DEFINITION OF ‘ABANDONED HOUSING PROJECT’: A LEGAL ANALYSIS

by

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Introduction

Abandoned housing projects are pathetic phenomena occurring in housing industry in Malaysia. Even though, housing industry has developed and permeated throughout the nation since Independence day, negative phenomenon that is kept recurring, is abandoned housing projects. As a result, considerable housing projects have been identified as being abandoned and have shuddered to a halt. Likewise, additional costs are required to complete the outstanding and remaining constructions of the abandoned housing units. Though housing, planning and construction laws and regulations have been passed by Parliament with the purpose of controlling and regulating the housing development industry in Malaysia, it is regretted that, this catastrophe — the abandoned housing projects are still common and persisting until today.

The objective of this paper is to accentuate and discuss the meaning and definition of abandoned housing project, insofar as the situations in Peninsular Malaysia is concerned. The definition which would be mainly highlighted and legally analyzed would that of the Division of Enforcement and Supervision, Ministry of Housing and Local Government (‘MOH’).

The Importance of Legal Definition of Abandoned Housing Project

The definition of abandoned housing project is thought should have been legally provided for and statutorily be interpreted. It is suggested, the administrative definitions given by the Division of Supervision and Enforcement, MOH be used as the statutory and legal definition of abandoned housing projects. In addition thereto, statutory provision especially the Housing Development (Control and Licensing) Act 1966 and its Regulations made thereunder (Act 118), if it were to be passed, must define when does actually abandonment occur? For example, abandonment may occur if
locus to take any action or interfere with their business. Let alone to declare the projects abandoned. Further more, they may emphasize that, even if they could not complete the construction within the statutory period, MOH has no legal right to take action against them, as they have agreed and undertook to pay the statutory damages for late deliveries of vacant possession to the purchasers\(^5\). This is the legal predicament. The associating effects arising from this legal problem is that, it would cause difficulties for MOH or the purchasers or the rehabilitating agencies to take over or go into the project for revival soonest possible to avoid further problems, unless this problem has been admitted by the developers concerned and they surrendered the projects to MOH to resume the construction\(^6\). The problem may also postulate further ‘headache’ and troubles in that, dispute and tussle may ensue between purchasers, local authorities, technical agencies, contractors, architects, engineers, state authorities, end financiers and the developers concerned\(^7\). This dispute could to a certain extent, lead to litigation\(^8\). If this were to happen, this would certainly prolong the plan for rehabilitation to an indefinite period of time. Yet the rehabilitation of the project remains stalled. Due to the long delay, to rehabilitate, the materials and physical states of the uncompleted building could have been damaged, becomes unsuitable for human habitation/occupation and the increasing costs and expenses needed to repair and replace them will increase\(^9\).

Further, by having the official, statutory and legal definition, the rehabilitation of the abandoned projects could be expedited and this would smooth the way for the due completion of the project without more ado. It follows that once certain project is officially, statutorily and legally defined as an ‘abandoned housing project’, MOH or the purchasers or the rehabilitating parties can without delay, after getting approval and endorsement from MOH, making official declaration and publishing it in the government gazette declaring that

\(^{5}\) Interview with Mr Tomadan Johari, the then Deputy Secretary General (Development), now as the Deputy Secretary General (Operation), MOH, Pusat Bandar Damansara, on 22 December 2005.

\(^{6}\) See for example Taman Han Chiang, Lot 2343, PB6, NED, Penang (Lam Chew Development Sdn. Bhd), file No 340/D/(547)/E and KPKT/BL/19/547-2.

\(^{7}\) For example Taman Showkat, Lot 2219, Mukim 13, NED, Penang (Showkat Industry & Realty Sdn. Bhd). See file No KPKT/08/824//337 Jil II.

\(^{8}\) Ibid.

\(^{9}\) See for example Taman Yew Lean, Lot Number 664, Section 2, NED, Penang. (Yew Lean Development Sdn Bhd). File No KPKT/08/824/365.
such a particular housing development be revived\(^\text{10}\). Thus, the project so abandoned can immediately be vested in MOH or purchasers or the rehabilitating parties' control through pre-emptive power. The defaulting developer, then, has no more power and right to develop the project. Following this, a new supplementary rehabilitation legal regime is required to guide and control the process of rehabilitation. The laws and statutory provisions granting necessary powers to MOH or the purchasers or the rehabilitating parties to take over the abandoned housing projects and to exercise necessary actions in order to rehabilitate them, will serve them with formidable statutory vesting and moratorium mechanisms against any interfering and unduly actions, either legal or non-legal, from recalcitrant parties who can jeopardize the whole rehabilitation processes.

The endorsement and certification that a particular housing project is an abandoned housing project, by MOH, is also crucial as there may be purchasers who may wish to terminate and nullify the sale and purchase agreements with such abandoned housing developer for the purpose of buying other new property, applying for the reduction of the monthly installment payment from the end-financiers, obtaining new loan from the end-financiers, requesting the end-financiers to stop making further release and disbursement of the loan funds to the defaulting abandoned developer for preserving the balance fund unreleased from being dishonestly manipulated by the developer and their architect to the detriment of the pecuniary, non-pecuniary and proprietary interests of the purchasers, supporting their applications to rent public or government/employers' houses and for the withdrawal of fund from the housing account of the Employee Provident Fund (EPF).

Further, the categorization of the problematic projects as falling under the definition of abandoned housing projects is paramount, as distinct from the 'late project' and the 'sicked project', as it helps ascertaining MOH and the rehabilitating agencies to step into the shoe of the abandoned housing developers and replace them for the purpose of rehabilitating and reviving the project so abandoned and

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\(^\text{10}\) See also s 11(1)(d) of Act 118, where the minister could invoke this provision in order to certify that a particular housing developer has abandoned the project. See also s 7 (g) of Act 118, where the housing developer is imposed, a statutory duty, by this section to inform immediately the Housing Controller that he is unable to meet his obligations to the purchasers at any stage of the housing development before the issuance of the CF. It is submitted that, this 'inability' also would include when the project is abandoned.
for focusing and undertaking special initiatives, treatments and ways to rehabilitate them and to help the fates of the aggrieved purchasers.

The Definition

Hitherto, ironically however, there has not yet, any official, legal or judicial definition on the meaning of ‘abandoned housing project'. Be that as it may, the current practical definition for abandoned housing project occurring in Peninsular Malaysia (the 2006’s definition), for the purpose of facilitation and administration, has been given by the Division of Supervision and Enforcement, Ministry of Housing and Local Government ('MOH') and is defined as follows:-

(a) Construction activities on site of the housing construction project have stopped for months or more consecutively, after the expiry of the Sale and Purchase Agreement (S & P) executed by the developer and the purchaser or;

(b) The developer has been put under the control of the Official Receiver and the Housing Controller is of the opinion that such developer cannot duly proceed with the execution of its obligations as a developer.

Before the above definition, there were various definitions of the same. For example, the 2000’s definition was as follows:

(a) Construction and development works on site of the project that has been terminated for the preceding 6 months or more. Such termination has either occurred consecutively or occurred during the period within which the project must be completed or beyond the required completion period. Completion period means the period within which the developer has to complete the construction of the housing units. For the landed property, the completion period is 24 months calculated from the date of the sale and purchase agreement being executed, whilst for flats the completion period is 36 months from the date of the execution of the sale and purchase agreement; or,


12 Ministry of Housing and Local Government, Laporan Senarai Projek Perumahan Terbengkalai Dari Tahun 1990 - Jun 2005 (List of Abandoned Housing Projects From Year 1990 - June, 2005), 2006, p. 1. This is the current definition of ‘abandoned housing projects'.
(b) Within the said duration of months, the developers concerned
had been wound up and has been put under the control of the
Official Receiver\(^{13}\) and the housing controller is of the opinion
that a particular housing developer fails to carry out their
obligation as a developer.

The definition prior to year 2000 was as follows\(^{14}\):

(a) construction and development works on site of the housing
project, have been terminated for 6 (six) months or more
continuously, regardless of whether the termination occurred
during the period within which the project shall be completed
by the developer or beyond such period, as which has been
stipulated in the sale and purchase agreement executed by the
developer and the purchasers; or

(b) the developer admits that he is unable to proceed with the
project; or

(c) the Housing Controller is of the opinion that the developer
cannot carry out their obligations as a fit developer.'

While the definition before 1990s, was\(^{15}\):

13 Attached to the Insolvency Department under the Prime Minister
Department. The function of this officer is to preserve and accumulate
the assets and money of the debtors, pending the determination and
distribution of the assets and money to secured and unsecured creditors
in order to settle up the debts owed by the debtors. See: http://

14 Ministry of Housings and Local Government, Senarai Projek
According to Zulfakar bin Rahmat, this definition was the definition for
abandoned housing projects issued by the Division of Enforcement and
Supervision, Ministry of Housings and Local Government for the 1990s.
See Zulfakar bin Rahmat, Projek Perumahan Terbengkalai di Malaysia:
Masalah dan Penyelesaianinya, Thesis for Master of Public
Administration, Universiti Malaya, 1994, p 26.

15 Rodziah Idris, Projek Perumahan Terbengkalai: Sebab, Kesan dan
Cadangan Mengatasinya, Latihan Ilmiah Ijazah Sarjana Muda Undang-
Undang, Universiti Malaya, 1990, p 17. However, according to Zulfakar
Rahmat, the definition from the Ministry of Housings and Local
Government on abandoned housing projects before 1990 was 'A scheme
where all activities on the site of development project have been
stopped or abandoned for one year or more after the expiry of sale and
purchase agreement'. Zulfakar Rahmat referred to Idris Mamat, Projek
Perumahan Terbengkalai: Satu Masalah Yang Memerlukan
Pengorbanan Semua Pihak, Ministry of Housings and Local
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(a) Housing scheme where its construction activities have been terminated for a period of more than one (1) year after the period which the developer shall complete the construction of the housing project is over (the completion period of the housing project is stated in the Regulations of Housing Developers (Control and Licensing) 1982 and 1989 viz, 24 months for ordinary houses and 36 months for flats); or

(b) if the construction works on site of the project has not been commenced, one (1) year after the execution of the sale and purchase agreement between the purchasers and the developer concerned and the purchasers had paid the 10% deposit. Under these circumstances the project is also deemed to be an abandoned project.

Further, there is another definition of the same in 1988 (‘the 1988’s definition), which read as follows:

An housing scheme where its activities on site of the housing project were stopped for a duration of one year, passing beyond the required period within which the developer shall have to complete the project thereof, according to the sale and purchase agreement executed by the developer and the purchasers.

The Legal Analysis and Critical Examination Over the Definitions

It is submitted, these various definitions of abandoned housing project may lead to the difficulty of classifying the problematic housing projects as abandoned housing project and may cause further confusion on part of the developers and the purchasers. It would result in the trouble of managing and handling as well as reviving the problematic housing projects which are deemed to be abandoned housing projects.

The below analysis and elaboration are meant to explain and discuss the meaning and its scopes and perimeters of the above various definitions of abandoned housing project in Peninsular Malaysia.

16 Division of Supervision and Enforcement, Working Paper For Overcoming the Problem of Abandoned Housing Projects throughout the Nation, Ministry of Housings and Local Government, 13th. April, 1988, which was cited by Suhaimi Mohd, Projek Terbengkalai: Masalah dan Penyelesaianannya Dalam Negara Masa Kini, Latihan Ilmiah Sarjana Muda Undang-Undang, Universiti Kebangsaan Malaysia, 1992, p 4.
The 2006’s Definition

(a) Construction activities on site of the housing construction project have stopped for 6 (six) months or more consecutively, after the expiry of the Sale and Purchase Agreement (S & P) executed by the developer and the purchaser or;

(b) The developer has been put under the control of the Official Receiver and the Housing Controller is of the opinion that such developer cannot duly proceed with the execution of its obligations as a developer\(^\text{17}\).

Elaboration

It is submitted that the meaning of the above definition, are as follows:

The First Limb

An housing project is deemed abandoned when:

Provided the sentence ‘...after the expiry of the Sale and Purchase Agreement (S & P)...’ means after the expiry of the statutory completion period (24 or 36 months), after the completion period for the development of the landed property (24 months) or flat (36 months), the developer terminates the construction works of the project for six(6) months or more than six (6) months.

However, the following situations shall not be considered as abandoned housing project:

(1) Provided the sentence ‘...after the expiry of the Sale and Purchase Agreement (S & P)...’ means after the expiry of the statutory completion period (24 or 36 months), if the above termination of works occurred less than six (6) months after the completion period (24 or 36 months); and,

(2) Provided the sentence ‘...after the expiry of the Sale and Purchase Agreement (S & P)...’ means after the expiry of the statutory completion period (24 or 36 months), if the developer stops and terminates the works, regardless of the duration, before the expiry of the completion period (24 or 36 months), the development of the project although terminated mid-way or in the mid-stream of it.

\(^{17}\) Ministry of Housing and Local Government, Laporan Senarai Projek Perumahan Terbengkalai Dari Tahun 1990 - Jun 2005 (List of Abandoned Housing Projects From Year 1990 - June, 2005), 2006, p. 1. This is the current definition of 'abandoned housing projects'.
The Second Limb

It is submitted the following situation shall render a housing project abandoned:

The developer has been wound up and put under the control of the Official Receiver, irrespective of whether this occurs during the course of the development within that completion period (24 or 36 months) or beyond the completion period (24 or 36 months) and that the Housing Controller is of the opinion that the developer could not fulfill his statutory duties as developer as required by Act 118 and administrative duties as required by MOH.

Nevertheless, the following situations shall not cause, it is submitted, abandonment:

1. A project shall not be deemed so abandoned if any of the above situations in the second limb does not happen concurrently. For example, the developer has been wound up and put under the control of the Official Receiver but the Housing Controller is still of the opinion that the developer has the capability to fulfill its statutory duties and administrative duties, as a developer. The statutory duties are those duties as prescribed in sections 7 (duties of a licensed housing developer), 7A (licensed housing developer to open and maintain Housing Development Account), 7B (licensed housing developer for the purpose of section 8, 8A 11 and 12), 8 (arrangement or agreement affecting the business of a licensed housing developer), 8A (statutory termination of sale and purchase agreement) and 9 (audit) of Housing Development (Control and Licensing) Act 1966 (Act 118). In this situation, the project shall still not be deemed an abandoned housing project. On the other hand administrative duties, are duties which have been imposed by MOH to ensure efficiency and good practices for the housing development activities and to protect the interests and rights of stakeholders, such as requirement to fill in a periodic specified form in a computerized system indicating the progress development stages.

2. Similarly, in the event, even in the opinion of the Housing Controller, a developer is not capable of carrying out the statutory or administrative duties as a developer, but the developer has not yet been wound up. The project shall still not be deemed abandoned;

3. As long as the developer has not been wound up, ie even though the process of winding up has been initiated, ranging from the moment of the issuance of the sealed copy of the judgment debt order until before the order of winding up made
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...to set aside the orders issued and applications made by the defaulting developers, solely for the purpose of ‘biding times’ and the possibilities of tampering with and hiding evidences. In the meanwhile, the purchasers are suffering a lot of troubles including, they cannot occupy the houses so purchased and have to pay monthly installment to their respective financiers with the possibilities of being made bankrupt by their financiers, plus with the ‘headaches’ caused by the cunning and sneaky defaulting developers who intentionally do so with the purpose of misleading and confusing the purchasers. It is more prudent, in this problematic situation, it is submitted, once the developer companies have received the petition, MOH and the purchasers shall have the preemptive power to take over the projects for rehabilitating them as soon as possible.

Fourthly, what if the said developer company has been wound up and be put under the control of the approved liquidator? Does this situation also fall under the definition of the control of the OR, partly warranting that the project would be considered abandoned?

In the winding up of a company, in the event there is an order for winding up, an approved liquidator shall have to be appointed. An approved liquidator means according to s 4 of the Companies Act 1965 (‘CA’) as ‘an approved company liquidator who has been approved by the Minister under section 8 as a liquidator and whose approval has not been revoked’. In short, any person can become an approved liquidator provided he is a company liquidator and has applied to the Minister of Finance to become an approved liquidator for the purpose of the CA, subject to the provisions in s 8 of the CA.

The powers and duties of the approved liquidator are provided in s 236(1)(2) of the CA. These powers are however be subjected to the direction of the Court or of the committee of inspection. These powers are, basically to run the affairs and businesses of the company for the purpose of settling all debts to the creditors — secured and

18 Committee of inspection may be appointed by the liquidator either on its motion or on the request of the creditors and contributories. The composition of the members of the committee is subject to s 242, where, inter alia, shall consist of creditors and contributories of the company or persons holding general power of attorney from creditors or contributories; or... If there is disagreement on the appointment of the committee or on its composition, the Court shall have the power to decide the matter as it thinks fit. See s 241(1)(2). It is submitted that, the purpose of the appointment of such committee is to assist the liquidator in the execution of his duties.
unsecured and carrying out all necessary and incidental duties as far as they deem fit and necessary as directed by the Court.

The appointment of an approved liquidator for the purpose of carrying out the above functions and powers is subject to the order of the winding up (s 227(1)). The appointment of the Official Receiver (OR)\(^{19}\) is only as a provisional liquidator pending the appointment of the approved liquidator by the court. The appointment of OR as the approved liquidator is only made by the order of the court, subject to the provisions in s 227(3), (4), (5), (6), (7) of the CA.

Thus, it is submitted that the sentence ‘under the control of the Official Receiver’ in the above definition, needs to be corrected. This is because, the appropriate word would be ‘under the control of the approved liquidator, not ‘the Official Receiver’ as approved liquidator will include the company auditor appointed under s 8 of CA or the Official Receiver as well, pursuant to s 277(3), (4), (5), (6), (7) of the CA. To hold only the word ‘Official Receiver’ to the definition would mean, it is submitted, absolving the situation where housing development carried out by a developer company which is being under the control of the approved liquidator.

Thus the correct definition would be ‘...the developer has been put under the control of the Approved Liquidator ...’, it is submitted.

Further issues are, regarding the failures of the definition to include the below situations:

(1) where the developer company is under receivership due to default of the developer company to repay the debts under the deed of debenture. Whereby the developer company has no ability and power to run its own business and affairs but being subject to the control of an appointed receiver and manager under the deed of debenture, for the latter to administer and manage the developer company and their business towards settling all the debts owed to the debenture holders and other secured and unsecured creditors pursuant to the deed of debenture and provision in the CA — s 191(1), s 292(1)(a)-(f), s 292(3), s 295(5) of the Companies Act 1965 or other duties as directed by the Court pursuant to s 183(3)(4) of the CA;

(2) where the housing developer is either a body of persons or an individual person or a firm (partnership) or a society or

\(^{19}\) According to s 4 of the Companies Act 1965 (Act 125), ‘Official Receiver’ means the Official Assignee, Deputy Official Assignee, Senior Assistant Official Assignee, Assistant Official Assignee, Bankruptcy Officer and any other officer appointed under the Bankruptcy Act 1967.
cooperative society. This is because, a developer does not necessarily be a company (an incorporated and separate legal entity), but also may include the former parties. Thus, situations where these parties may be regarded as being ceased to exist or incapable of managing their own affairs but subject to other's control pursuant to the provisions of the related statutes such as the Bankruptcy Act 1967 (Act 360), the Societies Act 1966 (Act 335), the Co-operative Societies Act 1993 (Act 502) and the Partnership Act 1961 (Act 135), then in this situation their housing projects shall too be so deemed as abandoned.

Further, despite the existence of the administrative definition of abandoned housing projects in Peninsular Malaysia, yet the definitions given always change from time to time and from year to year, resulting in certain problem of categorizing the 'problematic projects' whether they are truly abandoned or otherwise or merely a 'late' project or a 'sicked' project, which would warrant different legal or non-legal actions and treatment for addressing them by MOH, purchasers and other housing parties. Thus, there is an issue of lacking of certainty. The various periodic definitions of abandoned housing project are discussed below. Even on part of the Division of Enforcement and Supervision, Ministry of Housing and Local Government (MOH) itself, there are different kinds of definitions on the meaning of 'abandoned housing projects'. These definitions are different, although they came from one source i.e MOH. Probably, it is submitted, because these definitions had and have been issued at different intervals of time.

20 See Schedule for section 5(3) of the Housing Development Act (Licensing and Control) Act 1966 (Act 118) and Schedule A — Application For A Housing Developer’s Licence, of the Housing Development (Control and Licensing) Regulations 1989.

21 'Late Project' means, housing project which has not been completed within the statutory completion period (24 or 36 months), but passing beyond it. However, this project is not regarded as abandoned housing project, until it has triggered off the abandoned housing project's definition. This information was derived from an interview with Encik Ahmad Subky bin Nusi, Inspector in the Division of Enforcement and Supervision, MOH on 11 February, 2007.

22 In Malay language this project is called 'Projek Sakit'. This project means, project where its housing development and construction progress is retarded and not smoothly done according to the schedule and plan initially projected. This information too was derived from an interview with Encik Ahmad Subky bin Nusi, Inspector in the Division of Enforcement and Supervision, MOH on 11 February, 2007.
period and involving different situations and circumstances, thus these different situations and circumstances have warranted their differences. However, what can be concluded, these definitions are and were issued, at least, to facilitate the administration and management of the Ministry in facing and settling the problems relating to abandoned housing projects and for the purpose of categorization of the problematic housing projects.

Thus, the above highlighted issues have to be considered for formulating better definition of abandoned housing projects by the Division of Enforcement and Supervision, MOH so as to include and cover them as well as to address the lacunae hitherto identified.

The 2000's Definition

However, in year 2000, the same was defined as follows\(^2\):

(a) Construction and development works on site of the project, has been terminated for the preceding six months or more. Such termination has either occurred consecutively or occurred during the period within which the project shall be completed or beyond the required completion period. Completion period means the period within which the developer has to complete the construction of the housing units. For the landed property, the completion period is 24 months calculated from the date of the sale and purchase agreement being executed, whilst for flats the completion period is 36 months from the date of the execution of the sale and purchase agreement; or

(b) Within the said duration of six months, the developers concerned had been wound up and has been put under the control of the Official Receiver and the Housing Controller is of the opinion that a particular housing developer has failed to carry out their obligation as a developer.

Elaboration

The above definition, shall cover the following situations:

The first limb:

Construction and development works on site of the project, has been terminated for the preceding 6 months or more. Such termination has

either occurred consecutively or occurred during the period within which the project shall be completed or beyond the required completion period. Completion period means the period within which the developer has to complete the construction of the housing units. For the landed property, the completion period is 24 months calculated from the date of the sale and purchase agreement being executed, whilst for flats the completion period is 36 months from the date of the execution of the sale and purchase agreement.

Under the following situations, an housing project shall be considered abandoned when:

1. the developer abandons the construction works for six months or more during the duration period for the completion of the housing development either 24 months or 36 months, as the case may be.

2. The development works had not been completed within the required duration period for completion period, but passing beyond it without full completion and later the developer abandons the works for the duration of six months or more, consecutively or otherwise.

3. The developer abandons the projects intermittently and at regular interval (not consecutive), if accumulated the intermittent period of abandonment amounts to six months or more during the duration for the required statutory completion (24 or 36 months) or after it.

The situation below, it is thought, shall not be considered abandoned housing project:

The developer who abandons the construction works for less than six months during the duration for completion of the housing development.

The second limb:

Within the said duration of six months, the developers concerned had been wound up and has been put under the control of the Official Receiver and the Housing Controller is of the opinion that a particular housing developer has failed to carry out their obligation as a developer.

The below situation shall be considered as an abandoned housing project:

The developer company has been wound up by the court and it has been put under the control of the Official Receiver resulting in its affairs, management and business subject to the direction and management of the Official Receiver.
However, in the following situations, a housing project shall not be considered abandoned:

(a) the developer has not yet been wound up by the court and it has not been put under the control of the Official Receiver, even though there is proof as to the insolvency of the developer company or it is still in the course of the winding up proceeding; and,

(b) Even though the developer has been wound up and has been put under the control of the Official Receiver, but the Housing Controller is still of the view that the developer company is still capable of fulfilling the statutory duties and administrative duties of a developer.

Issues in the 2000's Definition

The sentence 'within the said duration of six months ...' in the second limb to the 2000's definition could be confusing. Certain questions can be raised in this respect, viz:

(1) Whether 'the said duration of 6 months' should commence from the date of the sale and purchase agreement or others? Or

(2) Is there any difference if the said duration of six months falls within any part of the statutory completion period (24 or 36 months) (for example it may fall in the early or in the middle or at the end part of that completion period)?

(3) Should that duration of six months be consecutive or otherwise (intermittently)?

(4) What about if the housing developer is wound up after that duration of six months (consecutively) from the date of the sale and purchase agreement has been executed?

(5) What is the position, if the developer is wound up at any time within the statutory completion period, and then be subject to the control of the Official Receiver?

It is difficult to answer the above questions but it is submitted, to simplify the matter, and to make it clear, the sentence 'within the said duration of six months' in the above definition is not necessary. To avoid any confusion, it is submitted, the sentence 'within the said duration of six months' should be rephrased to be 'at any time within the statutory completion period'. Thus, at any time within the statutory completion period (24 or 36 months), if the developer company is wound up by court and be subject to the control of the Official Receiver, the housing project undertaken shall be considered abandoned. It should be noted that, the fact that a developer company
is wound up and be subject to the control of the Official Receiver is not sufficient to constitute its housing project abandoned. There must be in addition thereto, based on the view of the Housing Controller, such a particular wound up developer company, has failed to carry out his statutory duties of a developer pursuant to Act 118 or administrative duties. This is because there was word ‘and’ in the second limb to the 2000’s definition.

The 1990’s Definition

Before year 2000, the given definition was as follows:

(1) construction and development works on site of the housing project, have been terminated for six months or more continuously, regardless of whether the termination occurred during the period within which the project shall be completed by the developer or beyond such period, as which has been stipulated in the sale and purchase agreement executed by the developer and the purchasers; or

(2) the developer admits that he is unable to proceed with the project; or

(3) the Housing Controller is of the opinion that the developer can not carry out their obligations as a fit developer.

Elaboration

There are three limbs in the above definition, and elaborated and discussed below.

The First Limb

Under the first limb, the following situations, it is submitted shall fall into the definition of abandoned housing projects according to the first limb:

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Before the 1990's Definition

There was however, another definition of abandoned housing projects, prior to the above definitions, which had been issued by the MOH, before 1990. This definition before 1990's definition, was:

(a) Housing scheme where its construction activities have been terminated for a period of more than one year after the period which the developer shall complete the construction of the housing project is over (the completion period of the housing project is stated in the Regulations of Housing Developers (Control and Licensing) 1982 and 1989 viz, 24 months for ordinary houses and 36 months for flats); or

(b) if the construction works on the site of the project has not been commenced, one year after the execution of the sale and purchase agreement between the purchasers and the developer concerned and the purchasers had paid the 10% deposit. Under these circumstances the project is also deemed to be an abandoned project.

Elaboration

First Limb

Based on this limb, the following situation shall be considered situations where abandoned housing projects occurred:

The developer who abandons the housing project for more than one (1) year after the expiry of the required statutory completion period (24 or 36 months).

While, the followings shall not be considered as situations where abandoned housing projects occur:

(1) The developer who abandons or stops the works either consecutively or not consecutively and regardless of the duration of the abandonment or stoppage during that required statutory completion period (24 or 36 months); and,

(2) The developer who abandons or stops the works less than one (1) year after the expiry of the required statutory completion period (24 or 36 months).

The 1988's Definition

Further, there was another definition of the same in 1988 (the 1988’s definition), which read as follows:

An housing scheme where its activities on the site of the housing project are stopped for a duration of one year, passing beyond the required period within which the developer shall have to complete the project thereof, according to the sale and purchase agreement executed by the developer and the purchasers.

Elaboration

This definition shall encompass this situation:

A developer who abandons the housing project for more than one year after the expiry of the required completion period as contained in the sale and purchase agreement executed.

However, the following situations shall not be so regarded:

(1) A developer who abandons the housing project for less than one year after the expiry of the required completion period as contained in the sale and purchase agreement executed; and,

(2) A developer who abandons the housing project during the period of the required completion period as prescribed in the sale and purchase agreement executed, regardless of the duration of the abandonment or the stoppage of works.

Other Definitions

Apart from the above definition from MOH, there are several minor definitions given by the housing/building professionals. For example, according to the receiver an abandoned housing project is ‘a project which has to be stopped either because the developer has faced financial problems or he has left the project and absconded’. While on part of the planner, abandoned housing project is being defined as

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26 Division of Supervision and Enforcement, Working Paper For Overcoming the Problem of Abandoned Housing Projects throughout the Nation, Ministry of Housings and Local Government, 13 April, 1988, which was cited by Suhaimi Mohd, Projek Terbengkalai: Masalah dan Penyelesiannya Dalam Negara Masa Kini, Latihan Ilmiah Sarjana Muda Undang-Undang, Universiti Kebangsaan Malaysia, 1992, p 4.

27 Cited by Abdul Halim Sallehuddin, Pengambil Alih Projek Perumahan Terbengkalai, Latihan Ilmiah Untuk Sarjana Muda Sains (Ukur), Universiti Teknologi Malaysia, 1991, p 3.
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'...a project which its construction has been deferred or postponed even though planning permission has been granted by the local authority or local planning authority'\textsuperscript{28}. These permissions include permission to plan and permission to develop housing project. \textsuperscript{29} It should be noted that, the definition of 'abandoned housing project', introduced by the planner, includes also, 'construction of housing project which has been stopped after its commencement thereof'\textsuperscript{30}.

Case Law

There are reported and unreported cases which highlight the abandoned housing projects. However, it is dismal to note that, all these cases have not defined the 'legal definition' of abandoned housing project. It is perceived that, judges in these cases, only accepted the concession from the litigant parties that the housing projects involved in their disputes were of 'abandoned housing projects' without any confirmation from MOH or carried out any legal analysis over the matter. These cases are:

1. \textit{Xavier Kang Yoon Mook v Insun Development Sdn Bhd}\textsuperscript{31} (the plaintiff purchaser succeeded in claiming late delivery damages. Abandoned housing project revived with the help from TPPT, Bank Negara);

2. \textit{Mahfar bin Alwee v Jejaka Megah Sdn Bhd & Anor}\textsuperscript{32} (the site for the housing project was sold off by the chargee bank on default of the chargor developer in repayment of the bridging loan);

3. \textit{Perwira Habib Bank Malaysia Berhad v Cheong Teng Kong & Others}\textsuperscript{33} (liability of the guarantor to the bridging loan borrowed by the borrower developer);

4. \textit{Bunga Nominees Sdn Bhd v Abdul Jabbar Majid & Ors}\textsuperscript{34} (application by the purchaser to have specific performance and damages in abandoned housing project against the developer and application for injunction against the receiver and manager from selling off the charged property);

\textsuperscript{28} Ibid.
\textsuperscript{29} Ibid.
\textsuperscript{30} Ibid, p 4.
\textsuperscript{32} [2004] MLJU 107.
\textsuperscript{33} [2003] MLJU 426.
\textsuperscript{34} [1995] MLJU 79; [1995] 3 CLJ 224.
(5) *Liew Jui Hua & Ors v Johor Property (M) Sdn Bhd*[^35^] (application by the purchaser to wind up the abandoned housing developer for failure to settle the late delivery damages);

(6) *Zainab bte Mohamed v Syarikat Permodalan Johor (PP) Sdn Bhd*[^36^] (the purchaser herself completed the unit she bought which had been left abandoned by the developer);

(7) *Chan Wing Kit & Ors v The Green Co-Operative Society, Ltd*[^37^] (dispute over professional fees between the architect, quantity surveyor and the developer);

(8) *Ismail bin Ibrahim & Ors v Lim, Lim & Oon*[^38^] (the site where an abandoned housing project located, was foreclosed by the chargee bank on default of the borrower developer);

(9) *Chai Ab Hung v Credit Corporation (Malaysia) Bhd*[^39^] (issue on the release of the balance loan unreleased without the consent of the end-financier);

(10) *Lai Soon Cheong v Kien Loong Housing Development Sdn Bhd & Anor*[^40^] (application of an injunction by the plaintiff purchaser to stop the sale of the land which was subject to a charge on the bridging loan granted by the defendant bank);

(11) *Hing Mob Sdn Bhd v Perdama-CMCC Sdn Bhd*[^41^] (application of specific performance by the plaintiff purchaser on the default of the developer to complete and abandon the construction of the housing unit purchased);

(12) *Skarf Development Sdn Bhd v KM Engineering Development Sdn Bhd*[^42^] (Dispute between the land owner and the developer of an housing project resulting in the termination of the housing project);

(13) *Taug Kam Thai and 133 Others v Langkah Cergas Sdn Bhd and Others*[^43^] (purchaser claimed late delivery damages from the abandoned housing developer);

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(14) Credit Corp (M) Bhd v Hasmah bte Salleh & Ors\(^44\) (action for the recovery of money lent by the end-financier against the defaulting purchaser borrower in an abandoned housing project was statute barred);

(15) Pilecon Engineering Bhd v Remaja Jaya Sdn Bhd\(^45\) (the court allowed the application of the receiver and manager to rehabilitate the abandoned housing project and stayed the application to wind up the housing developer company by the unsecured creditor);

(16) Lob Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd\(^46\) (issues on a deed of assignment);

(17) Kang Yoon Mook Xavier v Insun Development Sdn Bhd\(^47\) (The court allowed the application of the aggrieved purchaser for the late delivery of damages calculated from the date of the purported delivery of vacant possession until the date of the termination of the sale and purchase agreement);

(18) Penang Development Corporation v Teoh Eng Huat & Anor\(^48\) (issues on the relationship between principal and agent and the issue of the responsibility and liability of the bumiputra contractor for delay caused);

(19) Hongkong and Shanghai Banking Corporation Ltd v Kemajuan Bersatu Enterprise Sdn Bhd\(^49\) (The developer company was in the course of to be wound up by the creditor, where a provisional liquidator was appointed for the purpose of carrying out the rehabilitation financed by a loan from TPPT, Bank Negara);

(20) Aw Yong Wai Choo & Ors v Arief Trading Sdn Bhd & Anor\(^50\) (A joint venture housing development between the defendant developer and the Perak State Economic Development Corporation, where later the project was abandoned and had to be rehabilitated by the Perak SEDC and that the purchasers had to top-up some additional moneys due to changes in the specifications to the purported housing units);

\(^{44}\) [2004] 4 MLJ 550.


\(^{46}\) [1995] 4 MLJ 804.

\(^{47}\) [1995] 2 MLJ 91.

\(^{48}\) [1993] 2 MLJ 97.


\(^{50}\) [1992] 1 MLJ 166.
(21) Syarikat Chang Cheng (M) Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd\textsuperscript{51} (the purported housing development project abandoned due to notice of the local authority to stop the work and later there was hard granite found in the soil of the project site resulting in the termination of the construction works. The court admitted difficulty to calculate the late delivery damages due to these circumstances);

(22) Soo Hong & Leong Kew Moi & Ors v United Malayan Banking Corporation Bhd & Anor\textsuperscript{52} (the project was abandoned as the land on which the purported development was to be carried out had to be surrendered to the State yet, the developer still selling the un-subdivided units to purchasers);

(23) Keng Soon Finance Bhd. vwn MK Retnam Holdings Sdn Bhd [Bhagat Singh s/o Surian Singh & Ors, Interveners]\textsuperscript{53} (the charge created by the unlicensed housing developer over the site project was declared null and void by the court, resulting in the nullity of the foreclosure of the property on application of the chargee bank as this was contrary to the terms in the agreement of sale with the purchaser of disallowing the property be subject to a charge unless consented by the latter);

(24) Chan Wing Kit & Ors v The Green Co-Operative Society, Ltd\textsuperscript{54} (abandoned housing project — dispute over professional fees between the architect, quantity surveyor and the developer);

(25) Lob Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd\textsuperscript{55} (abandoned housing project involving issues of deed of assignment);

(26) Keng Soon Finance Berhad v MK Retnam Holdings Sdn Bhd & Anor\textsuperscript{56} (The Privy Council allowed the appeal of the Finance to sell off the charged land on default of the chargor developer and thus the application of the purchasers to stop the purported order of sale refused);

(27) MK Retnam Holdings Sdn Bhd v Bhagat Singh\textsuperscript{57} (issues on the rate of interest for indemnity of late delivery damages and the

\begin{itemize}
\item \textsuperscript{51} [1996] 1 MLJ 799.
\item \textsuperscript{52} [1997] 1 MLJ 690; [1997] 2 CLJ 548.
\item \textsuperscript{53} [1996] 2 MLJ 431.
\item \textsuperscript{54} [1995] MLJU 397.
\item \textsuperscript{55} [1995] 4 MLJ 804.
\item \textsuperscript{56} [1989] 1 MLJ 457.
\item \textsuperscript{57} [1985] 2 MLJ 121.
\end{itemize}
supplementary agreement to the standard formatted contract of sale of housing unit);  

(28) *Mohammad bin Baee v Pembangunan Farlim Sdn Bhd* \(^{58}\)
(Abandoned housing project — the purchaser applied to the court to force the receiver and manager to resume/rehabilitate the construction of the abandoned project, by way of specific performance but the court refused the application on the ground of causing difficulty to the court to exercise supervision. In the alternative, the court awarded damages to the purchasers for breach of contract by the developer);  

(29) *Ding Cha Hee v Tan Wan Eng & Hong Kok Cheong & Ors* \(^{59}\)
(Abandoned housing project — being a joint-venture project between the land owner and the developer. Later, the housing project abandoned, causing the land owner to terminate the JV. As a result, the contractor and the plaintiff purchaser suffered. The court held that the plaintiff and the contractor had right to claim damages due to the termination of the JV against the land owner);  

(30) *Tropiland Sdn Bhd v. Majlis Perbandaran Seberang Perai* \(^{60}\)
(about the planning permission, building plan and Certificate of Fitness for Occupation’s (CF) issuance, variation of the planning conditions, rejection of the application for CF);  

(31) *Majlis Perbandaran Seberang Perai v. Tropiland Sdn. Bhd* \(^{61}\)
(about the planning permission, building plan, CF issuance, and variation of the planning conditions. The court of appeal reserved the judgment of the High Court (above) to the effect that the amended layout plan (with no perimeter drain) had to be read together with the earthwork plan (with perimeter drain) and the earlier layout plan (with monsoon drain). Thus, the refusal of the local authority to issue the CF was justified as the applicant failed to complete the construction of the monsoon drain and the perimeter drain);  

(32) *Bencon Development Sdn. Bhd v. Majlis Perbandaran Pulau Pinang & Ors* \(^{62}\)
(the court had to decide whether the condition imposed by JKR (Public Works Department) was unreasonable, for supporting letter for CF could be granted by JKR to the applicant developer);  

\(^{58}\) [1988] 3 MLJ 211.  
\(^{60}\) [1996] 4 MLJ 16.  
\(^{61}\) [1996] 3 MLJ 94;  
(33) Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd\textsuperscript{63} (Application for conversion and subdivision of land subject to sale of at least 30% bumiputra purchasers, but in this case all the purported houses were sold off to non-bumiputra rendering the application for conversion and subdivision of the purported land rejected);

(34) Kin Nam Development Sdn Bhd v Khau Daw Yau\textsuperscript{64} (the appeal by the appeallant in the above case was dismissed by the Federal Court);

(35) Azali Bakar v Insun Development Sdn Bhd\textsuperscript{65}. (Legal suit to obtain late delivery damages as the purported housing unit had not been completed within the agreed period (two years of the execution of the sale and purchase agreement);

(36) Insun Development Sdn. Bhd. v. Azali bin Bakar\textsuperscript{66} (The legal action taken by the plaintiff purchaser against the defendant developer was statute barred);

(37) Idris Meon v Sri Rambai Sdn. Bhd.\textsuperscript{67} (disputes between parties in a JV agreement);

(38) Tan Ah Tong v Perwira Affin Bank Bhd & Ors\textsuperscript{68} (an unlicensed housing developer sold land together with building to purchasers. Later the housing developer defaulted on the repayment of the loan to the creditor chargee bank. The chargee bank applied to foreclose the property. The plaintiff purchaser contended that the application to foreclose should be dismissed on the ground of illegality. The court rejected the plaintiff’s contention);

(39) Tan Yang Long & Anor v Newacres Sdn. Bhd\textsuperscript{69} (one of the issues involved was whether the cause of action occurred only when vacant possession took place?);

(40) Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors\textsuperscript{70} (default of the borrower developer on repayment of loan to the lender bank, causing the latter to sell off the charged land. Purchasers intervened to stop the lender bank from selling off the charged

\textsuperscript{63} [1983] 1 MLJ 335.
\textsuperscript{64} [1984] 1 CLJ 181 (Rep); [1984] 1 CLJ 347.
\textsuperscript{65} [1994] 1 LNS 11.
\textsuperscript{66} [1996] 3 MLJ 188.
\textsuperscript{67} [1999] 8 CLJ 243.
\textsuperscript{68} [2002] 5 MLJ 49.
\textsuperscript{69} [1992] 3 CLJ 666 (Rep); [1992] 1 CLJ 211.
\textsuperscript{70} [1983] 1 MLJ 81.
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property. The Court dismissed the application of the purchasers;

(41) **Public Finance Bhd v Narayanasamy**\(^{71}\) (The housing developer sold to purchasers the purported land to be built houses on it but the land was still awaiting for sub-division. Later the land was subject to a charge of the chargee bank lender without the knowledge of purchasers, in which case the chargee bank lender knew of the earlier sales to the various purchasers. The chargor housing developer defaulted on payment. The chargee bank applied to sell the land but was resisted by the intervening purchasers. The court held that the purchasers had the right to resist the application for foreclosure by the chargee bank and there were fraud and collusion on part of the chargee bank);

(42) **Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd**\(^{72}\) (Purchaser to an housing project has no right to stop the order for sale granted to chargee bank);

(43) **Teoh Keoh Huat & Ors v Hock Seng Construction Sdn Bhd**\(^{73}\) (disputes between land owner and the developer in a JV agreement as there was delay to obtain the necessary approval);

(44) **Sri Binaraya Sdn. Bhd v. Golden Approach Sdn Bhd (Poly Glass Fibre (M) Bhd, Applicant)**\(^{74}\) (The court allowed the application to stay the winding up order to enable the developer company completing the abandoned housing project for the benefit of the purchasers);

(45) **Cempaka Finance Bhd v Willow Construction Sdn Bhd & Ors**\(^{75}\) (The court rejected the contention of the chargor developer to stop the order for sale on the ground that the bridging loan was illegally been granted as the chargor developer was still being an unlicensed housing developer at the time of the granting of the said loan by the chargee bank);

(46) **Lim Chee Holdings Sdn Bhd v RHB Bank Berhad (Formerly Known As Kwong Yik Bank Bhd)**\(^{76}\) (rehabilitation of an abandoned housing developer with the help of TPPT, Bank Negara and that the chargee bank agreed to withhold the

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\(^{71}\) [1971] 2 MLJ 32.

\(^{72}\) [1988] 3 MLJ 54.

\(^{73}\) [1999] MLJU 734.

\(^{74}\) [2002] 6 MLJ 632.

\(^{75}\) [2000] 4 MLJ 557.

\(^{76}\) [2005] 6 MLJ 497.
foreclosure proceeding facilitating the rehabilitation of the project);

(47) Bank Bumiputra Malaysia Bhd Kuala Trengganu v Mae Perkayuan Sdn Bhd & Anor 77 (A chargor developer obtained a bridging loan to finance the construction of their purported housing development project from a chargee bank but later the chargee bank prematurely terminated the loan causing losses and difficulties to the chargor developer to proceed with the development of the project and finally had to abandon it. The Supreme Court held that the chargee bank was to be blamed for the loss and for prematurely terminated the loan);

(48) Perwira Habib Bank v Oon Seng Development Sdn Bhd 78 (purchaser for value has no right to stop the order for sale granted to chargee bank, as the charge took precedence over subsequent dealing in the land);

(49) Buxton & Anor v Supreme Finance (M) Bhd 79 (purchaser for value has no right to stop the order for sale granted to chargee bank as the charge took precedence over the subsequent dealing in the land);

(50) Bank Bumiputra Malaysia Bhd v Mahmud Hj Mohamed Din & Anor 80 (purchaser for value has no right to stop the order for sale granted to chargee bank as the charge took precedence over the subsequent dealing in the land);

(51) JKP Sdn Bhd v PPH Development (M) Sdn Bhd 81 (disputes between the land owner/proprietor and the contractor);

(52) Vistanet (M) Sdn. Bhd v Pilecon Civil Works Sdn Bhd 82 (disputes between the main contractor and sub-contractor in an housing development project);

(53) Chin Kit Yee & Anor v Yeng Chong Realty Bhd 83 (claim made by the plaintiff purchaser to terminate the agreement and for the refund of the sums paid to the defendant developer as there was abandonment. The court granted the application of the plaintiff purchaser);

83 [2006] 4 CLJ 432.
(54) Poh Geok Sing v HB Enterprise Sdn Bhd (disputes between a JV partner in a housing development project);

(55) Syarikat Mohd Noor Yusof Sdn Bhd v Polibina Engineering Enterprise Sdn Bhd (dispute between the developer and the contractor in a housing development project); and,

(56) Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Berhad (a housing development project was abandoned as the bank lender withheld arbitrarily the loan fund (bridging loan) to the developer and other unconscionable policies leading to the breach of the contract).

**Suggestion and Conclusion**

It is in the author's submission, that the legal and official definition of abandoned housing project be adopted by the government, especially, the Division of Supervision and Enforcement, MOH and be provided in Act 118, for the purpose of achieving the above highlighted objective and to avoid possible problems, legal or non-legal, as illustrated in the above discussion. It is perceived that the policy of the court of not referring and relying on the definition as provided by MOH, would to a certain extent could cause a chaotic meaning deviated from what has been defined by MOH, being the authority and regulatory body in housing development and industry in Peninsular Malaysia. On part of MOH, based on the above analysis, it is submitted that the definition given has some lacunae and loopholes, warranting it to be improvised and improved on account of what has the author listed and explained above.

84 [2006] 1 CLJ 765.
85 [2005] 2 CLJ 675.
86 [2006] MLJU 326.