case restricts the scope of the adjoining neighbour's right to object to development.

⁴³ *Tok Jwee Kee v Tay Ah Hock & Sons Ltd and Town Council, Johore Bahru* [1969] 1 MLJ 195.

⁴⁴ *Tok Jwee Kee v Tay Ah Hock & Sons Ltd and Town Council, Johore Bahru* [1969] 1 MLJ 195 at pp.201-202.

⁴⁵ *Datin Azizah v Dewan Bandaraya Kuala Lumpur* [1997] 2 MLJU 204 HC.

⁴⁶ The right to be heard, which an applicant had under the FTPA 1973 was abrogated by the 1982 Act. S 21 of the Federal Territory Planning Act 1982 is silent on the issue of informing the owners of adjoining land about the proposed planning application.

⁴⁷ *Datin Azizah Bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur & Ors*. [1992] 2 MLJ 393.

⁴⁸ *Freddie Lee @ Lee Long Kooi & 2 Ors v Majlis Perbandaran Petaling Jaya & Anor* [1994] 3 MLJ 640.

⁴⁹ S 21(6) of the Town and Country Planning Act 1976.

⁵⁰ Green lung or green zone is the terms used to areas, which are reserved as recreation area where development will not be permitted.

Similarly in *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru*,⁵¹ the High Court refused to grant *locus standi* to the plaintiff on the ground that the plaintiff's house was not located on land adjoining the disputed project. Therefore, the plaintiff was not an adjoining neighbour to enable him to assert positively that his legal position would be affected by the planning permission that was granted to the developer by the defendant. In *Zain Azahari Bin Zainal Abidin v Datuk Bandar Kuala Lumpur*,⁵² the plaintiff as an adjoining neighbour challenged the appellant's decision to grant development order by applying to the High Court for *certiorari*. The complaint was that the appellant had acted in excess of his jurisdiction when he issued the development order, which had increased the population density of the locality. This can only be done by resorting to the provisions of the Planning and Development Rules 1970 ("1970 Rules") as required by the FTPA 1982 and rule 2(3) of the 1970 Rules. The *Datuk Bandar* in exercising his powers, by approving the development application to Tradium Sdn. Bhd., granting approval to erect a three-storey building on its land, thus increasing the population density of the locality, had acted in excess of his jurisdiction.

The *Datuk Bandar* appealed to the Court of Appeal⁵³ against the High Court decision and held the Court was wrong in its reasoning in the light of the legislative history and practical realities. The Court of Appeal in dismissing the appeal held that the powers and discretion granted to the planning authority under section 22 of the FTPA 1982 must be exercised reasonably and in accordance with the terms of the Act. Thus, to say that resorting to section 64 of the FTPA 1982 every time a planning application was made would cause all development in Kuala Lumpur to grind to a halt because making a rule and gazetting the same would cause delay is not a good basis to refuse the right to participate. The right of the adjoining neighbour to object is rather limited. In areas where there is a development plan in existence, the adjoining neighbour is not allowed to object to a proposed development.⁵⁴ In *Leila Dulcie Allana Labrooy & 9 Ors. v Majlis Bandaraya Ipoh & Anor*,⁵⁵ the judge found that the requirement of notice under section 21(6) TCPA 1976 is not applicable. The reason being that the said lots are in an area with an existing development plan as such there is no requirement to notify the plaintiffs and hear their objections.

Although the court refused to grant relief to the plaintiffs, the Court rightly commented that the defendant would still be required to give consideration to those matters pertaining to proper planning, for to hold otherwise would make the provisions of section 21(6) of the TCPA 1976 superfluous. In *Epcos Marine Sdn. Bhd. v Yang Di Pertua Majlis Perbandaran Pulau Pinang & Anor*,⁵⁶ it was held that the right for the adjoining neighbour to participate in the planning permission approval process comes to an end when a development plan comes into force. The Malaysian courts have been rather inconsistent in interpreting the rights of the adjoining neighbours to complain. This is an important avenue for public participation and the court must be prepared to weigh the importance of public participation in promoting environmentally sustainable development. Thus, the avenues of public participation in the planning system appear to be mainly for the purposes of meeting certain ideologies of the planners and legislature.

The actual implementation of the legal provision providing for public participation is definitely not consistent since the right to participate is determined by the planners and the courts often do not disturb such findings. A problem that may be apparent in this area is that the adjoining neighbour may not be keen to raise an objection or may need assistance in raising such objections. Assistance to the adjoining neighbours may come from interested citizens and NGOs who may be able to provide invaluable assistance. However, the authorities may not be too keen to encourage such an alliance. The scope of the adjoining neighbour's right to object may be widened in order to give the citizens opportunity to take action against errant authorities and developers.

⁵¹ *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287; In this action the court referred to the decision in *Abdul Razak Ahmad v Kerajaan Negeri Johor & Anor*. [1994] 2 MLJ 297, an action brought by the same plaintiff against the Johore State Government objecting to the proposal to construct 'a floating city' in Johor Bahru. The plaintiff brought this action against the Johore State Government since he has also filed an action citing the Ketua Pengarah, Kementerian Sains, Teknologi dan Alam Sekitar as a defendant in an attempt to obtain a copy of the environmental impact assessment report of the proposed development project, see *Abdul Razak Ahmad v Ketua Pengarah Kementerian Sains, Teknologi dan Alam Sekitar* [1994] 2 CLJ 363.

⁵² *Zain Azahari Bin Zainal Abidin v Datuk Bandar Kuala Lumpur* [1995] 2 CLJ 478.

⁵³ *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2MLJ 17.

⁵⁴ S 21(6) of the Town and Country Planning Act 1976.

⁵⁵ *Leila Dulcie Allana Labrooy & 9 Ors. v Majlis Bandaraya Ipoh & Anor*. [1995] 4 CLJ 727;

See also *Ah San @ Goh Ah Soon v Majlis Bandaraya Ipoh & Ors* [2000] 1 MLJ 615.

⁵⁶ *Epcos Marine Sdn Bhd v Yang Di Pertua, Majlis Perbandaran Pulau Pinang & Anor*. [1993] 3 CLJ 446.

Public Participation in the Environmental Impact Assessment Process

The other avenue for participation in the planning process is in the environmental impact assessment process ("EIA"). A proposed development that falls within the list of prescribed activities in the Environmental Quality (Prescribed Activities)(Environmental Impact Assessment) Order 1987 ("EIA Order 1987") is required to submit an EIA statement to support its application.⁵⁷ The importance of the EIA statement in focusing decision makers onto environmental concerns, providing for public participation in development and aiding developers in formulating 'environment friendly' developments is widely accepted.⁵⁸ Public participation can be considered to be an important element in the EIA process for the obvious reason that it would be involving all concerned stakeholders in the decision-making process, thus rendering a fairer and more democratic decision.⁵⁹ It would also ensure transparency and make it less amenable to corrupt influences. It engages the parties in a constructive process, ensuring that all the relevant considerations that need to be incorporated into the decision have been brought to light and will be considered before a final decision is made.⁶⁰

According to Yeater and Kurukulasuriya, the persons most likely to be affected by the project should be able to influence the EIA process.⁶¹ It is they who can provide the necessary information needed for making sound decisions. On the positive side, they can best assist the determination of economic and social benefits flowing from the project.⁶² Sheate contends that public involvement may identify issues that the experts may not have detected as important, 'but which could prove to have a degree of importance out of all proportion to the magnitude of the impact.'⁶³ In Malaysia, the Environmental Impact Assessment Guidelines ("EIA Guidelines") expresses the role of the public in the EIA process as,⁶⁴ a reliable way of predicting the impact of a project on people. It was also mentioned that a responsible, interested and participating public is important in environmental management.⁶⁵ There are three avenues for public participation in the EIA process in Malaysia:

- a. during the Preliminary Assessment stage, the project proponent can obtain such participation through the means suggested in the EIA Guidelines;
- b. during the Detailed Assessment stage, members of the public may send in their submissions after the Detailed Assessment Report has been made public; and
- c. after the Director General of Environment has made a decision, an appeal can be filed under section 35(e) of the EQA 1974 by aggrieved members of the public who have an interest to protect.

Public participation at the Preliminary Assessment stage of the EIA process is essential⁶⁶ and mandatory.⁶⁷ According to the EIA Guidelines, a valid assessment cannot be made without some form of public participation, which can be an aid to project planning in the following manner:⁶⁸

⁵⁷ S 34A of the Environmental Quality Act 1974.

⁵⁸ Gilpin, A., *Environmental Impact Assessment* (Cambridge, Cambridge University Press, 1995) Chapters 8 and 9; United Nations Environment Programme, *Guidelines for Assessing Industrial Environmental Impact and Criteria for the Siting of Industry* (Paris, UNEP, 1980); also see Hunn, MN., "Development of United Nations Environment Programme, Guidelines for Assessing Industrial Criteria for the Siting of Industry," in Clark, B.D. *et. al.*(eds.) *Perspectives on Environmental Impact Assessment* (New York, Reidel, 1984) at pp.253-263.

Refer McEldowney J and McEldowney S., *Environmental Science and Law* (London, Longman, 1996) Chapter 6 generally; Kennedy, WV., "Environmental Impact Assessment and Bilateral Development Aid: An Overview," in Wathern, P., *Environmental Impact Assessment: Theory and Practice* (London, Routledge, 1988) pp.272-285 at p.272; Harvey, N., *Environmental Impact Assessment: Procedures, Practice and Prospects in Australia* (Melbourne, Oxford University Press, 1998) at p.2; Ashby, E., "Background to EIA," in O' Riordan, T., and Hey, R.D.,(eds.) *Environmental Impact Assessment* (Farnborough, Saxon House, 1976) at pp.3-4.

⁵⁹ *Ibid*

⁶⁰ *Ibid*

⁶¹ Yeater, Marceil and Lal Kurukulasuriya, "Environmental Impact Legislation in Developing Countries," in Sun Lin (ed.) *UNEP's New Way Forward: Environmental Law and Sustainable Development*, (1995) at p.258.

⁶² *Ibid*.

⁶³ Sheate, W.R., "Public Participation: The Key to Effective Environmental Assessment," *Environmental Policy and Law* (1991:21) at pp.156-160.

⁶⁴ Department of Environment, EIA Guidelines, (Malaysia, Department of Environment, 1995) Section 1.6.1, at p.11.

⁶⁵ *Ibid*.

⁶⁶ EIA Guidelines, Section 2.4.5, at p.24.

⁶⁷ EIA Guidelines, Section 1.5.3, at p.8 states 'Some form of public participation is mandatory',.

⁶⁸ EIA Guidelines, Section 1.4.5, at p.6.

- a. Monitor community needs and ensure that the direction or emphasis of the project continues to satisfy those needs;
- b. Identify both material and psychological impact of the project on the community;
- c. Measure and promote the social acceptance of the project in the community and avoid costly modifications or abandonment of the project at a later stage;
- d. Monitor changing environmental values in the community; and
- e. Obtain additional environmental information known to the local population.

The choice of the form of public participation recommended in the EIA Guidelines is public opinion sampling, public meetings or workshops and regular meetings with a Citizens' Committee.⁶⁹ Public participation must be carefully planned to obtain the maximum benefit from it.⁷⁰ In the Detailed Assessment stage, according to the EIA Guidelines, public participation should be included if it is likely to benefit the planning of the project in the following ways:⁷¹

- a. Clarify the nature of the impact or provide a better estimate of the magnitude of the impact;
- b. Provide project planners with a better understanding of community aspirations and needs;
- c. Allay fears in the community or improve the social acceptability of the project; and
- d. Provide additional environmental information to project planners.

The EIA Guidelines provides that the need of public participation and the form it should take should be discussed during the formulation of the terms of reference for the Detailed Assessment. The manner of public consultation proposed at this stage are the same as the Preliminary Assessment stage, except that at the Preliminary Assessment stage, members of the public neither have access to a copy of the Report, nor do they have a right to comment on the report. At that early stage, it is the developer who canvasses for public opinion. In 1996, after a general review of the effectiveness of current EIA procedures, the DOE introduced a new dimension into the drafting of the terms of reference. For the first time, the terms of reference for all detailed EIA reports were required to be displayed for public comments. The DOE was of the view that the process can benefit the developer by saving time in planning a project and to make better decisions based on the information gathered.⁷² In addition, apart from independent experts, interested members of the public with the necessary qualification⁷³ were invited to sit on the Review Panels to ensure that reports were more comprehensive and thus accelerate the review process.⁷⁴ These changes are a clear departure from the current provisions of the EIA Guidelines with regard to the procedure for Detailed Assessment.

It is the responsibility of the developer to ensure that sufficient copies of the detailed EIA report are made available for the Review Panel, the approving authority, concerned environment-related agencies and the interested public.⁷⁵ As soon as the Review Panel receives the detailed EIA report, it puts up public notices 'as it considers appropriate' (usually this is by way of an announcement in the local press) stating that the detailed EIA report has been received for review, the nature and location of the project, where copies can be obtained and the cost of each copy. Public representations and comments on the EIA report should be forwarded in writing to the Review Panel not later than 45 days after the notice.⁷⁶ The Detailed EIA Reports are also open for inspection at all the DOE offices.⁷⁷ According to the DOE, in spite of this provision, public participation is still 'very much lacking.'⁷⁸ For instance during the Sungai Selangor Dam EIA report approval process, the DOE had received more than 200 letters of comments from the public when the report was released on 2nd March 1999.⁷⁹ However, according to the Director General of DOE in this case, only 18 letters commented on the technical and scientific consequences of the proposed dam's environmental impact while the rest were merely protest letters. This is a reflection of a possible misconception on the part of the public as to the type of comments that will be taken into consideration in the EIA review process.

⁶⁹ EIA Guidelines, Section 2.4.5, at p.24.

⁷⁰ EIA Guidelines, Section 1.4.5, at p.7.

⁷¹ EIA Guidelines, Section 3.4.4, at p.31.

⁷² Department of Environment, Environmental Quality Report 1996 (Malaysia, Department of Environment, 1997) at p.50.

⁷³ *Ibid.*, at p.51.

⁷⁴ *Ibid.*

⁷⁵ EIA Guidelines, Para 3.4.7, at p.32.

⁷⁶ EIA Guidelines, Para 3.4.7, at p.34.

⁷⁷ EIA Guidelines, Para 4.5, at p.37.

⁷⁸ Department of Environment, Malaysia Environmental Quality Report 1997 (Malaysia, Department of Environment, 1998) at p.60.

⁷⁹ Tan, C.L. and Yoga, S.S., "Dam EIA draws flood of response," in *The Star*, 20 April 1999, Section 2, 4.

The Sungai Selangor Dam EIA Report, was made available at the DOE headquarters in the city and its offices in all states, the Selangor Public Library and the Hulu Selangor District Council.⁸⁰ Despite this, the public complained that the report should have been more accessible. The nature of public participation in the EIA process can be realised depending on various factors. The nature of the public notice given by the DOE, which usually appears as a public announcement in the local press is inadequate in situations involving rural and native communities. This also creates problems of accessibility to the EIA Reports that are available only in certain urban locations, which may be inconvenient for affected communities. The EIA Reports are rather expensive for example the Bakun Dam EIA Report was priced at RM150 per copy, thus making it unaffordable for the public to purchase it. The technicalities of an EIA report are also difficult to be comprehended by laypersons. Public participation can be effective if the relevant EIA documents are made available at convenient locations, at free or reasonable cost and are comprehensible to the layman at least by providing a non-technical summary. Unless there are interest groups with expertise in the relevant disciplines and who are able to understand, digest and evaluate the data presented in the detailed EIA report on behalf of the affected communities, it is highly unlikely that the public will be able to comment with sufficient authority on the impact of a development activity.

The EIA Handbook provides for public participation in the EIA process to be exempted in certain circumstances.⁸¹ The developer usually applies for exemption if he believes that, it is in the public interest that a detailed EIA report should not be made available to the public. The developer must forward an application for exemption from the requirement of public participation to the local planning authority. The local planning approving authority in consultation with the DOE will refer the matter to the National Development Planning Committee (“NDPC”) for a decision.⁸² This is to ensure that an impartial body and not the approving authority that is directly involved in the project make the final decision. The detailed EIA report is available for public viewing once it has been approved for implementation. This is useful as it affords an opportunity for members of the public, who may be aggrieved by the decision of the Director General of DOE to approve the EIA Report, to have access to the grounds for approval before filing an appeal to the Appeal Board, as provided under section 35(e) of the EQA 1974. However, this avenue has to-date never been used.⁸³

The rights of participation in the Preliminary EIA stage in the state of Sarawak have been removed, thus only allowing participation at the Detailed EIA stage but even then it is not mandatory. According to the Sarawak EIA Handbook, the need for public participation should be discussed during the formulation of the technical proposal of the Detailed EIA,⁸⁴ and it ought to be included in the Detailed EIA process on the initiative of the developer and where it affects public interest.⁸⁵ The Sarawak EIA Handbook recommends public participation if it is likely to benefit the planning of the project in a number of ways and these are identical to those set out in the Federal EIA Guidelines. If public comment is invited during the Detailed EIA stage, such comments must be received in writing by the Sarawak Natural Resources and Environment Board (“NREB”) within 30 days of public notification by the NREB. Members of the public may have access to copies of the detailed EIA Report at the NREB office. The provisions in the Sarawak EIA Handbook, clearly provides that public involvement in the EIA process is at the discretion of the developer.⁸⁶ Generally the categories of participants allowed to participate in an EIA report are the followings:

- a. those appointed to manage and undertake the EIA process (usually the team leader and a staff of experts);
- b. those who can contribute facts, ideas or concerns to the study; and
- c. those with direct authority to permit, control or alter the project, i.e. project developer, aid agency/investors, competent authorities, regulators, etc.”

⁸⁰ Lau, L and Foo Y.P., ‘DOE Pledges to Make EIA More Accessible,’ in *The Star*, 8 March 1999, at p.6.

⁸¹ EIA Guidelines, Para 3.4.7, at p.34.

⁸² In the *Bakun Dam* case, the EIA Report was not made available to the public, even after it was approved, because the project was subject to the Sarawak EIA procedures, which does not require EIA Reports to be made public. Finally, it was the Federal Cabinet that gave the approval for the report to be made public.

⁸³ There is no reported case on this matter. Information on the functioning of the Environmental Appeal Board is also not available.

⁸⁴ Natural Resources and Environment Board, *A Handbook of the Policy and Procedure of EIA in Sarawak*, (Sarawak, 1995) at p.20.

⁸⁵ *Ibid* at p.19.

⁸⁶ *Ibid* at p.25.

This portion in the Sarawak EIA Handbook is a reproduction of Principle 2 of UNEP's basic procedures for developing countries in implementing the EIA process. Principle 2 of UNEP provides that "Those who can contribute facts, ideas or concerns including scientists, economists, engineers, policy makers, and interested individuals or representatives of interested or affected groups."⁸⁷ The Sarawak EIA Handbook appears to have adopted merely a portion of Principle 2 thus leaving it to be deliberately vague and ambiguous as to who would eventually be consulted in the EIA process. This enabled the state to restrict the participation of the natives in the *Kajing Tubek & Ors v Ekran Bhd. & Ors*,⁸⁸ ("Bakun Dam case"). The requirement for public participation in the EIA approval process is often not complied with by the planning authorities. The courts also have not accorded much recognition to the rights of participation on the basis of lack of *locus standi*. In the *Bakun Dam* case public participation was not allowed during the EIA Review process. The first part of the EIA Report of the Bakun Dam entitled Detailed EIA for reservoir preparation was displayed to the public only after the Federal Cabinet directed the NREB to do so. Press reports indicated that the report was only displayed in three towns in Sarawak.

Interested persons were only given an hour to browse through the 318-page report. No photocopying was allowed although people were allowed to copy the contents by hand and was charged a cover price of RM150 for a copy of the report. A copy of the report available at the DOE office was not made accessible to the public.⁸⁹ However, no reasons have been given by the NREB for legally limiting public participation in this way, although such participation is internationally accepted as an integral part of the EIA process and is a requirement in the EIA practice for the rest of Malaysia. In *Abdul Razak Ahmad v Ketua Pengarah Kementerian Sains, Teknologi dan Alam Sekitar*,⁹⁰ Abdul Razak commenced an action to seek a declaration to grant him the right to view the EIA report in respect of a development in Johor Bahru. Haidar J held that as a citizen of Malaysia and as a resident of Johor Bahru, the plaintiff had a right to the EIA report to determine to what extent the projects' impact on the environment would affect him specifically, and the residents of Johor Bahru in general. Therefore, the plaintiff had an interest to protect.

The problem with public participation in the EIA process in Malaysia is that the court has clearly established that only those who have a legal interest to protect are entitled to such a right. Both the Malaysian and the English courts appears to have adopted a restrictive approach and limit the rights of interested citizens seeking to enforce their rights of consultation which is an integral part of the EIA process. Therefore, despite being in an advanced developed nation, the English Judges also have adopted restrictive approach similar to the Malaysian Judges. The English courts also have accorded priority to economic development compared to environmental interest.⁹¹ It is understandable that competing interests are at stake in the EIA process. On one hand is the developer who is obliged to fulfil his commercial undertaking, or the local, state or federal government intending to use the environment for a particular private or public purpose.

On the other hand the people living in that environment will face the impact of a project directly either by some inconvenience or by displacement. There are also members of the public who may not be directly affected but nevertheless have a compelling interest to conserve the environment. What is a beneficial effect to one party may be detrimental to another. The EIA process thus, is an important tool in providing for an equitable evaluation of all the competing interests at stake. The current practise in implementing the EIA laws must be reviewed. Public rights to the view the EIA reports and to participate should not be limited. The decisions of the Malaysian courts in limiting the right of the individual public-spirited citizen or collective interests to enforce public rights in the courts are proof of such limitations. According to Kiew, the system tends to favour the influential and powerful, (the national and multinational investors). He also boldly stated that the constitution of the country favour the majority and the sector of the community in power.⁹²

Role of Non-Governmental Organisations in Promoting Public Participation

The Penang Hill public demonstration highlighted the important role assumed by the NGOs in Malaysian land development planning decision making. The NGOs have participated actively in ensuring promotion of environmental interests in land development planning.

⁸⁷ United Nations Environment Program, *Environmental Impact Assessment – Basic Procedures for Developing Countries*, (1986) at p.6.

⁸⁸ *Kajing Tubek & Ors v Ekran Bhd. & Ors* [1996] 2 MLJ 388 (HC).

⁸⁹ Surin, Jacqueline Ann, "EIA Report on Bakun Project Declassified," *The Star*, 22 June 1996;

Surin, Jacqueline Ann, "DOE Not Allowed to display EIA," *The Star*, 7 July 1995, p.6.

⁹⁰ *Abdul Razak Ahmad v Ketua Pengarah Kementerian Sains, Teknologi dan Alam Sekitar* [1994] 2 CLJ 363.

⁹¹ *Ibid.*

⁹² Kiew Bong Heang, "EIA - Ideals, Realities and Ethics," in *The Malayan Naturalist*, Vol.50 No.1 Dec 1996, 30, at p.32.

The NGOs have assumed similar role in assisting the natives in Bakun, the *Thean Teik* case,⁹³ Endau Rompin controversy, *Asian Rare Earth* case,⁹⁴ the natives land rights case,⁹⁵ the Kuala Juru affair,⁹⁶ Jerai International Park,⁹⁷ and in various other situations where they view development as posing harm to the environment. There are few prominent NGOs, Consumers Association (“CAP”), Sahabat Alam Malaysia (“SAM”), Aliran, Centre for Environment Technology and Development Malaysia (“CETDEM”), Environmental Protection Society Malaysia (“EPSM”), Suara Rakyat Malaysia (“SUARAM”), Malaysian Nature Society (“MNS”), and World Wildlife Fund, Malaysia (“WWF”). Some of the prominent Malaysian NGOs were formed in late 1970s, but their impact or presence was only realised in the 1980s.⁹⁸ These NGOs unite at times to muster support to oppose development projects considered harmful to the environment. This was the case in the Penang Hill public demonstration where a few NGOs united to promote effective public participation. During the 1990s it appeared that the government has introduced the practice of consulting the NGOs on environmental planning issues. For instance they are invited to be members of the Environmental Quality Council in the Department of Environment and the Environmental Law Review Committee.⁹⁹

Despite the recognitions of their role in development planning, the NGOs often face various problems in their endeavour to participate in the land planning decision making process. They were often refused the right to participate on the ground of lack of sufficient interest to participate. Further, the opinion of the NGOs have always been brushed aside by the government by saying that the NGOs are under the influence of foreign media and seeking to undermine the government by criticising the government policies.¹⁰⁰ The Internal Security Act 1960 has been invoked several times against NGOs who criticised the government’s environmental policies. In October 1987 few NGOs were arrested under Operation Lallang, under the Internal Security Act 1960 on the ground that the NGOs were a threat to national security. The arrests have struck a devastating blow to the NGOs so much so that they are very cautious in expressing their views.¹⁰¹ This of course can deter any individual from joining the NGOs in voicing concerns arising from land development activities in their neighbourhood. Questioning of issues considered sensitive especially the environmental impacts of government development projects also may result in prosecution under sedition laws.¹⁰²

All these restrictions deter the public to participate in the NGOs programs. The individuals despite being aware of the effectiveness of the NGOs campaigns as in the Penang Hill, *Asian Rare Earth Sdn. Bhd.*,¹⁰³ however, are rather worried of the prospect of being arrested. This restricts the movement of the NGOs in participating in the decision making process due to lack of public support and participation. The Federal Constitution of Malaysia guarantees rights to freedom of speech assembly and association.¹⁰⁴ However, such rights are curtailed by various restrictions such as the requirement to obtain a police permit for organising any gathering of more than five persons.¹⁰⁵ License is required to operate newspapers,¹⁰⁶ however they can be threatened with closure if found to carry articles highlighting adverse impacts of any government development policies. Societies are required to register with the registrar of societies.¹⁰⁷

⁹³ *Trustees of Leng San Tan Khoo Kongsi (Penang) Regd & Others v Poh Swee Siang* [1987] 2 MLJ 611 SC; *Lim Khoo Eong v Trustees of Leong San Tan Khong Kongsi* [1987] 2 MLJ 621; *Sidek bin Haji Muhammad & 461 Others v Government of the State of Perak* [1982] 1 MLJ 313.

⁹⁴ *Woon Tan Kan & 7 Others v Asian Rare Earth Sdn. Bhd.* [1992] 4 CLJ 2207.

⁹⁵ *Jau Jok Evong & Ors v Marabong Lumber Sdn. Bhd. & Ors.* [1990] 2 CLJ 625.

⁹⁶ CAP assisted the villagers in the Kuala Juru fishing village where the villagers were affected by the river pollution caused by a factory, see *Kuala Juru: A People’s Cooperative* (CAP, Penang, 1980).

⁹⁷ Jerai International Park is a tourism project planned at the foothills of the Gunung Jerai in Kedah.

⁹⁸ See Harding A., “Public Interest Groups, Public Interest Law and Development in Malaysia,” in *Third World Legal Studies*, 1992, pp.231-243 at p.231. In this article Harding examined the public interest law and the role assumed by public interest groups in development issues in Malaysia.

⁹⁹ Mr. Gurmit Singh, the President of CETDEM and EPSM is a member of the Environmental Quality Council and has also contributed to the Environmental Law Review Committee.

¹⁰⁰ See Harding A., “Public Interest Groups, Public Interest Law and Development in Malaysia,” in *Third World Legal Studies*, 1992, pp.231-243 at p.236.

¹⁰¹ During the course of the interview with the Legal Adviser from CAP, there was some hesitation on the part of the legal adviser to answer certain questions.

¹⁰² Sedition Act 1948 as amended by the Emergency (Essential Powers) Ordinance 1970.

¹⁰³ *Woon Tan Kan and 7 others v Asian Rare Earth Sdn Bhd* [1992] 4 CLJ 2207.

¹⁰⁴ Article 10 of the Federal Constitution of Malaysia 1957.

¹⁰⁵ S 27 of the Police Act 1962.

¹⁰⁶ Printing Presses and Publications Act 1984.

¹⁰⁷ Societies Act 1966.

NGOs often register as society or company pursuant to Companies Act 1965 and are subject to the restrictions and limitations prescribed therein. The government also often target the NGOs, as they are of the belief that the NGOs paint a negative image of the country in the international media, which can discourage multinational investors.¹⁰⁸ The Malaysian NGOs often lament that the Malaysian public is not actively involved in the formal planning process.¹⁰⁹ The public must be prepared to fight for their own cause in order to safeguard their fundamental rights such as a right to a clean environment rather than merely relying on NGOs.¹¹⁰ The role of the NGOs in promoting public participation in Malaysia is undeniable and has largely been instrumental in ensuring the government considers environmental information in development planning.¹¹¹ However, the government has yet to realise the usefulness of the NGOs role in ensuring input from the interested members of the public are taken into consideration in development planning so as to ensure a higher degree of compliance on the part of the people.

Penang Hill Public Protest

The Penang Hill case emerged when, sometime in September 1990, a memorandum of understanding was signed between the Chief Minister of Penang and Berjaya Corporation to develop Penang Hill.¹¹² The hill is about 830 metres above sea level, and makes a series of forested ridges and summits, which has been easily accessible, as being a cool and tranquil retreat, from the heat and bustle of the city of Georgetown.¹¹³ The developer was given the exclusive right to develop the entire Penang Hill, which is one of Malaysia's outstanding areas of natural beauty and also the habitat for many unique species of flora and fauna. This development was expected to involve 900 hectares of land stretching along the entire length of the hill, on which various entertainment centres, hotels and shopping complex will be built to attract both the national and multinational tourists. Penang Hill mostly comprises of forest where there were legally protected trees and it is also a water catchment area. Any form of development leave alone a massive development proposed by the developer will pose a serious impact on the environment especially soil erosion, loss of water supply, flooding of the lowlands nearby, air pollution besides the destruction of the trees, flora and fauna. The Penang Hill has resisted development so far and it provided protection to the Island of Penang, which is already being affected by the various industrialisation programs, introduced by the government.

At the time when the Penang Hill development was proposed, the Island of Penang only had a structure plan, which was adopted in 1989. There was no local plan prepared for the Penang Hill as such the proposed development will have to be approved based on the structure plan.¹¹⁴ The Penang Island Town Council ("Council") has omitted a very important procedure prescribed by the TCPA 1976. The TCPA 1976 provides that if a proposed development is located in an area where there is no local plan, the local planning authority must serve a notice on the owners of the adjoining lands informing them of their rights to object to the application for obtaining planning permission.¹¹⁵ There was no information regarding the invitation to the adjoining neighbour to participate in the proposed development approval process. That was probably because the public was not aware of their right to participate in the planning permission approval process. The focus was more on the EIA report submitted by the developer to the Council together with the application for planning permission. Furthermore, the definition of an adjoining neighbour is rather restricted,¹¹⁶ thus limiting the rights of participation from the public and the NGOs unlike the EIA approval process where any interested person may seek to participate. The public, unhappy with the memorandum of understanding, managed to organise a campaign to save the Penang Hill with the assistance of the NGOs.

¹⁰⁸ Utusan Consumer is CAP's newsletter, which carries various articles related to politics, economic and social conditions in the country.

¹⁰⁹ Source: Interview with Mr. Gurmit Singh, President of CETDEM and EPSM

¹¹⁰ See generally, Gurmit Singh, "Environment: What Citizens Can Do About It", in Consumers Association of Penang (ed) in *Development and the Environmental Crisis – A Malaysian Case*, (Penang, CAP, 1982).

¹¹¹ *Ibid.*

¹¹² Bukit Pinang Sdn. Bhd., a subsidiary of Berjaya Corporation signed the memorandum of understanding with the Penang state government.

¹¹³ *Utusan Konsumer*, Mid-September 1990 at p.2.

¹¹⁴ S 22(2)(a) of the Town and Country Planning Act 1976 provides that in processing an application for planning permission, the local planning authority is required to take into consideration the development plans which are important policy documents. The development plans are a type of blueprint, which provides the relevant background information, which can guide the planning authority to arrive at a fair and just decision. In the event if there is no local plan, the information provided in the structure plan could be used, however it may not provide detailed information required for such a sensitive project like the Penang Hill.

¹¹⁵ S 21(6) of the Town and Country Planning Act 1976.

¹¹⁶ S 21(8) of the Town and Country Planning Act 1976.

They were concerned about the impact the mega project could pose to the Penang Hill and the Island itself. They therefore, wanted the government to assure that the project will not pose serious environmental problems. Information on the effects of the development project was collected and published.¹¹⁷ The Chief Minister of Penang said that the state had agreed to the project after careful assessment by various government departments concerned as well as considering an environmental impact assessment report (“EIA”) compiled by the developer that was submitted to the DOE.¹¹⁸ The NGOs discovered that the DOE had yet to approve the preliminary EIA Report when the memorandum was signed. The two NGOs, actively involved in the Penang Hill case, are the Consumer Association of Penang (“CAP”) and Sahabat Alam Malaysia (“SAM”).

These two NGOs’ and six other public interest groups¹¹⁹ formed the Friends of Penang Hill (“FPH”) to protest and respond to the development project proposed for the Penang Hill. The issue received wide coverage from the NGOs newsletters and all leading Malaysian newspapers in various all languages. The government tried to maintain secrecy since the project involves disposal of land worth an estimated amount of RM88 millions simply by the planning authority’s consent. There was no open tender or publicising of the terms of the Memorandum of Understanding. The matter only came to public scrutiny after being alerted by the NGOs especially SAM and CAP, which had its base in the Island of Penang. *Suara Sam* the newsletter of SAM and *Utusan Konsumer* had criticised the preliminary EIA report. The EIA report treatment of the impact on five gazetted water catchment areas was thought to be ‘very shallow’ considering the project location on the highest summits and ridges of Penang Hill and the steep gradients and heavy rainfall in the area.¹²⁰

The EIA report is also considered to have grossly underestimated the amount of clearing and levelling that would take place and to have proposed impact mitigation measures that were general, vague and inadequate.¹²¹ The FPH launched a vigorous nation-wide letter and signature campaign against the proposal. The daily national newspapers initially gave wide coverage to the issues, however they were as usual asked to ‘tone down’ or even completely delete adverse comments on the project.¹²² The Penang Ratepayers Association called on the state government to defer project decisions until a good local plan for Penang Hill was produced.¹²³ In late October, the DOE informed CAP that it had rejected the EIA report and that the project would only be considered if the initial plan were modified to avoid conducting the EIA and if a new EIA report was submitted.¹²⁴ Meanwhile there were new developments within the Penang State Assembly where the Chief Minister¹²⁵ lost his seat in the October 1990 elections where the development of Penang Hill was a major issue.

In January 1991, the first two days of the new state assembly sitting were devoted to a debate on the Penang Hill project. The State Assemblymen comprising of members of all other political parties expressed concerns about the project. The new Chief Minister revealed that one of the conditions of the memorandum of understanding was that an EIA had to be approved by the DOE before the state could consider approving the project. The developer was given eight months to revise the plan for Penang Hill and a new EIA report had been commissioned, with clear guidelines from the DOE, which would take into account the views on the initial plans by various quarters and the advice from the state government.¹²⁶ In late January 1991, representatives of FPH met the new Chief Minister and State Exco and presented a report criticising the Penang Hill project from the planning approval procedure views, environment and cost-benefit analysis as well as an alternative proposal plan for the hill’s future. The developer was asked to scale down the project.

¹¹⁷ The name of the book is *Penang Hill: The Need to Save Our National Heritage* (Penang, 1991). The authors comprised of experts from various disciplines such as legal profession, economics, engineering, biology and agronomy.

¹¹⁸ *Ibid.*

¹¹⁹ The six were the Malaysian Nature Society, The Malaysian Muslim Youth Movement, the Environmental Protection Society of Malaysia, Aliran, the Penang Youth Council and the University of Science Malaysia Academic and Administration Staff Association.

¹²⁰ *Suara Sam* 5(5) 1990 and *Utusan Konsumer* of Mid September and October 1990.

¹²¹ *Ibid.*

¹²² *Utusan Konsumer*, October 1990.

¹²³ *Ibid.*

¹²⁴ *Utusan Konsumer*, Mid-November 1990.

¹²⁵ The Chief Minister at the time of signing of the Memorandum of Understanding was the Gerakan party leader, Dr. Lim Chong Eu. He was succeeded by Dr. Koh Tsu Koon also from Gerakan and former lecturer from the Science University in Malaysia. Gerakan which was originally an opposition party is at present one of the component parties of the Barisan Nasional (the ruling party since independence until to date).

¹²⁶ *Utusan Konsumer*, January 1991 at p.7.

They submitted another development proposal in which an allegedly scaled down version of the project was proposed. However, the FPH was able to prove that the new revised proposal was in fact an expansion of the original project.¹²⁷ Due to the campaign's massive support, the DOE invited the FPH to sit on the panel to review the EIA report for the project. The DOE was flooded with thousands of letters from the public who called on the State government to reject the Penang Hill project.¹²⁸ The DOE reported that for this 'much publicised' project, it received 419 written comments (before the closing date) and 953 written comments (after the closing date)¹²⁹ from members of the public in conjunction with the review process of the detailed EIA Report, signifying the strong public interest generated against the proposed development plans for Penang Hill. The public protest organised by the NGOs had been extremely successful in halting the Penang Hill project.

The above case illustrates that developers often manage to obtain a grant of planning permission despite failing to fulfil the necessary requirements especially the submission of an EIA report, which is essential for projects that are potentially harmful to the environment. The authorities could have abused their discretionary powers in approving the proposed project that poses serious threats to the environment if it is not for the public protest against the EIA report. The importance of the EIA process as a mechanism to gather and disseminate environmental information for the public's scrutiny prior to approval of a proposed development has not been realised. The EIA process had been ineffective in preventing environmentally harmful projects due to the wide discretionary powers vested on the planning decision makers by the Legislature. Luckily, despite not being able to object to the proposed development during the planning permission approval stage, the public was able to bring up the issue during the EIA consultation process. The proposal by Berjaya Corporation is typical of many other which have in fact been implemented without public scrutiny in recent years. Many such development projects have been implemented in various parts of the country on the pretext of economic development, social restructuring and elevation of poverty.

The NGOs comprised of educated and environmentally alert citizens who used their knowledge and experience in contributing towards the success of the campaign. The public could not have managed to gather the relevant information easily compared to the NGOs. The Penang Hill case can be said to succeed in persuading the government to reject the proposed project by the developer. The government refused to consent to the application on the basis of the rejection of the EIA report by the DOE. The Penang Hill public demonstration opposing land development, which could cause severe environmental harm, is one of its kinds as it managed to halt development. It is very rare that the government will refuse consent for development if such development can bring economic gain. This is an interesting development where public opinion was considered prior to consenting to the development. The Penang Hill case raised important issues such as the availability of statutory rights for public participation, the role of the NGOs in assisting the public in realising effective public participation in the country's development planning, availability of information for the public to participate effectively.

Factors Influencing Effective Public Participation

According to Goh, in order to have meaningful and effective public participation, which is a very refined and delicate political process, the following aspects are essential:¹³⁰

- a. knowledge of the planning process;
- b. there must be an effective method of providing the necessary information;
- c. representative of participants; and
- d. a high degree of political participation.

These criteria are considered to be able to ensure that the public can participate effectively in the planning process in order to ensure that just and fair decisions are delivered.¹³¹ However, at present this appears to be in theory only and often the public is unaware of the activities of the planning department until it is implemented. There are various reasons for the failure of public participation in Malaysia as explained by the local planning authorities.¹³²

¹²⁷ Meenakshi Raman, "Country Report Malaysia," (1997) Vol. 2(1) *Asia Pacific Journal Of Environmental Law (APJEL)*, (London, Kluwer Law International) pp.58-71 at p.69.

¹²⁸ *Ibid.*

¹²⁹ Department of Environment, *Environmental Quality Report 1991*, (Malaysia, Department of Environment, 1992) at p.130.

¹³⁰ Goh, B.L., *Urban Planning in Malaysia History Assumptions and Issues* (Malaysia, Tempo Publishing, 1991) p.106.

¹³¹ *Ibid.*

¹³² Kamalruddin Shamsudin, "Public Participation in Planning: A Brief Reflections" in *Habitat Malaysia: Human Settlements Journal of Malaysia* (Vol.4) March 2000; Kamalruddin Shamsudin, "Public Participation in Structure Planning - Proposals

The following paragraphs will discuss briefly the factors influencing effective public participation.

a. Knowledge of the Planning Process

Malaysians, at all levels, educated or uneducated have very limited knowledge of the planning process. They are often not aware of development plans preparation. Further, they are often not keen to participate, as they are not sure of their rights. They also often say that there are others who will participate. They also believe that the NGOs are there to represent their interest. The public often will not complain unless a particular problem affects their interest directly. They rather not interfere with their neighbour's actions for fear of being branded as meddlesome. The nature of the Malaysian society, which is multiracial, also prevents the public from complaining against the activities of a neighbour who is from a different race for fear of arousing anti racial sentiment and branded as antiracial.

b. Lack of Effective Method for Providing Necessary Information

Information about the planning process is vital in order for the public to have an informed input in the planning decision making process. However, in Malaysia there are two problems faced related to information. One is the lack of information and there are no other effective methods for providing information. The public often faces difficulty in accessing the relevant information. The planning register is often not available for public viewing. The planning authority considers it as their prerogative either to release or withhold any information. The plans prepared by the planners, use technical planning jargons that are difficult for laypersons to comprehend. The public is often unaware of the preparation of the plans except by advertisements in the daily newspapers. As such people living in rural areas are not aware of the existence of such plans and will not be able to provide their views, which are very relevant. The public is also have problems in accessing reports and studies commissioned by the government where useful and specialised information relating planning and environmental aspects are gathered. Internet facilities are not fully utilised to provide useful information to the public. Thus, the planning officials must devise methods to dissemination of relevant information to the public in order to promote effective public participation.

c. Representative of Participants

The planning authority often disregards the importance of public participation and has not done enough to promote effective public participation. Both Federal and State Government development projects are consented without requiring compliance with planning requirements. They are merely required to consult the State Planning Committee on any development activity that it proposes to carry out within the state.¹³³ This exempts them from the requirement of applying for planning permission. As such public participation can be negated and the development project can be allowed to proceed without any input from the public.

d. High Degree of Political Involvement

Local councillors appointed by the State Government assumes an important role in the development plan formulation. Assemblymen from different constituencies of the state are elected to form the State Government. The local councillors are appointed from among members or supporters of political parties that have won the election and formed the State Government. These councillors may not be the best people to represent the interests of the residents within their local authority area. This proves that participation in the planning process is very much controlled by politicians who are keen to ensure the successful implementation of government development policies.

Concluding Remarks

Public awareness is an important tool to ensure that development process takes into consideration and incorporates all the necessary points made by the public at the time of their objection. As has previously been discussed, the aim of allowing public participation is to ensure that urban development plans are in agreement with the wishes of the people, which in turn will ensure a higher degree of public compliance with the plan. It appears that the planning authorities are very concerned in ensuring successful implementation of the country's development policies formulated to boost the economic rather than taking into consideration the effect of such activities on the environment and the public. Apparently, the avenues for public participation appear not to have been fully utilised and the planning authorities have not done much to promote effective public participation. In order for the public to participate, they must be equipped with all information necessary for them to make out their objections.

for Strengthening the Process," Project for Workshop Urban Renewal, Institute for Housing Studies, Rotterdam, 1990; Kamalruddin Shamsudin, "Towards Effective Public Participation at the Report of Survey Exhibition Stage", Discussion Paper for the Federal Department of Town and Country Planning, 1990.

¹³³ S 20A of the Town and Country Planning Act 1976.

The importance of providing access to information to the citizens is undeniable. The EIA report should be made accessible to all persons wishing to view the report, as that would provide environmental information informing the public of the impact of any development activity on the environment. This also ensures that the public will have access to sufficient information so as to formulate constructive objections. In order that the Malaysian society be more actively involved in the decision making process, the Malaysian government would be expected to move away from the monologue concept, which is being practiced at present. More conveniently by adopting a dialogue option would be more conducive to provide opportunity to the public to voice their concerns rather than merely accepting what the government chooses to approve. The NGOs must also be allowed to participate at all levels of planning decision making process. Factors such as lack of information, lack of public awareness, limited government initiative to promote effective participation, as discussed above have contributed towards reducing the effectivity of public participation in planning decision making. Awareness of the surrounding area by the public would be useful to ensure that planning decisions take into consideration the wishes of the residents living in the area. Local planning authorities have to realise that through better participation and interaction between the public and the local authority, a win-win situation could come into existence in which all 'clients'¹³⁴ of the planning process can benefit from this smart partnership.

¹³⁴ 'Clients' of planning process includes the local planning authority, public, developer and other relevant government agencies.