

MEMBERS CIRCULAR: 11/2021

TO : ALL REHDA SELANGOR MEMBERS

**FROM : JAMES TAN KOK KIAT
CHAIRMAN PLANNING POLICIES & STANDARDS SUB-COMMITTEE**

DATE : 21 DECEMBER 2021

SUBJECT : ARTICLE ON STREET, DRAINAGE AND BUILDINGS ACT 1974 (SDA 1974)

Dear Fellow Members,

REHDA Selangor Planning Policies & Standards Sub-Committee had conducted a study regarding the jurisdiction of local authority to impose upon a developer with condition to upgrade a public street (beyond boundary of development site) or to make financial contribution towards such upgrade. As such, we had engaged Halim, Hong & Quek Advocates & Solicitors (HHL) for their legal opinion on the following issues:

- a) whether the definition of “frontage” under Street, Drainage and Buildings Act 1974 to include any owner of premises that stands to benefit or benefitted from the infrastructure work is too wide;
- b) whether local authority has the power to collect contribution fund from Developer for their upgrade of a public street beyond the Developer’s development site;
- c) whether the local authority can impose obligation on a developer to upgrade a public street as one of the conditions for granting development approval; and
- d) whether the local authority can request a developer to provide undertaking to pay contribution fund for the upgrading of a public street.

Attached herewith, please find the written article by HHL for members information only. We believe the finding provide a better understanding on Developers’ legal position on the above issues.

If you have any query on the article, kindly contact REHDA Selangor Secretariat at 03-7806 4853 or email to selangor@rehda.com.

Thank you.

Yours sincerely,

**REAL ESTATE & HOUSING DEVELOPERS ASSOCIATION MALAYSIA
SELANGOR BRANCH**

**JAMES TAN KOK KIAT
CHAIRMAN PLANNING POLICIES & STANDARDS SUB-COMMITTEE**

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STREET, DRAINAGE AND BUILDINGS ACT 1974

Who will fall within the definition of “developer concerned” and “frontagers”?

Pursuant to Section 8 of Street, Drainage And Buildings Act 1974 (“SDA 1974”), local authority may recover the cost of constructing a new street or widening, opening, enlarging or improving the public street, from the developer concerned or the frontagers or both. So, who will fall within the definition of “developer concerned” and “frontagers”?

“Developer concerned” is not defined in the SDA 1974 and only the term “developer” is being provided with definition in SDA 1974. “Developer” means any person, body of persons, company, firm or society who or which engages in or carries on or undertakes the business of developing or providing moneys for development or purchasing or partly developing and providing moneys for purchasing buildings. Meanwhile, “frontager” means the owner of premises fronting on, adjoining, abutting on, or (though not actually so fronting, adjoining or abutting) adjacent or accessible to a street or back-lane or where the owner of the premises by himself or his tenant has the right to use or commonly does use the street or backlane as a means of access to or drainage from the premises; and in the opinion of the local authority, the use or the right to use is for the advantage or benefit of the land.

In other jurisdictions, such as Scotland and England, the definition of “frontager” was construed narrowly by the courts to include those premises which are not in physical contact with the street work but must be in close proximity to the street works. However, it was given a wide definition by the Parliament in SDA 1974 to include those who in the opinion of the local authority benefitted from the infrastructure work carried out by the local authority. Accordingly, it can be understood from the provision that it is based on the principle that those who benefitted from it should pay for the upgrading works. The question here is on the extent to which the local authority should exercise its discretion on this matter. It was stated in the Federal Court case of *Pengarah Tanah dan Galian, WP v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 (“Sri Lempah Enterprise Sdn Bhd”)* that “it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place”.

In addition, under Section 8(4), the local authority may take into consideration any or all of the following factors in determining the respective amounts to be paid by the frontagers or developers:

- (a) the frontage of their respective premises;
- (b) the area of their respective premises;
- (c) the degree of benefit to be derived by those premises from the construction of the street;
- (d) where any section of the street has previously been constructed, the amount and value of street works already executed by the frontage;
- (e) reasonable charges in respect of surveys and superintendence;
- (f) the cost of the premises voluntarily surrendered by the owners to the local authority; and
- (g) any other matters which in the opinion of the local authority are relevant and proper to be considered.

Therefore, the local authority when exercising its power under the SDA 1974 in determining who is the frontage or developer concerned should apply the Wednesbury reasonableness test as laid down in the case of *Sri Lempah Enterprise Sdn Bhd* and consider the criteria set out in Section 8(4) especially the proximity of their premises to the infrastructure work if those premises are not in physical contact with the street work.

Whether the local authority can collect contribution fund from the developer concerned for the upgrade of a public street beyond the developer’s development site by the local authority?

It is important to consider whether the local government has been conferred the power to impose contribution fund on developers. There would be no issue if there is an express provision empowering local authorities to collect contribution fund for infrastructure upgrades. For example, the Sales Tax Act 2018, the Service Tax 2018 and the Income Tax Act 1967 which expressly confers to the local government to collect taxes.

However, if the scope of the Act relates to practical and administrative matters, clearly the local government lacks the power to require contribution and the developers are not legally required to make contribution because “however excellent the motive of the local government is in imposing the capital contribution, it is unconstitutional and contrary to law” as cited in the case of *Howe Yoon Chong v Chief Assessor, Property Tax, Singapore (1978) 2 MLJ 87*.

Likewise, SDA 1974 is not a statute which impose specific contribution fund. The SDA 1974 also does not have any clear and unambiguous wordings or clauses mentioning that the local authority is being given the power to collect contribution fund from the developers. Section 132(1) of the Act provides that “There shall be established for the purpose of this Act in each local authority a fund to be known as the “Improvement Service Fund” into which shall be paid all moneys that may from time to time be paid to a local authority for the purposes of carrying out the provisions of this Act, all moneys recoverable by the local authority from any person under this Act or any by-laws made thereunder and any contributions from any person towards the beautification, construction or laying out of any street, drain, culvert, gutter or water-course.” This provision imposes duty on the local authority to establish a fund known as “Improvement Service Fund” rather than establishing a legal power on the local authority to collect contribution from frontagers or developers.

Further, it can be deduced from Section 8(2) & 8(3)¹ that the prerequisite prior to the local authority's cost recovery is where the relevant works must have been completed. Hence, the local authority shall construct or improve the public street and recover the cost of upgrading from the developer or frontager or both after completion of works.

Whether the local authority can impose obligation on a developer to upgrade a public street or drainage work?

(a) Public Street

Section 5 of the SDA 1974 provides that the local authority may, with the consent of the State Authority-

- (i) lay out and make new streets and back-lanes;
- (ii) build and construct bridges and tunnels;
- (iii) turn, divert, discontinue or stop up any public street; and
- (iv) widen, open, enlarge or otherwise improve any public street.

There is no provision in the SDA 1974 that provides for the local authority to impose conditions upon or require a developer or frontager to construct, improve, maintain or repair any public street.

According to the Section 5 and Section 8, the local authority shall construct or improve the public street and recover the cost of upgrading from the developer or frontager or both after completion of works.

On a side note, the construction of bridge does not fall under the definitions of "street" and "street works". Any bridge or any structure support or foundation connected to the foregoing falls within the definition of "building" in the SDA 1974.

(b) Drainage Work

It is worthwhile to note that under section 51 of the SDA 1974, a nearly similar clause applies for the construction and upgrading of drains and watercourses. It was stated that where the the local authority has made such main or has made such surface or storm water drains, culverts, gutters and water- courses, it may recover the cost of constructing and making such surface or storm water drains, culverts, gutters and watercourses, including the cost of acquiring any land or of any compensation paid in the course of such works. However, with the approval of the State Authority, the local authority may require developer to deposit a sum as may be apportioned by the local authority or a security to the satisfaction of the local authority.

¹ S8 (2) - If such sum is to be paid by the developer, it may be recovered from the developer.

sS8 (3) - If such cost is to be paid by the frontagers, the persons who are the frontagers when the work is completed shall be liable and the sum shall be recoverable in the manner hereinafter provided.

Key takeaways

Relying on the principle in the case of ***Sri Lempah Enterprise Sdn Bhd*** above, the local authority shall apply the Wednesbury reasonableness test and exercise their discretion to determine whether the developer has reasonably derived benefit and advantage from the infrastructure work and fall within the category of “developer concerned”.

In addition, the local authority shall construct or improve the public street and recover the cost of upgrading from the developer or frontager or both after completion of works according to the Section 5 and Section 8 of SDA 1974 instead of collecting contribution fund from the Developer prior to completion of the upgrading of public street.

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