

THE LAW AND POLICIES WITH REGARD TO FOREIGN PURCHASE OF LAND IN THE COUNTRY WITH SPECIAL REFERENCE TO JOHOR

Adibah Awang has been teaching Property Law at the Property Management and Valuation Department, Faculty of Surveying, Universiti Teknologi Malaysia since January 2, 1985. Formerly, she was working as a Legal Assistant at the Drafting Section of the Attorney-General's office. She obtained her Diploma in Law from Institut Teknologi Mara, Shah Alam in 1984 and later obtained her Advanced Diploma in Law from the same institution in 1987. She graduated with a Master of Comparative Law degree from the International Islamic University of Malaysia, Petaling Jaya in 1992. The article "The Law and Policies with regard to Foreign Purchase of Land in the Country with special reference to Johor" is based on her Master of Comparative Law dissertation i.e. A Study on Landownership by Non-Citizens in Johor Bahru."

Abstract

Prior to March 25, 1985, there was no restriction as far as origin, race and citizenship went with regard to ownership of land in Malaysia. Pursuant to Act A587 of 1984, Part Thirty-Three (A) was inserted in the National Land Code, the effect of which was to impose restrictions on foreign ownership of landed properties. In the case of land subject to the category "agriculture", there was an absolute prohibition on its disposal to and a restriction on its dealings in favour of foreigners. But in the case of land subject to the category "building", a disposal could be effected in favour of a non-citizen upon the prior written consent of the State Authority. Any acquisition of land in contravention of these provisions shall be null and void. However, land subject to the category "industry" can be acquired freely by the foreigners. Part Thirty Three (A) unfortunately, had a short life span and was repealed in less than two years via Act A658/1986, with effect from January 1, 1987 giving effect to no limitation as far as foreign ownership was concerned. Now, we are witnessing another set of Part Thirty-Three (A), re-introduced, with certain modifications to the repealed 1984 version, via Act A832, and gazetted on 16.7.92. The writer seeks to give an overview of the law and policies prior to the 1992 Amendment and the present position with regard to foreign purchase of land in this country.

1.0 Introduction

Unlike her ASEAN neighbours such as Thailand and Indonesia which have imposed certain limitations on foreign ownership of land in the country, Malaysia, in her desire to encourage foreign investment in the country, has exercised a liberal policy as regards to foreign land ownership since independence in 1957. The law did not even impose any limitation as to the number and acreage of properties that could be acquired by a foreigner. Thus, the citizen and foreigner had an equal right and opportunity to own land in the country, except for Malay Reservation land.

For almost 20 years after the National Land Code was enacted¹, there was no law restricting foreign purchase of real property in the country. However, after lengthy discussion and due consideration, an amendment to the National Land Code was made to restrict foreign ownership. It was passed by Parliament by introducing a new part, Part 33A, with effect from March 25, 1985. The law was passed to protect the citizens and to enable them to purchase land and houses and prevent the flow of "hot money" from abroad which would cause a boom as it did in the Johor Bahru property market in the early 70's, when property prices increased beyond control. The then Minister of Land and Regional Development, Dato'

Rais Yatim, when tabling the bill restricting foreign ownership said that the time has come for the government to give priority to its citizens in acquiring land in the country as had been done in other ASEAN countries². The introduction of Part 33A in limiting foreign ownership of land was a major breakthrough in the Malaysian land law.

However, with the economic slowdown in the country in 1984 to 1986, due to the world economic recession, the Government in their desire to bring foreign capital into the country by encouraging foreign investment, repealed altogether Part 33A. The position went back to the status quo, i.e. the position prior to 1985.

In the year 1988, Malaysia experienced an unprecedented economic growth, and Johor Bahru once again experienced the inflow of "hot money" similar to that encountered in the 70's, when Singaporeans flocked into its property market to buy properties especially residential and agricultural properties. Due to the fall of nearly 40% in the value of the ringgit against the Singapore dollar, Johor Bahru

1 The National Land Code (NLC) came into force on January 1, 1966 and was applicable in all the states of Peninsular Malaysia.

2 MALAYSIA: Perbahasan Dewan Rakyat, Parlimen ke 6 Penggal Ke 2, Bil. 11-21 Mac, Julai 1984 col. 2821

properties became "hot properties" resulting in a boom in the property market which in turn brought negative repercussion to the locals, in the form of soaring cost of living, high inflation rates, traffic congestion problems and exorbitant real property values.

Statistics show that in the last five years, foreign nationals and companies owned a total of 5,615 hectares of land in the state³. Due to this widespread selling of landed properties to foreigners, especially in Johor, the state government in 1990 made proposals to the Federal Government to amend the National Land Code to restrict foreign purchase of certain types of land in the state⁴. The 1992 Amendment to the National Land Code⁵ (hereafter referred to as the 1992 Amendment), *inter alia*, reintroduced Part 33A which was repealed in 1987. The writer seeks to give an overview of the law and policies prior to the 1992 Amendment and the present position with regard to foreign purchase of land in this country.

2.0 THE POSITION PRIOR TO THE 1992 AMENDMENT

2.1 Restrictions in respect of foreigners under the National Land Code

The National Land Code provides extensively for those entitled to be parties to dealing and to whom land may be disposed of. Those entitled are:

- a. Natural person other than minors;⁶
- b. Corporations having powers under their Constitution to hold land;
- c. Sovereigns, governments, organizations and other persons authorised to hold land under the provisions of the Diplomatic and Consular Privileges Act, 1957;

- d. Bodies expressly empowered to hold land under any other written law.

This means that anybody who falls under the above mentioned categories and who has the capital may own land in Malaysia. However, by virtue of the National Land Code (Amendment) Act 1984 (Act A587) which came into force on March 25, 1985, a new Part 33A consisting of sections 433A to 433E were inserted giving effect to the restrictions on the rights of non-citizens and foreign companies to deal in land. This amendment was followed shortly by the National Land Code (Amendment) (No.2) Act 1985⁷ which came into force on September 13, 1985 in which subsections (3), (4) and (5) were inserted to section 433B, which provides that the restrictions on dealing in land with regard to foreigners shall not apply to any charge effected or lien created in their favour whether before or after the commencement of Act A624.

In other words, landowner may charge or create any lien on the land to a foreign individual company without obtaining prior approval of the State Authority but this foreigner is not allowed to bid at the sale of agricultural land without the approval of the State Authority.⁸

[Section 433A of the Code provides interpretation of the terms "foreign company" which is defined as "foreign company defined in sub-section (1) of section 4 of the Companies Act, 1965", and "non-citizens" was defined as "natural person who is not a citizen of Malaysia."]

Depending on the category of land use, a non-citizen or foreign company might deal in land or acquire land by way of disposal, but only with the prior approval of the State Authority upon an application in writing

to the State Authority. However, in the case of land subject to the category "agriculture" or to any condition requiring its use for any agricultural purpose, there is an absolute prohibition as to its disposal and a restriction on its dealings (except by way of a charge or a lien) in favour of foreigners⁹. But where the land was subject to the category "industry", no approval was necessary. This is in line with the government's policy to attract foreign investors to come and set up industries in this country. As regards to land subject to the category "building", a disposal and dealing can be effected in favour of a non-citizen or foreign company only upon the prior written consent of the State Authority¹¹.

The effect of non-compliance with these provisions is to nullify and invalidate any disposal, dealings etc. in favour of a foreigner¹¹. However, where the State Authority grants any approval to alienate, dispose or deal with land to a foreigner, it may, at its discretion impose terms and conditions which are endorsed on the document of title to the land¹². But the restrictions imposed under Part 33A is not applicable to sovereign, government, organizations authorised to hold land under the provision of the Diplomatic and Consular Privileges Act 1957 and to bodies expressly empowered to hold land under any other written law.¹³

3 Zaili Baron, "Kesan Pemilikan Tanah oleh Warganegara Asing". Seminar on Amendments to the National Land Code 1992 Its Implications on Property Development Jan. 19-20, 1993 UTM, Skudai, Johor.

4 The Star, August 1, 1991

5 Act A832.

6 The age of majority is, for most purposes, 18 years, See the Age of Majority Act 1971, s.2 and 4

7 Act A624

8 Section 433B (4)

9 Proviso to section 433B

10 Ibid

11 Section 433C

12 Section 433B (2)

13 Section 433E

These provisions which had a short life span of less than two years, were repealed in 1986 with effect from January 1, 1987 by virtue of Act A658 which removed limitations on land ownership by foreigners in Malaysia. It is interesting to note here that when the bill for the amendment of these provisions were tabled in the House of Representatives on December 8, 1986, there was a heated debate from both the government and opposition against the amendment. However, the bill to repeal Part 33A was nevertheless passed after a debate of about two hours. There was however, no member of Parliament from Johor who stood to give any opinion on the matter.¹⁴

2.2 Restrictions Imposed by Other Laws and Regulations

Other forms of restrictions on landownership imposed by other laws but not specifically against foreigners, are the Malay Reservation Enactments of the respective Malay States, the National Land Code (Penang and Malacca Titles) Act 2/1963, Customary Tenure Enactment (FMS Cap, 215), Land (Group Settlement Areas) Act 1960, and the Aborigines Peoples Act 1950. These legislations serve to preserve land within the possession of certain groups of people. However, the Malay Reservation law became one of the country's laws which was "entrenched" in the Federal Constitution.¹⁵ Being closely identified with the special rights of the Malays, any change in the Malay Reservation law requires not only the two-thirds majority vote of the people's representatives in both the State and the Federal legislature, but also the concurrence of the Conference of Rulers.

Malay reservation land refers to that special category of land situated within the territorial bound-

aries of each state in Peninsular Malaysia which can only be owned or held by Malays. The State Authority, in exercising its powers of disposal under the Code, can alienate such lands only to Malays, and what constitutes a "Malay" depends on the definition and interpretation of that term as determined in the respective State legislations. Dealings in respect of such lands, such as transfers, leases, charges and easements, can only be transacted amongst Malays, and any dealings involving non-Malays in such Malay reserve lands will be held null and void.¹⁶

2.3 Policies of the State Government of Johor Restricting Foreign Ownership

In general there are no written policies restricting or prohibiting foreign land ownership in Johor but in alienating land, priority is given by the State Authority to the citizens to own land.¹⁷ As in the case of other states in Malaysia, the state of Johor in controlling land use and ascertaining that certain land remains in the hands of certain owners, have also been imposing restrictions in interest on alienation or on realienation of land under the surrender and realienation procedure. The types of restriction imposed are:

- General restriction
- Bumiputra restriction
- Restriction on dealings with foreigners

The general restriction is imposed on certain free lots or open lots and it is endorsed on the document of title to the lots or land as follows:

"This alienated land shall not be transferred, leased, charged or transmitted in whatever form including the use of a sale and purchase agreement intending to transfer or sell the land, without prior approval of the State Authority"

The objective of the State Authority in imposing this type of restriction is to control dealings on the particular lot or land. However, this prohibition against subsequent dealings is not absolute as the registered owner may apply for approval via a form and attaching with it a processing fee of RM10 to the Land Office.

"Bumiputra lot" is another form of restriction in interest imposed by the State Authority on alienation or on realienation of the land under the surrender and realienation procedure, to the effect that the ownership of this particular category of land is limited to Bumiputras only and dealings to non-Bumiputras are prohibited. This restriction is endorsed on the document of title of the land as follows:

"The land herein once transferred to a Bumiputra, shall not, subsequently, be sold, leased or transferred in any form whatsoever, to a non-Bumiputra without prior approval of the State Authority"

This means that once approval of the State Authority is obtained to transfer or lease this type of land to a non-Bumiputra then the new proprietor who later intends to sell the land to another non-Bumiputra, need not have to apply for approval from the State Authority. He is deemed to have complied with the restriction in interest by the ap-

14 Seventh Parliamentary Debate, House of Representatives, First Session, Jilid No. 1, No. 31-45, November 1986 to March 1987 at column 6422 to 6462

15 Article 89 thereof

16 FMS, subsection (i) of section 19; Johor, subsection (i) of section 20; Terengganu, subsection (i) of section 21; Kelantan, subsection (i) of section 12; Perlis, subsection (ii) of section 5 and subsection (ii) of section 5A; Kedah, subsection (2) of section 6. See the cases of Haji Hamid b. Ariffin v. Ahmad B. Mahmud (1976) 2 MLJ 79, Ho Giok Chay v. Nik Aishah (1961) MLJ 49 and Idris b. Hj. Mohamed Amin v. Ng Ah Siew (1935) FMSLR 70

17 Interview with the Johor Director of Land and Mines, Datin Paduka Hajjah Fatimah bt. Abdullah

proval given by the State Authority on application made by the previous Bumiputra owner of the land. However, this does not mean that the Bumiputra restriction has been "lifted" or removed from the document of title as it still runs with the land and thus, binds the proprietor of the land. In other words, once this land changes into the hands of a Bumiputra proprietor, then this restriction will take effect.

This type of restriction imposed by the State Authority so as to control and protect the Bumiputra land ownership and ensure that certain land is alienated only to Bumiputra and remained in the hands of the Bumiputra. In Johor, land surrendered to the state for development purposes and later re-alienated to the same owner after conversion or sub-division has been approved by the State Authority, once re-alienated to these developers, will be subjected to new conditions and restrictions in interest. In line with the New Economic Policy (NEP), the Johor State government requires that for new housing estate projects, 40% of it must be allocated to Bumiputra and the balance, consist of free lots open to all citizens. This means that once the development project has been approved, the State Authority on realienating the land to the developer will impose this "Bumiputra lot" restriction. This is to ensure that Bumiputra are assured of houses in the housing estate and the number of Bumiputra ownership in a housing project is ascertained. The body which ensures that this 40:60 quota is complied with is the Housing Section of the Johor State Secretary's Office.

The obvious setback in imposing these types of restrictions in interest, is that, unlike the Malay Reservation land which is governed by a statute, the restric-

tions imposed are not governed by any form of legislation but merely imposed by the State Authority at their discretion according to the land policies prevalent at the time. As has been observed, the restrictions imposed are not absolute as the State Authority's approval may be obtained to deal with the land to a non-Bumiputra. For housing development projects, where the developer fails to sell the "Bumiputra lots" within 18 months of completion to Bumiputra or after three advertisements are made, then the State Authority may on application of the developer, gave its approval for transfer to non-Bumiputra. However, for other types of land, no proper guidelines are given specifying in what circumstances the State Authority may give its approval or reject an application to deal with this type of property to non-Bumiputra.

What is the effect of non-compliance with the restriction in interest? The law explicitly provides that the transfer of land subject to the restriction in interest is incapable of registration and thus the transfer is null and void¹⁸ In such cases the Johor Land Office will impose a penalty on land owners who fail to comply with the restriction in interest. For example in housing projects, an agreement made between the housing developer and the State Authority, would provide that in cases of sales of Bumiputra single-storey terrace houses to non-Bumiputra without prior approval of the State Authority, the developer would be fined RM400/ per lot. The penalty imposed depends on each case and at the discretion of the State Authority and in fact is a condition for approval from the State Authority. This means that once a fine is paid by the housing developer for the breach,

approval will be given by the State Authority and thus the dealing is registered in favour of the purchaser.

Therefore, the effect of non-compliance with the restriction in interest does not have the effect of nullifying the transaction which contravened the restriction or made the transaction incapable of registration but the registered proprietor of the land is merely subject to a penalty in the form of a fine which is also a pre-condition to approval. Hence, the reason for many of these Bumiputra lots being transferred to non-Bumiputra and also foreigners.

Another question that arises as regards to the Bumiputra restriction is how far the restriction binds a person who has a registrable interest on the land. For example where the land was charged in favour of a bank and on failure of the chargor to discharge the charge within the specified period, then, whether the bank in exercising their rights as chargee i.e. right to sell the property charged, is under an obligation to make an application for approval of the State Authority. There is no case as yet on this point but the Johor State Legal Advisor was of the opinion that once a landowner has obtained approval from the State Authority to charge his land, then in cases of default in payment by the chargor, the chargee has the right to sell the property without obtaining approval from the State Authority. This is because he is deemed to have obtained the approval from the State Authority when the owner or chargor obtained approval to charge his land to the bank. Once the State Authority has given approval to the landowner to charge his land subject to a restriction in interest, then the chargee, on default by the

chargor, has the right to sell without approval from the State Authority. The rationale behind this interpretation is that if the chargee was required to ask for approval from the State Authority for public auction, this will be in contravention with the chargee's right as provided under the law. If the latter interpretation is preferred, then banks and financial institutions will be reluctant to give financing to landowners who held land subject to this restriction.

The latest form of restriction on landownership in Johor is restriction on foreign land ownership which came into force on May 7, 1987 vide Circular of the PTG No.3/1987. This administrative directive requires all Land Administrators in Johor on alienation and re-alienating of land under the surrender and re-alienation procedure, to impose restrictions against foreign purchase of "residential" and "shop" properties by endorsing on the document of title the following restriction:

The land herein shall not be sold, leased or transferred in any form whatsoever, to foreign nationals or foreign company without prior written approval of the State Authority"

This means that the proprietor of land subject to this restriction has to apply to the State Authority for approval to transfer his land to a foreigner. The objective of this restriction in interest is to control dealings on residential and commercial land to foreigners. However, as with other forms of restrictions imposed, there are no written guidelines given when the State Authority should approve or reject an application for transfer or lease of this type of property to a foreigner.

The issue on the validity of the restrictions imposed by the State

Authority of Johor arises as there is no provision in the National Land Code or other written laws which empowers the State Authority on alienating land to impose restrictions in interest which are "conformable with law" only. In other words the powers of the State Authority in imposing restrictions must comply with and not be contrary to any written law in force. Thus, the question that arises now is whether the restrictions in interest imposed by the Johore State Authority, are "conformable to law".

As to the repeal of Part 33A of the National Land Code with effect from January 1, 1987 removing limitations on foreign ownership of property in Malaysia, the question that arises here is the validity of imposing restrictions on foreign purchase of shop lots and residential properties alienated or re-alienated as at May 7, 1987. According to the Director General of Land and Mines, Malaysia, this administrative directive has no legal standing as there are no provisions in the National Land Code or any other written laws to the effect. Moreover, the law restricting foreign ownership had been repealed.

2.4 Other Forms of Limitation on Landownership

The Foreign Investment Committee (FIC) which was formed in 1974 under the Economic Planning Unit (EPU) of the Prime Minister's Department acts as the government's watchdog in regulating private sector investment by both the local and foreign investors in the country. Although the policy of the government is to encourage foreign investment in the country, it is vital that national interests are given priority when forming investment policy guidelines in the country. Thus, with the setting up of the FIC, the government hoped to achieve a balanced ownership

and control, in line with the New Economic Policy (NEP) which provides a 30% allocation for Bumiputra participation, 40% for the non-Bumiputra and 30% to the foreigner.

In controlling the acquisition of fixed assets by foreigners in the country, the FIC approval is required for every purchase of real property, regardless of price. Thus, prior to registration of the transfer, the purchaser must have a certificate from the FIC approving the purchase and this certificate is attached to the Memorandum of Transfer to be submitted to the Land Office. If the certificate of approval from the FIC is not obtained then the Land Registration Office is not expected to register the transfer even though the requirements of the National Land Code were fulfilled. The FIC tightened the rules governing foreign property ownership in April last year by "reinforcing" its February 1974 guidelines by sending letters to housing developers and the Bar Council stating that under the 1974 guidelines, all foreign purchases including terrace units, bungalows, apartments and condominiums require its approval¹⁹. These changes were subsequently attacked by investors, developers, lawyers and property consultants as being so vague that they frightened away potential investors. The FIC's relaxed guidelines issued last December, can be summarised as follows:

1. Condominium units costing more than RM300,000 will no longer be subject to conditions on use or length of ownership. (Under the previous guidelines condominiums above RM500,000 could only be resold after five years of purchase). However, approval of the FIC need to be obtained for such acquisition.

¹⁹ "Builders in a fix over directive", New Straits Times June 19, 1992

2. Foreign individuals and companies cannot buy residential property worth less than RM80,000.
3. Acquisition of a shop house must be made by a company that is at least 70% owned by locals.
4. A foreigner may buy only one unit of residential property for his own use or investment.
5. If foreigners want to buy more than one property, this must be done through a local company with at least 70% Malaysian equity.
6. Condominiums and apartments priced between RM80,000 and RM300,000: foreigners may purchase for owner-occupation, but cannot resell within three years of purchase. If it is rented out, then, it cannot be resold within five years of purchase.
7. Bungalows worth more than RM500,000: foreigners may purchase for owner occupation but cannot resell within three years of purchase. If properties purchased were rented out by owners, they cannot be resold within five years of purchase.
8. Bungalows worth RM80,000 to RM500,000 : foreigners may purchase for owner-occupation: cannot be resold within three years of purchase.
9. Terrace houses and link houses worth more than RM200,000: foreigners may purchase for owner-occupation; cannot be resold within three years of purchase. If rented out, cannot be resold within five years of purchase.
10. Terrace houses and link houses worth between RM80,000 and RM200,000: foreigners may purchase for owner-occupation; cannot be resold within three years of purchase and cannot rent out the property.

The irony of the role of the FIC in the approval of property ac-

quisition by foreigners is that the law (prior to the 1992 Amendments) freely permitted foreign ownership. This contradiction is further highlighted since FIC was not formed pursuant to any Act of Parliament but merely as a government watchdog to oversee that local interests are protected. Its role is to monitor and ensure compliance with the New Economic Policy. In the Federal Court case of *David Hey v. New Kok Ann Realty Sdn. Bhd.*²⁰ even though the Court expressed its willingness to regard the guidelines as public policy and not merely political policy, it did not expressly state that the guidelines have the force of law.²¹ Moreover, as registration of land ownership is a state matter, the role and authority of the FIC in imposing conditions and restrictions at its discretion when approving acquisition by foreign nationals is questionable. It was reported that the Johor Government will announce its own guidelines on foreign ownership of property and are giving the FIC one week to make adjustments to its rulings to follow their guidelines. The Johor Menteri Besar, Tan Sri Muhyiddin Yassin cites the authority of the State over land as the basis for drawing up separate regulations.²² He further commented on the revised FIC guidelines as not practical as errant developers could exploit the price ceiling eligibility and raise prices so as to meet the condition to be able to sell their units to foreigners. In mid December, Selangor Menteri Besar, Tan Sri Muhammad Taib said that the guidelines "need not" be implemented in the state. He said that if the guidelines were to be implemented to the fullest extent, it would affect adversely, not only the property market, but also the economic development in the state. Thus, now lies the question as to whether the rules of a State supercede those of a body with federal powers such as the Foreign Investment

Committee? According to the Director General of Lands and Mines Malaysia, the FIC guidelines are merely administrative in nature and have no legal standing and the State Authority may register land in favour of the foreigners even if the guidelines are not complied with.²³

Another form of limitation on foreign ownership is in the form of control imposed by Bank Negara Malaysia to the amount of financing made available to foreign nationals who want to purchase properties here. Prior to 1988 there was no borrowing limit for foreign nationals, i.e. 100% domestic financing was available to them. However, in 1988, foreigners could only borrow up to a maximum of 70% of the value of the property purchased. A further reduction to this limit was introduced in early 1990 whereby a maximum limit of 50% domestic financing was set. However via a directive dated November 9, 1990, Bank Negara provided that no approval of domestic financing for property acquisition and development by non-citizens and non-citizen controlled companies will be given by the central body.²⁴ The main reason for the imposition of this restriction was to encourage funds from abroad for investment purposes thus saving the country foreign currency exchange which is more profitable.

However it could not be ascertained how many of these foreign purchases were actually

20 (1985) 1 MLJ 167

21 Salleh Buang, "Foreign Ownership of Land: Implication of the NLC (Amendment) Act 1992", a paper presented at the Seminar on Amendments to the NLC: Its Implications on Property Development, January 19 to 20 1993, UTM, Skudai

22 The Star, "Johor sets rules on ownership", January 5, 1993

23 Interview with Dr. Nik Mohd. Zain Nik Yusof, Director General of Land & Mines Malaysia on June 9, 1992

24 The Star Business Section, November 21, 1990

funded by domestic financing and thus the effectiveness of controlling foreign ownership by reducing domestic funding to foreigners is doubtful.

3.0 THE POSITION AFTER THE 1992 AMENDMENTS

3.1 The 1992 Amendment Act to the National Land Code 1965 which, *inter alia*, sought to impose restrictions on foreign land-ownership in the country was tabled in the Dewan Rakyat, by the Parliamentary Secretary of the Ministry of Land and Cooperative Development. It took the house merely half an hour to have the bill passed. It was then passed by the Dewan Negara on June 4, 1992 and became the National Land Code (Amendment) Act 1992 (Act A832).

The 1992 Amendment Act, *inter alia*, re-introduced Part 33A which was repealed in 1987. This part consists of five provisions which were basically the same as the former Part 33A. However, the third proviso to the former section 433B which totally prohibits dealings and disposal of agricultural land to foreigners, has not been included in the new section 433B. Thus the State Authority may alienate or allow dealings of agricultural land to foreigners which were totally prohibited under the repealed Act. This is because the government did not want to impose a stringent law that prohibits foreign landownership absolutely which, if imposed would discourage foreigners from investing in the country. This reflects the government's desire to strike a balance between maintaining foreign capital inflow on the one hand and restricting foreign purchase of land. This again can be seen by the exemption of industrial land from the restriction.²⁵

The 1992 Amendment to the National Land Code merely seeks to legalise what the Johor State Authority had done for the past

five years in imposing restrictions on foreign purchase of residential and shop lots. However, the uncertainty as regard the effect of the non compliance with the restriction in interest is solved by the insertion of a new section 433C. The section provides that any disposal or dealings to a foreigner, the approval of which had not been obtained shall be null and void. Prior to this amendment, approval of the State Authority is merely administrative in nature, that is, contravention of it will not invalidate the transaction but the landowner will only face a penalty in the form of a fine and the dealing to the foreigner will nevertheless be registered by the Land Office.

Similar to the repealed 1985 Amendment, landowners may charge or create any lien on the land to a foreign company without prior consent of the State Authority but charge and lien holders were not allowed to bid at the sale of agricultural land without the consent of the State Authority.²⁶ However, under the 1992 Amendment, this prohibition is extended to include building land.²⁷ The only setback is in section 433B(6) which states that subsection (3) and (4) shall apply retrospectively i.e. to any charge effected or any lien created whether before or after the commencement of this Part. The position prior to the 1992 Amendment allows the chargee to bid at the sale but now the chargee or lien holder must obtain approval of the State Authority before he is entitled to bid at the auction sale. It has yet to be seen whether such application for approval is granted or refused.

The 1992 Amendment Act confers wide powers to the State Authority in alienating land to foreigners. The law does not give any guideline as to when the State Authority may approve or reject an application for deal-

ings or disposal of land to foreigner. The discretionary powers of the State Executive Council which is chaired by the Menteri Besar should be fettered by law rather than on political considerations which, as have been observed, have led to the soaring increase in the number of foreign-owned landed properties.

4.0 CONCLUSION

Prior to the 1992 Amendment, the law did not impose any limitation on foreign landownership in the country. Despite the liberalised law, the State Authority of Johor in alienating land have been imposing various forms of restrictions in interest on the land alienated or on realisation of land, the latest form being restrictions against purchase of shoplots and residential lots by foreigners. However, the effectiveness of these restrictions in controlling the increase of foreign purchases of land was suspect due to overwhelming number of properties acquired by the Singaporeans in recent years.

As pointed out earlier the form of restrictions imposed were administrative in nature and they were not governed by any statute but depended solely on the political and socio-economic considerations prevalent at the time. Thus, there were no definite rules governing its implementation. For example, "Bumiputra lot" can be transferred to a non-Bumiputra by payment of a penalty of RM5000- by the landowner. Despite the contravention of the restriction, the transfer to the non-Bumiputra will still be registered by the Land Office just by the payment of this penalty. The non-compliance with this restriction will not

25 Second proviso to section 433B of the National Land Code

26 Section 433B (3)

27 Section 433B (4)

nullify and invalidate the transaction. In other words, money can buy policies.

There were no written guidelines as to the State Authority's power of approval for transfer or lease of land to foreigners. The wide discretionary powers of the State Authority have resulted in many lands being transferred to foreigners. The approval power of the State Executive Council chaired by the Menteri Besar should be fettered by law because if left unfettered, there will be a tendency for abuse.

In ascertaining that Bumiputra were able to own houses, the Johor government have directed all housing developers to allocate 40% of the project to Bumiputra. The Housing Section of the State Secretary's Office, is the body that controls the 40:60 quota. Many of these housing developers preferred to sell to non-Bumiputra or foreigners who were able to offer a higher price for these properties. It was reported in the Property Market Report that sales of residential properties to foreigners in 1990 indicated a 10% to 20% over payment by the Singaporeans. Thus, Bumiputra seeking to purchase houses in a housing project will find that the Bumiputra lots have been sold out but on checking with the Housing Section of the office of the State Secretary, may find that none of the Bumiputra lots have been sold by the developer. This was done so that the developer may sell the houses to the foreigners as the policy provides that where a developer fails to sell a Bumiputra lot within 18 months of its completion to a Bumiputra or after 3 advertisements are made, then the State Authority may allow the developer to sell to a non-Bumiputra or foreigner. Certain developers were even willing to pay the fine of RM5000 per lot imposed on non-compliance with the restriction in interest as they can obtain a greater

profit by selling the properties to the foreigners who were willing to pay more than the price offered by the developer.

The form of control on foreign purchase of land by the FIC is also doubtful since the FIC have no authority over the State Authority to require them to comply with their conditions as land is a State matter. It was reported that the Johor state government had finalised its own new set of guidelines on foreign land-ownership which sets a quota on foreign ownership in particular housing schemes in the State and decided not to follow the RM80,000 price ceiling eligibility set by the FIC, as the state government felt that developers may use this as an excuse to increase prices to sell to willing foreign buyers. If Johor prevails in its intent to impose a different regime on real estate ownership by foreigners other States might be tempted to follow suit. Like the southern State, the rest desire and actively seek investment. Whither then the force of FIC's guidelines? The Director-General of Lands and Mines recently announced that the differing guidelines set by the FIC and the state governments on foreign ownership would be streamlined by March this year. It is hoped that this move would correct several irregularities resulting from the different guidelines.

There is undoubtedly a need for achieving a balance between the importance of foreign investment in the country on the one hand, and the need to safeguard local interests especially the interest of the Malays as conferred by the Constitution. However, the fact that Malaysia's rapid economic expansion in the last few years was mainly fuelled by these foreign investments, should not be the one and only consideration for continuing with the liberalised policy. The need to ascertain that local interests are safeguarded should also be given

equal consideration. The crux of the issue is whether we should have an open and uncontrolled market which enables outsiders, flush with cash, to buy houses in preferred areas, in Johor Bahru, Malacca, Seremban, K.L.-P.J.-Subang Jaya, Ipoh and Penang. This open property market will surely bring in hardship to the locals especially the poor because of inflation and competition elbowing out most Malaysians from owning houses.

It is observed from the essay that the inadequacy of the laws and policies restricting foreign landownership have prompted the Federal Government to pass the 1992 Amendment to the National Land Code. The re-introduction of Part 33A repealed in 1987, highlight the element of "social sensitivity" of the legislation to the demands of its rakyat. However, unlike the repealed 1985 Amendment, the 1992 Amendment does not provide a total prohibition on foreign ownership of agricultural land. Similar to the repealed 1985 Act, the new section 433B confers wide powers of approval on the State Authority to alienate or approve transfer of land to foreigners. It is therefore, necessary for these powers to be fettered by law rather than on mere political considerations which have led to the arbitrary disposal and dealings of land in Johor. After maintaining an open door policy on foreign landownership in the country for nearly three decades, it is time for the government to look hard at these policies and consider how far they have benefitted the citizens as a whole. Otherwise, all the time, effort and money pumped in by the Government in the implementation of the safeguards conferred by Article 153 of the Federal Constitution protecting the special interest of the Malays, and efforts to eradicate poverty of Malaysians and the restructuring of Malaysian society by correcting the economic imbalances

through the New Economic Policy, would be put to waste. In other words, the whole exercise would be meaningless. **SJ**

REFERENCES

1. **Adibah Awang**, "A Study on Landownership by Non-Citizens in Johor Bahru", Master of Comparative Laws dissertation, Petaling Jaya : International Islamic University (1992) (Unpublished)
2. **Ahmad Hj. Hashim**, "Garis-Garis Panduan Jawatankuasa Pelaburan Asing Mengenai Perolehan Rumah-Rumah Kediaman oleh Kepentingan Asing", Seminar on Amendments to the National Land Code 1992; Its Implications on Property Development. Skudai, January 19 & 20, 1993, UTM
3. **Fatimah bt. Abdullah**, "Dasar-Dasar Pengurniaan Tanah di Negeri Johor dan Masalah-Masalah dalam Melaksanakannya", Tesis Diploma Pentadbiran Awam, Kuala Lumpur: Universiti Malaya (1976) (Unpublished)
4. **Grace Xavier**, "Implications of the Restrictions on Foreign Ownership following the Amendments", Seminar on Amendments to the National Land Code 1992; Its Implications on Property Development, Skudai, January 19 & 20, 1993, UTM
5. **Judith Sihombing**, National Land Code - A Commentary, Kuala Lumpur: MLJ Pte. Ltd. (1981)
6. **Kuljeet Singh Dhillon**, "Reasons and Implications of Foreign Investment in the Commercial Property Market with particular emphasis on Highrise Office Building. Case Study: The Golden Triangle and Its Periphery", Bachelor of Surveying (Property Management) dissertation, Johor Bahru: Universiti Teknologi Malaysia (1991) (Unpublished)
7. **Nik Abdul Rashid Nik Abdul Majid**, A Mimeograph on Land Law and Land Administration, Kuala Lumpur: University of Malaya 1971) (Unpublished)
8. "Issues on Property Development following the Amendments to the NLC", Seminar on Amendments to the National Land Code 1992; Its Implications On Property Development, Skudai, January 19 & 20, 1993, UTM
9. **Nik Mohd. Zain Yusof**, "Land Ownership Policies", Commercial Property Transactions and Land Ownership Policies Seminar, Johor Bahru, January 20, 1992, Centre for Management Technology
10. **Salleh Buang**, Associate Prof., The Malaysian Torrens System, Kuala Lumpur: Dewan Bahasa dan Pustaka (1989)
11. "Foreign Ownership of Land: Implication of the NLC (Amend) Act 1992", Seminar on Amendments to the National Land Code 1992; Its Implications, On Property Development, Skudai, January 19 & 20, 1993, UTM
12. **Teo Keang Sood and Khaw Lake Tee**, Land Law in Malaysia - Cases and Commentaries, Singapore: Butterworths (1987)
13. Malaysia: Perbahasan Dewan Rakyat, Parlimen ke 6 Penggal ke 2. Bil. 11-21 Mac-Julai 1984
14. Malaysia: Perbahasan Dewan Negara, Parlimen ke 6 Penggal ke 2 1984
15. Malaysia: Perbahasan Dewan Rakyat, Parlimen ke 7 Penggal I, Jld. 1, Jld. 1 Bil. 31-45, November 1986 - Mac 1987
16. Property Market Reports 1986, 1987, 1988, 1989 and 1990 Kementerian Kewangan Malaysia
17. Sixth Malaysia Plan 1991-1995, Kuala Lumpur: Jabatan Cetak Kerajaan
18. Federal Constitution
19. National Land Code 1965
20. National Land Code (Amendment) Act 1992 (Act A832)
21. Johor State Land Rules 1966