

THE LEGALITY OF BLOCKING PUBLIC SPACES IN GATED AND GUARDED COMMUNITY SCHEMES AFTER 2007

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ABSTRACT

This article examines the issue of legality of gated and guarded community schemes (GACOS) in Malaysia under the existing laws, especially those amended and enacted in 2007. The article looks at the letter and implication of the existing laws and also examines other issues such as the surrender of public spaces to the local authority, the ownership of the public spaces and common properties as well as the charges and fees payable by the property owners in the given GACOS, in the state of Penang. The article evaluates the legal texts, examines the data obtained through interviews and questionnaire with and among officers of the local authority, developers, and residents of GACOS. The results of this study showed that the letter of law clearly prohibits any form of blocking of public spaces, while the guidelines issued by the local authority so permits. In addition, the local authority is still requiring the surrender of these spaces by the developers. It was also found that the residents of GACOS pay charges imposed by the local authority on top of fees imposed by the developers or management committees. Based on these situations and practices, therefore, GACOS in Malaysia are considered illegal. A review of the situation is needed. The policy-makers, in their re-examination of the issue, need to look into the interest of the people on one hand, and public interest and, therefore, the permissibility of GACOS on the other. The problem can be solved in two ways. Firstly, amend section 46(1)(a) of the Street, Drainage and Building Act, 1974. Secondly, repeal or amend the guidelines and correct the current practices by not requiring the surrender of public spaces in GACOS. Apart from that, charges payable to the local authority must be reviewed.

Keywords: gated community, blocking public spaces, maintenance fees, law, amendment

1.0 INTRODUCTION

Prior to 2007, the burning topic among the academic circles was the issue of extra legality of gated and guarded community schemes (GACOS) in Malaysia. The laws applicable to property development i.e. the National Land Code, 1965, the Strata Titles Act 1985, the Town and Country Planning Act 1976, the Housing Development (Control and Licensing) Act 1966 were not specific on the issue. Neither the laws concerning registration of titles i.e. National Land Code, 1965 and the Strata Titles Act 1985 have included GACOS nor was the Housing Development (Control and Licensing) Act 1966, comprehensive enough to regulate the issue of common properties and their management. Questions were raised about the blocking of public roads leading to GACOS which are considered public spaces and therefore are considered to be open to public. It is contended that the blocking of public spaces is against section 46(1)(a) of the Street, Drainage and Building Act 1974. As such, the local authority would not be able to give planning permissions to GACOS. Notwithstanding this, the development of GACOS has been up and coming as there was demand for it in the housing market.

By 2007, after policy revision, several laws were amended in order to address the prevailing land-related problems including gated and guarded schemes. Strata Titles (Amendment) Act 2007, Street, Drainage and Building (Amendment) Act 2007, and Housing Development (Control and Licensing) (Amendment) Act 2007 were passed. At the same time, a new statute i.e. Building and Common Property (Maintenance and Management) Act 2007 was enacted by the Parliament of Malaysia for the purpose of bringing high-rise and landed gated residential schemes under one governing law. The issue of tenure and management of common properties in GACOS were finally settled, as the law applicable to strata was extended to GACOS and a new law, i.e. Building and Common Property (Maintenance and Management) Act 2007 was enacted in order to provide a legal basis for the management of common properties in both high-rise and landed properties. What was not amended, however, was section 46 of Street, Drainage and Building Act 1974.

Against the general expectation, in the industry and academic circles, all problems of gated and guarded communities were not comprehensively addressed by the lawmakers. Section 46(1)(a) of Street, Drainage and Building Act 1974 was not amended. Thus, this has caused confusion at least on two points. Firstly, there is a question of legality of GACOS in light of section 46 of Street, Drainage and Building Act 1974. This section prohibits the blocking of the public spaces. As the road and facilities in GACOS are surrendered to the local authority whereby they become public, GACOS will be then illegal if the roads and facilities in this scheme are blocked. Subsequent to this point, the maintenance fees payable by the homebuyers need not be imposed as it will be the duty of the local authority to maintain the facilities. Secondly, based on the presumption that the lawmakers purposely did not amend the above section 46, then, one would also presume that the legislature intended the open spaces in GACOS to remain private. This means that a developer of GACOS does not have to surrender open spaces to the local authority. However, several subsequent studies revealed that in some schemes, this was not the case. Print media have highlighted the illegality of blocking of access roads and other common properties as they are surrendered to the local authority (The Star, 11/08/2007).

This article aims at highlighting the weaknesses of the present laws governing GACOS and proposes amendments on them. To do this, the article examines firstly, the legality of blocking public spaces in a gated and guarded community scheme under the new laws and secondly, the liability of developers, house-buyers and the local authority in the maintenance of public spaces. The second part has two purposes: firstly, to ascertain the conclusion drawn from the first part and secondly, to study the impacts of the legality issue or otherwise on the consumers. The method of study on these issues was two-fold: firstly, examining secondary information on the issue of GACOS and secondly, administering interviews and questionnaire with officers of the local authority, developers, and the homebuyers in GACOS.

The study comprises legal texts, before and after the 2007's amendment. This is followed by views and practice of the local authority in the study area about and in relation to the new laws. The article ends with a discussion on the findings and general summary of the study.

1.1 GACOS and the Law

In Malaysia, according to Stanley Gabriel (2007) and Azimudin (2005) the gated community refers to a cluster of houses or buildings that are surrounded by walls or fences or a perimeter with entry or access to houses or buildings controlled by certain

measures or restrictions such as guards, ropes, strings, boom gates, chains or blocks which normally includes 24-hour security, guard patrols, central monitoring systems and closed circuit televisions (CCTVs). One would presume that he does not differentiate between GACOS in Malaysia and those in other countries. The Malaysian GACOS refer to a type of residential development where access is restricted and public spaces are privatized (Gobbler, 2002). GACOS could be high-rise or landed properties which may include terraced houses, semi-detached and bungalow houses with or without facilities (Hasmah and Ahamad Ariffian, 1993). The common factor uniting high-rise and landed gated and guarded properties is the subdivision of one lot to many. This is the joint effect of subsections 6(1) and (1A) of the Strata Titles Act 1985 which provide:

- (1) Any building having two or more storeys on alienated land held as one lot under final title (whether Registry or Land Office title) shall be capable of being subdivided into parcels; and any land on the same lot shall also be capable of being subdivided into parcels each of which is to be held under a strata title or an accessory parcel.
- (1A) Any alienated land having two or more buildings held as one lot under final title (whether Registry or Strata Titles (Amendment) Land Office title) shall be capable of being subdivided into land parcels each of which is to be held under a strata title or as an accessory parcel.

Another common factor uniting high-rise and landed gated and guarded properties is the recognition of common properties inside a particular scheme. GACOS may have common amenities, facilities and common properties to which no single owner of the land is entitled. As to whether they are private or otherwise will depend on their surrender by a developer to the local authority. Once they are transferred to the local authority, they will be considered public under section 3 of the Street, Drainage and Building Act, 1974. This interpretation is sought to stand in light of the following sections.

Land owners in a subdivided land and building own the scheduled parcel alone, other items and facilities are termed common properties if they are not surrendered to local authority. According to section 2 of the Building and Common Property (Maintenance and Management) Act 2007, "common property, in relation to a development area, means so much of the development area as is not comprised in any parcel, such as the structural elements of the building, stairs, stairways, fire escapes, entrances and exits, corridors, lobbies, fixtures and fittings, lifts, refuse chutes, refuse bins, compounds, drains, water tanks, sewers, pipes, wires, cables and ducts that serve more than one parcel, the exterior of all common parts of the building, playing fields and recreational areas, driveways, car parks and parking areas, open spaces, landscape areas, walls and fences, and all other facilities and installations and any part of the land used or capable of being used or enjoyed in common by all the occupiers of the building." A somehow similar but limited list is given in clause 35 of Schedule H, under the Housing Development (Control and Licensing) Regulations, 1989. Some of these items mentioned in the above provisions are also mentioned in the Fifth Schedule to Schedule H under the Housing Development (Control and Licensing) Regulations, 1989 for the maintenance and service of which the homebuyers could be charged. They are sewerage maintenance, refuse collection and disposal cleaning and cleansing services, gardening and landscaping. Overall, some items in section 2 of the Building

and Common Property (Maintenance and Management) Act 2007 and clause 35 of Schedule H under the Housing Development (Control and Licensing) Regulations, 1989 are comparable to that under section 2 of the Local Government Act, 1976 though the latter refers to public place.

Public place according to section 2 of the Local Government Act, 1976 means “any open space, parking place, garden, recreation and pleasure ground or square, whether enclosed or not, set apart or appropriated for the use of the public or to which the public shall at any time have access”. Under section 48 of the Street, Drainage and Building Act, 1974 “public place” means any street, park, garden, promenade, fountain, traffic island or circus, playground, river bank, whether above or below high water mark, place of a public resort or any place to which the public have access.

It is clear that gardening and landscaping are used for gardens and recreational places. Similarly, driveways, parking areas, and open space under the term common property as well as public space are of the same contents. Public place or open space includes the streets as defined under section 3 of the Street, Drainage and Building Act, 1974, which in turn includes “any road, square, footway, passage, or service road, whether a thoroughfare or not, over which the public have a right of way, and also the way over any bridge, and also includes any road, footway or passage, open court or open ally, used or intended to be used as a means of access to two or more holdings, whether the public have a right of way over it or not, and all channel, drains and ditches at the side of any street shall be deemed to be part of such street.” The street is divided into private and public. Public street under section 3 of the Street, Drainage and Building Act, 1974 means “any street over which the public have a right of way which was usually repaired or maintained by the local authority before the coming into operation of this Act or which has been transferred to or has become vested in the local authority under this Act or in any other manner.”

The broad reading of these sections implies that common properties could be converted into public ones once they are surrendered to the local authority for they can be easily understood from terms used in the definition of public space or street. The impact of such an understanding will be discussed in due course (see 1.2.2.2).

1.2 Legality of GACOS

The legality of GACOS can be examined at two historical stages: prior to 2007 and at the latter stage.

1.2.1 GACOS Before 2007

Before 2007, GACOS were developed without a specific legal framework. According to Fernandez, (2007) the legal basis for the creation of GACOS was grounded on a set of agreements between the developer and the purchasers in relation to their respective rights and obligations for the management and use of the areas within the scheme. Additionally, the legality of the scheme under section 46 of the Street, Building and Drainage Act, 1974 was questionable, and the binding effect of deeds of mutual covenant was disputable as between the developer and the owners who purchased the property from original purchaser.

Due to the extra legality of the schemes, the deeds of mutual covenant were used to provide for the ownership and management of common properties. The statutory template for sale and purchase of GACOS (Schedule G) did not accommodate GACOS as it did not provide for the ownership and management of common properties. Although Schedule H has had the provisions for common properties, it did not apply to landed GACOS for this Schedule was designed for those properties which were governed by the Strata Titles Act 1985. This Act would apply only to high-rise buildings having two or more storeys on alienated land held under one lot (Azlinor, 2005). Bungalow houses, semi-detached houses, double-storey houses and single storey houses do not fall under the jurisdiction of the Act. Should the Act apply to landed GACOS, the problem relating to the title in common properties and their management would have been resolved. This was not the case.

The legality of GACOS was at stake because of the blocking of public roads and building guard houses on road shoulders. Any act to close, barricade or restrict the access of a public road, drain or space, was apparently in contravention of Section 46(1) (a) of Street Drainage and Building Act 1974, Section 80 of the Road Transport Act 1987 and Section(s) 62 and 136 of the National Land Code 1965. Similarly, the provisions of the Town and Country Planning Act 1976 were seemingly contradicted when guard houses were built on public land or on road shoulders. Section 46 (1)(a) of the Street, Drainage and Building Act 1974 provides that that any person who “(a.) builds, erects, set up to maintain or permit to be built, erected or set up or maintained any wall, fence, rail, or any accumulation of any substance, or other obstruction, in any public place ... shall be guilty of causing an obstruction ...” Subsection 46 (1)(a) if read together with section 46(1)(b) is quite clear which leaves no room for permissibility of blocking a public place; subsection (1)(a) has no exception while subsection (1)(b) empowers local authority to make some exceptions. Thus, there is no doubt under section 46(1)(a) concerning the illegality of any barrier constructed on public road.

Besides, the law was not comprehensive. As the developers of GACOS had to enter into deeds of mutual covenants with house buyers for the management of common properties, whereby the developers had to charge maintenance fees on house buyers under the said agreement, these agreements were not strictly binding on the subsequent house buyers under the law of contract. Under this law, one needs to be privy to a contract in order to be sued in the court of law. Such a relationship between a developer and a subsequent purchaser was questionable.

The above weaknesses after quite some time had caused the government to amend the laws which are explained below.

1.2.2 GACOS After 2007

The above problems of extra-legality of GACOS, the ownership of house and common properties, the management of common properties, and the effect of deeds of mutual covenants on parties succeeding the original owners were solved by amending some of the existing legislations dealing with housing issues and a new legislation was passed that would control the management of GACOS, including the newly created landed strata. These are discussed in the following section.

1.2.2.1 The Making of New Laws Dealing with the Development of GACOS in Malaysia

To deal with the issue of extra-legality of GACOS, Strata Titles (Amendment) Act 2007 has amended section 6 of the Act by allowing buildings and land to be subdivided into parcels, thus, enabling landed estate with common properties to be statutorily created, and relatively regulated more effectively like other types of strata schemes under Strata Titles Act 1985 (Moses, 2008). This not only settled the issue of extra-legality but also the problem of title to common properties in GACOS, as now, once the strata title is registered, the owner of the parcel will also have rights to common properties automatically. This was further enforced by the amendment to Housing Development (Control and Licensing) Act 1966.

Subsequent to Housing Development (Control and Licensing) (Amendment) Act 2007, the subsidiary legislation i.e. Housing Development (Control and Licensing) Regulations, 1989 were amended. This was necessary, as the purpose of the Act is to protect the interest of purchasers. In line with this purpose, the amended Housing Development (Control and Licensing) Regulations 1989 came into operation on Dec 1, 2007, and introduced significant changes to the statutory agreements between a developer and housing accommodation's purchasers. These regulations require that purchasers of landed and high-rise strata titled housing accommodations use the statutory form of sale and purchase agreement devised under Schedule H, which very clearly reads from the heading, "Building or land intended to be subdivided into parcels".

The problem relating to the management and maintenance of common properties was solved by Building and Common Property (Maintenance and Management) Act 2007. This legislation is in force in all states within Peninsular Malaysia and the Federal Territory of Labuan. This Act was enacted to provide for the proper maintenance and management of buildings and common properties before a developer delivers vacant possession to home owners. The joint-management body (JMB) comprising the developer and the homeowners will be responsible for the maintenance and management of common properties until a Management Committee (MC) is formed; after which it will be responsible to perform the functions of the JMB. Under the new regime, developers, the original house buyers (as long he is still the owner), and their successors will be liable for the performance of duties specified under the Act i.e. the management and maintenance of the common properties. This, therefore, has resolved the problem of gated schemes which was inherent in deeds of the mutual covenants. The statutory duties will be enforced against them all and contravention of duty will make the violators subject to penalties specified under Building and Common Property (Maintenance and Management) Act 2007.

The unresolved issue now seems to be the blocking of public spaces and the building of guard house on road shoulders. Considering the wisdom and intelligence of the drafters, however, one then presumes that the issue should not be unresolved in the minds of the drafters of the new provisions and legislations. To follow this line of thinking then, as a natural consequence of the new amendments and legislation, the new regime would be free from problems. This presumed state of affairs is explained below.

1.2.2.2 The New Legal Framework

As was mentioned above that the concept of GACOS is based on a private residential estate, where all members of the community, in addition to the ownership of their individual units, share common properties and share the cost and expenses of management and maintenance thereof. It could be so from the very beginning or it could be through the privatization of public spaces and services. The later is possible when the open spaces, facilities and services are under the jurisdiction of the local authority, and then converted into private schemes. In Malaysia, both scenarios seem to exist. It is a public knowledge, reported by media, that some non-GACOS in recent years have opted for the conversion of their public spaces to private ones, causing varying reactions from the government and some members of the schemes. This, however, is not the issue here, as our discussion is dedicated to those schemes which were designed and developed, from the very beginning, to be GACOS.

A gated community at the outset is possible, under the new laws, in the following ways:

1. Land to be subdivided according to Strata Titles Act, 1985.
2. The Sale and Purchase Agreement to be in accordance with Schedule H of Housing Development (Control and Licensing) Regulations 1989.
3. The purchasers of accommodation units in the community to have right to common properties and, in return, to share the burden of management and maintenance of the said properties.
4. The common properties to comprise all land, spaces, facilities, and services that otherwise would be considered public spaces and facilities which naturally would be under the jurisdiction of the local authority.

While items 1 to 3 are clear, the last one is troublesome. The problem is whether or not the open spaces and facilities are really common properties in GACOS established before and after 2007 once they are surrendered to local authority. In a new scheme, nevertheless, these spaces and facilities can still be considered common properties as the developer does not have to surrender them to local government. Part two of Street Building and Drainage Act, 1974 does permit the construction of private streets, provided one complies with the conditions imposed under section 9 of this Act. However, in the case of old schemes, both before and after 2007, where the properties are surrendered to the local government, all open spaces would be considered public. Hence one may not call them common properties anymore. It is also suggested that where a developer surrenders certain areas of land as reserved for access roads, playgrounds, parks, etc under section 236(2) of the National Land Code, such land will become state land and the roads will become public roads. Thereafter, the status of public roads will not be changed by erecting walls, fences, guards, barriers, etc (Mah Weng Kwai, 2008).

Private streets would become public after a declaration under section 12 or section 13 of Street Building and Drainage Act, 1974. Section 12 of the Act allows private streets to be declared public, on request of the community, while section 13 of the Act provides for private streets to become public street even if such is not based on the

request from the private individual or individuals. This deprivatisation are problematic in the case of old GACOS.

In fact, the problems are multiple. Firstly, once the private street is declared public, it would remain so under the law until the local government decides otherwise. Though Local Government Act, 1976 speaks of the closure of public streets under Part VII, but it is clear that this part implies no reprivatisation of public places. According to Zaki Tun Azmi, CJ and Abdul Aziz Mohamad, FCJ, in the case of *UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd and other appeals* [2009] 1 MLJ 737 section 12 of the Act is not to be read as imposing an obligation to continue to keep a public street as a public street but rather to keep under repair. Section 46(4) of the Act empowers the local authority to allow for temporary erections for purposes of festivals and ceremonies. As such, section 12 and section 46 of the Act do not confer a right to the local authority to close [... a State road] just because a Temporary Occupation Licence (TOL) under section 65 of the National Land Code, 1965 had been issued. One needs to be reminded that the TOL issued by the State Authority was serving a sort of public interest. Under no circumstances this can be equated with privatisation of public road for the benefit of a small community of home owners.

Secondly, the old problem that is the obstruction of the public street still hovers over the old GACOS. Section 46 (1)(a) of Street Building and Drainage Act, 1974 still exists without any amendment to it. Subsection (1)(a) is very clear, as the prohibition of obstruction of the public place is absolute, compared to subsection (1)(b) which prohibits obstruction if it is without the permission of the local authority. This, therefore, probably still makes the old GACOS extra-legal because in the old GACOS, roads and other open places are surrendered to the local authority which under section 12 are considered public.

Thirdly, concerns about the management and maintenance of open places and streets are further complicated. The surrender of a public place/space to the local authority and its maintenance by it is the test of it being a public place. Under section 12 (1)(a) of the same Act, a public street should be maintained by the local authority forever. By virtue of section 63 of the Local Government Act, 1976 “a local authority shall have the general control and care of places within the local authority area which have been or shall be at any time set apart and vested in the local authority for the use of the public or to which the public shall at any time have or have acquired a common right.” This is the duty of the local authority. Consequently, where, the local authority provides maintenance of the public places the services are financed by the public taxpayer. Neither are the maintenance fees paid by individual residents nor is access to such places denied to any members of the public. Under such circumstances, it is possible that developers may exploit the purchasers of housing accommodations as the latter are obliged by law to pay monthly fees for services that are financed by taxpayers. In case where monthly fees are really spent on the maintenance and management of public spaces and facilities, purchasers are charged heavily as they will not only provide for the maintenance of their own facilities but they will also need to pay assessment rate as well as quit rent. Subsequent to this double-taxation, the local authority may be contracting out its statutory duty to developers at the expense of home owners, which one may ask whether this is fair and whether it is permissible under the law. So far, it is very clear that under section 63 of the Local

Government Act, 1976 a local authority shall have the general control and care of all places within the local authority area. Similarly under section 101, among others, it is the mandatory power of the local authority to do all things necessary for or conducive to the public safety, health, and convenience (101(v)). The local authority may perform this duty by itself or may enter into a contract with another person to perform the duties imposed by the law. However, this should be understood to mean that the expenses should be borne by the local authority. A further question arises, under section 63 of the Local Government Act, 1976 which recognises the rights of the public to have access to such spaces. Though this may not be a discrimination against ordinary individuals as was thought by some, but it could certainly be a restriction over the rights of the public to have access to publicly financed places. These are serious questions pertaining to the practice of local authorities. A discussion on this is proposed in the next section.

1.3 The Case Study

It was understood that subsequent to the amendment of the laws in 2007, it was suggested that intensive training should be provided for local authorities' staff so that the new laws would be implemented without major problems. Due to the ambiguity in the law as mentioned above and the question of legality of GACOS, the following questions need to be asked:

1. Are the roads to GACOS still now blocked?
2. What are the guidelines issued by the local authority after the amendment of 2007?
3. Are roads, open places, and other facilities in the landed GACOS, completed before 2007, handed over to and remain under control and care of the local authority?
4. Does the local authority give planning permission when the layout plan indicates the blocking of the roads leading to GACOS?
5. Does the local authority require that housing developers surrender open places and other facilities to it?
6. Who is the owner of common properties?
7. Who manages common properties?
8. Do homeowners pay monthly maintenance fees, assessment rates and quit rent?

The purpose of the enquiry is to ascertain the truth about the blocking and the erecting of barriers on roads leading to GACOS or of public spaces, and whether the house buyers in GACOS are burdened with high charges or fees.

The investigation was carried out on landed GACOS within the jurisdiction of Municipality of Central Seberang Prai (MPSPT), Penang. We purposely excluded the issue of guard house since it was not as significant as the issue of gate that blocks access roads to GACOS.

Four managers who work with four different developers of GACOS were informally interviewed. Sets of questionnaires were also distributed to GACOS' residents, 97% of whom were owners. Besides, two key officers of the Urban Planning and Landscaping Department of MPSPT were informally interviewed as they were

considered to be able to provide reliable information pertaining to planning and legal requirements of GACOS. Based on a site visit, the list of GACOS is given in Table 1.

Table 1: Landed GACOS in the Municipality of Central Seberang Prai

Mukim	Name of Scheme	Developer	Type of Houses	Age of scheme
Juru	Taman Seri Cendana	Metrio Development Sdn. Bhd.	Semi-detached Bungalow	1-3 years
Bukit Minyak	Taman Bukit Minyak Indah	DNP Land Sdn. Bhd.	Semi-detached Bungalow	1-3 years
Simpang Ampat	Taman Tambun Indah	Tambun Indah Sdn. Bhd.	Semi-detached Bungalow	4-10 years
Bukit Tengah	Taman Bukit Kecil	Oriental Max Development Sdn. Bhd	Semi-detached Bungalow	4-10 years

1.4 Findings

The answers to the abovementioned questions are summarised in the proceeding sections. They pertain to the year of completion of the GACOS, erection of barriers on access roads to the GACOS, planning permission, ownership and maintenance of properties, and burden of payment of services. Discussion follows.

1.4.1 Age of Scheme

Out of the four schemes, two were completed between four to ten years, namely Taman Bukit Kecil and Taman Tambun Indah. The other two schemes were completed between one to three years, namely Taman Seri Cendana and Taman Bukit Minyak Indah. All of the projects were developed before 2007 (see Table 1).

1.4.2 Erection of Barrier on Access Roads

This study finds that access roads to the residential areas were blocked by either automatic bar-gates or gates and guard posts (see Figures 1, 2, 3). Only registered residents were permitted entry into the gated community. For safety and security reasons within these areas, the general public and visitors were denied entry unless they have registered themselves with the guards. It was also found that this has caused inconvenience to the general public, especially GACOS' visitors as was corroborated through the questionnaire (see Figure 4).

Even though the road barrier fulfils the needs of privacy among the residents, it has however created inconvenience to the visitors. Out of eighty respondents in the four GACOS, 87% agreed that the erected barriers had caused inconvenience. Although the public may enter a gated community, they have to show their identity cards to the guard and to get their visitor pass after making a registration. Only a minority of 13% of the respondents said that the blocked access road and entry procedure have not caused inconvenience to them.



Figure 1: Automatic Bar-Gate in Taman Seri Cendana



Figure 2: Automatic Bar-Gate in Taman Tambun Indah



Figure 3: Guard Post and Gate in Taman Bukit Minyak Indah

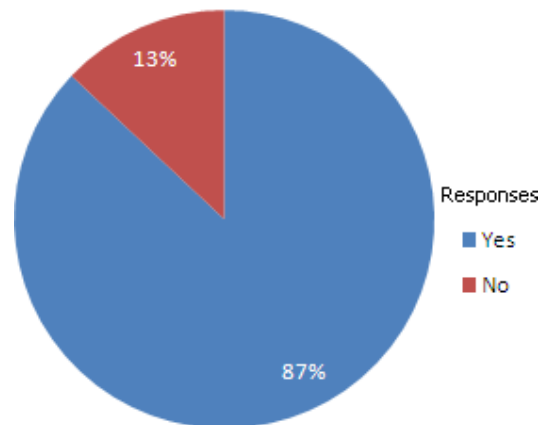


Figure 4: Inconvenience to Visitors as a Result of Road Barriers

1.4.3 Approval of Development Plans of Gates and Guard house and the Legality of Fences on Public Spaces

After project completion, developers will have to surrender certain areas of the land to the local authority. These areas are reserved for public facilities such as access roads, playgrounds, parks, etc. As mentioned earlier, section 46(1)(a) of Street, Drainage and Building Act, 1974 prohibits erecting barriers on roads. Yet, the MPSPT authority, upon developer's application, approves erection of gates, fences, and/or guard house on the land.

The approval of erection of such barriers was justified on two reasons. Firstly, the absence of law containing provisions for security within GACOS. Secondly, as a result, there have been growing security problems within such areas. Thus, the local authority and the State Government have come up with guidelines since 2007. As a consequence, there are two ways in which developers can obtain planning approval for the erection of gates and fences in GACOS. Firstly, they submit a layout plan of the proposed gates and fences. Secondly, they forward a layout plan of the whole project. A developer can get approval for erecting fences at certain part within a GACOS, provided that the road is unlocked upon instruction by MPSPT when there is an adjacent development taking place. In general, a developer can get planning approval for a fenced housing development with certain conditions:

- i. allowing the relevant department to have access to the area for maintenance purpose;
- ii. allowing the adjacent owners to get access to the area for construction purposes if needed;
- iii. obtaining approval from Public Works Department before any structure can be constructed on a road reserve;
- iv. complying with the instruments listed by MPSPT whereby fences will be demolished if there are complaints;
- v. complying with the conditions listed upon plan approval by technical departments.

It is to be noted that under the guidelines for building guard houses, it is a condition that MPSPT will not be responsible for any maintenance of guard houses which are built by the developers. Besides, the local authority has the power to demolish the guard house if a developer does not fulfil the above conditions.

This discussion shows that the public open spaces are capable of being constructed upon against the prescription of section 46(1)(a) of Street, Drainage and Building Act, 1974. The guidelines also indicate that MPSPT will not be responsible for any maintenance of guard house and gates or fences. It will, therefore, be reasonable to ask who shall pay for their maintenance whereas maintenance requires ownership of the premises. This is discussed below.

1.4.4 Ownership and Maintenance of Common Facilities in GACOS

Ownership and, therefore, maintenance of common properties requires the surrender of these facilities to the local authority. Not until they are surrendered, the ownership is vested in the house buyers. However, it will be not the same once the developer surrenders the roads etc. to the local authority. After the surrender of open places and facilities to the local authority, they become public to which everyone has a right of use. It is therefore not to assume that developer or the homeowner has exclusive rights to those places.

An interview with an officer at the local authority revealed that these common facilities are required to be surrendered to the local authority and, therefore, have to be declared as public spaces even though they are located within the gated community areas. These areas are then reserved, for example, for access roads, playgrounds,

parks, etc. This was corroborated through interviews with developers and a questionnaire survey among homeowners from whom we discovered that common facilities such as roads, landscaping, drains, playground, lightings, and community halls in GACOS are owned by the local authority as they have been surrendered to the local authority. In other words, the roads within GACOS are still considered public. Thus, according to section 63 of the Local Government Act 1976, public amenities such as street lighting, drainage, playgrounds, landscape, and community halls etc., which are usually regarded as common properties for the use by the residents, are deemed to be public places, a state land, which falls under the jurisdiction of the local authority and not the developer.

As a rule, one who owns a facility such as an open space should maintain it. By the law, facilities have to be declared as public spaces even though they are located within gated community area and should be maintained by local authority. This is found to be true in practice too. The developers and residents affirmed this. It was further disclosed that there was an agreement between the local authority and the developer for maintenance. The respondent from Metro Development stated that MPSPT will only take action to maintain those areas when they receive complaints. Normally, it will take at least 30 days before an action is being taken. Of course this is natural, as it needs to go through certain channels so that the approval for the maintenance of the open spaces can be granted.

1.4.5 The Burden of Paying for the Maintenance of Public/Common Places

This study found that GACOS' residents have to pay for both maintenance fees to the developer and assessment rate to the local authority. The maintenance fees charged by the developer (Table 2) are meant for services such as security, grass cutting, landscape, playground, community hall, badminton court and others.

Table 2: Monthly Maintenance Fees

Developers	Maintenance fees		
	RM50 - RM100	RM101 - RM200	RM201 - RM300
Metro Development Sdn Bhd	√	-	-
DNP Land Sdn Bhd	-	-	√
Tambun Indah Sdn Bhd	√	-	-
Oriental Max Development Sdn Bhd	-	√	-

Out of the four GACOS studied, two of the developers charged maintenance fees of RM50 – RM100. The remaining two developers charged RM101 - RM200 and RM201 - RM300 monthly. The charges vary due to the difference of sizes of the area, common facilities, and security system in the schemes. All home buyers are contractually bound to pay monthly maintenance fees to the developers. This means, in addition to paying assessment rate twice a year, homeowners within GACOS also pay an extra amount of monthly maintenance fees of RM50 – RM300 (Table 3). Thus, the residents of a gated community will normally bear an extra financial burden.

Table 3: Comparison of Assessment rate and Maintenance fees

Type of Houses	Gated Community		Non-gated Community	
	Assessment rate	Maintenance fees	Assessment rate	Maintenance fees
Terrace	RM101-RM200	RM50-RM300	RM101-RM200	RM0
Semi-D	RM201-RM400		RM201-RM400	
Bungalow	> RM400		>RM400	

1.5 Discussion

This study discovered that roads, as a common property, are conditionally permitted to be blocked. Other so-called common properties are in fact public facilities as their ownership is not vested in the residents of GACOS. However, residents in these schemes still pay maintenance fees in addition to normal assessment rate and quit rent. By implication, it was found that the problem of illegality of old as well as new GACOS has not yet been settled. This is so simply because as long the common properties are public facilities and/or places, their blocking of access, use, or enjoyment is against the law.

The old GACOS have been inaccessible to the public due to entry barriers even though roads and common spaces are surrendered to the local authority. In new schemes, despite the fact that the local authority expects the developer of the GACOS to surrender all open spaces and facilities to it, it still approves the application for the erection of gates and fences in these schemes.

It is pertinent to note, the local authority may have led itself to believing that the content of section 46(1)(a) of Street, Drainage and Building Act 1974 is prohibiting the barriers that are erected without the permission of the local authority. Such a notion does not stand, considering the language of this section. It is yet to be discovered what type of procedures the local authority follows after the surrender of open spaces including roads and streets, for subsequent privatisation. Following the existing law, a set of procedures have to be followed when the local authority intends to close a street permanently, including the gazetting of the notice to that effect.

The guidelines issued by the local authority are not helpful. Although the permission is conditional and seems to be temporary and, thus, in line with general spirit of law, it is obvious that such a closure is not meant for the purposes mentioned under the relevant laws. Such a closure violates the freedom and rights of the citizens. Roads and open spaces are public properties and, therefore, member of the public should have unrestricted access to them.

Security is a cardinal interest to all citizens, nevertheless, violation of other people's rights is not a justification for preserving the security of a small group of people. The development of GACOS is a great selling point for developers. For homebuyers, it is a great advantage to have guard houses at all entry points to a particular scheme, to check on all incoming cars; to have guards patrolling the neighbourhood at regular intervals; to have high walls circling the perimeter; and to have a record of incoming

traffic observed with CCTVs, etc. If this is upheld by the lawmaker, then it would be a good idea to completely privatise the facilities.

The proponents of GACOS thought that, in this type of schemes, one can expect better quality public services, such as garbage removal and park maintenance as these jobs are privatised, leaving local authorities to concentrate on the provision of other aspects (Gabriel, 2007). Irrespective of whether or not such a wish is realistic, one should also expect that section 46 (1)(a) be amended since illegality of GACOS under the current situation is more serious than the expected life comfort and other advantages.

Agreement between the local authority and developers was not investigated. How such a contract works and whether or not such a contract would be binding on the MC after the management is transferred to the latter is yet to be seen. It is assumed that similar problem as that between the developers and the succeeding homeowners under the deeds of the mutual covenants may arise. This needs to be investigated further.

The last issue that needs a brief discussion is the double charges. GACOS' homeowners pay service charges in addition to assessment rate and quit rent imposed by the local authority. Are these charges justified? If the roads and open spaces are surrendered, this will not only make the schemes illegal, it will also make the roads and open spaces public spaces and, therefore, the local authority shall be liable for their maintenance. If so, GACOS' homeowners shall not be liable for the maintenance of these public spaces cum common properties. This and also when one deducts the expenses of those facilities which are not considered public, still the amount of the maintenance fees are deemed higher. Thus, paying for both maintenance and assessment rate might be a burden for those who choose to live in GACOS. Whether this is fair to the home buyers concerned is another question to be asked.

1.6 Summary

A GACOS is a cluster of houses that is surrounded by walls or fences with the entry to or exit from these houses in the area controlled by certain measures or restrictions. It is a concept that makes the community a private and self-managed residential area in terms of security and traffic flow generally brought within the Malaysian legal framework for housing accommodations. Tenure in the units and rights to common facilities and open spaces are secured under the law. The framework for the management of common properties is developed under a separate law that applies to both land and high-rise strata.

Nevertheless, the issue of illegality of the blocking of access roads to GACOS under laws governing public places remained unresolved. While it may violate the rights of the public to have access to those roads and facilities, the fees and charges imposed on homeowners in the landed GACOS also seemed to be higher compared to normal properties. The law affecting GACOS needs a review. It was suggested that section 46 (1)(a) of Street, Drainage and Building Act be amended in the way that allows the local authority to make exceptions as in the case of blocking of open spaces, as provided in section 46(1)(b). Otherwise, all guidelines contravening section 46 should be revoked. Consequently, it should be the duty of the local authority to extend its

service to these schemes for maintaining public amenities such as street lighting, drainage, playgrounds, landscape, and community halls etc. Otherwise, it should revise the assessment fees or exempt homeowners in GACOS from paying such fees altogether.

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