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Proposed Legislation On The Disposal of Airspace (Spatium) – A Good or a Bad Thing?

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Recently, the Department of Director General of Lands and Mines (JKPTG) published a survey as part of its public consultation exercise to seek feedback on the government's proposed amendment to the National Land Code 1965 (NLC) to introduce the concept of disposal of airspace (spatium) so that airspace titles can be issued for development purposes especially in urban areas (the Proposed Amendment). The Proposed Amendment is in line with the government's aim to achieve a more resilient and sustainable development in the country, by innovatively creating development from finite resources.

This alert summarises the existing concept of underground land and stratum in Malaysia and the proposed concept of ownership of airspace title. It also discusses some arguments in favour of the Proposed Amendment and highlights some potential issues relating thereto.

Definition of "Land"

Under Section 5 of the NLC, "land" includes any ground with any substances or structures permanently attached to it, whether on or below the surface, all vegetation and other natural products, as well as land covered by water. However, the extent of exclusive use and enjoyment of land by a landowner is limited to only such a height and depth "reasonably necessary to the lawful use and enjoyment" of the land pursuant to Section 44(1)(a) of the NLC.

The Concept of Underground Land and Stratum

Prior to the amendments made to the NLC (notably, Part Five (A) of the NLC),¹ "land" was previously regarded as two dimensional in terms of length and breadth, without any express restriction on the use of the height and depth of the land.

However, due to the increase in population and economic development as well as rapid urbanization growth in the cities, Part Five (A) of the NLC was introduced by the

¹ National Land Code (Amendment) Act 1990.

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government. This was followed with the [Guideline of Underground Land Disposal Implementation Under National Land Code 1965](#) (the Guideline) by the JKPTG to formulate a legal framework for underground land and stratum development.

The Guideline prescribes for the minimum depth of underground land ownership for different categories of land. Any application for stratum title should not be less than such minimum depth prescribed. Notably, there is no provision in the Guideline or the NLC limiting the maximum depth of underground land ownership.

In 2016, further amendments have also been introduced to the NLC² and the Land Acquisition Act 1960 (LAA)³, which provide for the alienation and the acquisition of a stratum or three-dimensional lot of underground land.

The Concept of Airspace (Spatium)

The idea of stratum development was first raised by the Pakatan Harapan administration in 2018. Just recently, the JKPTG has revisited such proposal and conducted a survey as part of its [public consultation exercise](#) to seek feedback on the proposed introduction of the concept of disposal of spatium.

The proposed concept involves the creation of overlapping or stacking development on existing developments owned by others and the establishment of multi-layered ownership of space above the land surface.⁴

Some examples of overlapping developments in Malaysia include buildings on the highways such as the Ayer Keroh and Sungai Buloh Overhead Bridge Restaurants and bridges between buildings, for instance the link bridge between Prangin Mall and the Komtar Complex in Penang.

Arguments in Favour of The Proposed Amendment

Firstly, with the ever-growing urban population and chronic land shortage in certain developed areas of Malaysia, it is undeniable that the development of spatium for residential

² National Land Code (Amendment) Act 2016.

³ Land Acquisition (Amendment) Act 2016.

⁴ JKPTG, Cadangan Pelupusan Ruang Udara (Spatium) <[%cspapp.bi.viewfile.cls \(mpc.gov.my\)](#)>.

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purpose may help to address the problem of land scarcity, property overpricing and inner-city vehicles traffic congestion.

Undoubtedly, if overlapping developments can be built in the airspace above existing buildings, streets, or public roads, more green and open spaces such as public parks, bicycle lanes and safe pedestrian walkways can be built for the benefit and enjoyment of the people living in and visiting the city.

Potential Issues?

Notwithstanding that overlapping developments may be a solution to create a more sustainable development in urban areas, there are several issues that the government will need to address in formulating and introducing the law on disposal and acquisition of airspace titles, such as the following:

- *Constitutional Right to Property*

One pertinent consideration is in relation to the formulation and application of clear and structured legislative framework relating to the Proposed Amendment by the government. As of now, it is unclear whether the proposed law will apply to the airspace above public spaces only or the airspace above commercial and residential properties or both, and whether they will affect only existing developments or new developments.

In respect of constructing overlapping buildings in the airspace above public spaces, such as public roads or highways, the potential issues that may arise would be different from those arising from building overlapping development above privately-owned residential and commercial properties. Certainly, the development of airspace above properties of existing owners would involve more complex issues, for example, a person's constitutional right to his property under Article 13 of the Federal Constitution ("FC") may be adversely affected.

Among the issues that need to be considered are whether a person has the right to object to such proposed overlapping construction, and the right to be given adequate compensation if the government decides to acquire the airspace above such property, and if it is only applicable to acquisition for certain public interest purposes, for instance-to develop stacking or overlapping construction projects such

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as highways, viaducts or railway tracks for mass rapid transportation purposes? In view of Article 13 of the FC, it is submitted that robust legal procedures for acquisition of airspace including the procedures relating to payment of adequate compensation to the affected landowners in case of a government acquisition should be put in place.

- *Safety concerns*

Another major concern relates to public safety and public well-being— what are the safety measures that need to be implemented to mitigate any danger or hazard to the safety of the public and to ensure the public's standard of living is not compromised or adversely affected arising from such stacking development?

Lastly, it is also essential to look into whether such overlapping development is the most ideal and viable approach for sustainable urban planning. Are land resources truly scarce and limited in cities such as Kuala Lumpur and within the Klang Valley? It has been contended that if the government develops more affordable housing units on the outskirts of the city with good living environment and efficient public transportation system, there would be no need for overlapping developments with close proximity of residential units, stacking on top of other developments, especially in the COVID-19 era!

Conclusion

It is advisable for the government to carefully consider the abovementioned issues, particularly whether such Proposed Amendment relating to the disposal of spatium will achieve good urban planning objective and create a sustainable environment for the Malaysian society to live in.

Authored by Shera Chuah, Associate and Muneerah Mohd Azlan, Paralegal with the firm's Corporate & Real Estate Transactions practice.

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