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POWER TO DECIDE ON DEVELOPMENT APPLICATIONS UNDER THE NATIONAL LAND CODE 1965: THE POSITION IN SELANGOR

Sharifah Zubaidah Aljunid[1]

ABSTRACT

This article addresses the general issue of over concentration of powers in land decision-making on the executive in the majority of states in Malaysia. The writer focuses on one of the mechanisms used to achieve this; namely through the administrative technique of delegation of powers. Statutes conferring administrative powers sometimes confer on the administrative authority the power to delegate such powers to other officers. This article examines the nature of land development applications and the type of powers delegated in the state of Selangor with regard to land matters. Based on the premise that where there is already a provision for delegation of powers under the National Land Code, 1965, powers under this Code should not be delegated to the executive under a general delegation of power statute, the writer accordingly proposes that the power of the State Authority to delegate powers under the Code be restricted.

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1 Assistant Professor, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University, Malaysia.

INTRODUCTION

(i) Nature of Land Development Applications

Land development applications are applications submitted to the land office to facilitate the intention of the registered proprietor to develop his land. A registered proprietor under the National Land Code, 1965 ('NLC') holds a conditional title as upon alienation of the land to him, the state authority is empowered to impose a category of land use,[2] express conditions as well as restrictions in interest on the document of title.[3] If these do not accord with subsequent plans to develop the said land, the registered proprietor must apply to the land office to change such details on the document of title so as to bring it within the contemplated development.[4] These may include applications for sub-division and/ or amalgamation of plots of land, applications for variation of express conditions or restrictions in interest on the document of title or variation of categories of land use, as well as applications for surrender and re-alienation.

It will be argued that the power to decide upon land development applications under the NLC, although administrative in nature, requires special skill and knowledge relating to land use planning and can best be exercised by officers in charge of land administration or the State Authority under the NLC, as the case may be.

Applications for sub-division and amalgamation require the approving authority to consider, inter-alia, the following matters:[5]

(a) that the sub-division or amalgamation would not contravene any restriction in interest to which the land is for the time being subject;
(b) that the sub-division or amalgamation would not be contrary to the provisions of any written law;
(c) that the necessary approval of the planning authority has been obtained;

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2 See section 79(2)(f) and section 52 NLC.
3 See section 120 NLC.
4 Failing which the proprietor could be subjected to enforcement action for breach of conditions under Chapter Five of Part Seven of the NLC.
5 See sections 136 and 147 NLC.

(d) that the sub-division or amalgamation would not be contrary to any plan approved by the State Authority for the development of the area in which the land is situated, or to any decision of any planning authority for that area;

(e) that no item of land revenue is outstanding;

(f) that any chargee, lessee or lien-holder of the land has consented in writing to the application;

(g) that the area of any sub-divisional or amalgamated portion will not be less than the minimum area appropriate for land of the class or description;

(h) that the shape of any sub-divisional or amalgamated portion will, in his opinion, be suitable for the purposes for which it was intended to be used;

(i) that a satisfactory means of access will be available as of right from each such portion.

The nature of the matters above require specialized skill to deliberate on and thus, it would only be appropriate to be decided upon by land administration officers. It was the legislative intent of Parliament that sub-division and amalgamation applications should be approved by the land administration authority and not a government executive. This can be gleaned from the Second Reading of the NLC Bill:[6]

> "Private proprietors will no longer enjoy an unfettered right to sub-divide, partition or amalgamate their lands at will: these processes are now placed under the control of the Land Offices."

Does this mean that the power to decide on sub-division and amalgamation are non-delegable? Such powers may be delegable by virtue of the wordings to sections 135(2) and 146(2) which read "In the absence of any direction to the contrary by the State Authority..." implying that the State Authority may direct that the power to approve such applications is to be exercised by some other person or body.[7] Though

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6 See *Proceedings of the Dewan Negara*, 9th August 1965 at 1586.

7 This is the view of Judith Sihombing in her book *National Land Code, A Commentary*, Vol. 1, Malayan Law Journal (2000) at para. 305-350, XIV 8 and para. 955, XIV 127.

delegable, such powers should only be exercised by those possessing the necessary skill and knowledge to decide on such matters.

Section 124 NLC empowers the proprietor of alienated land to apply to the State Authority to change the category of land use, rescind any express condition or restriction in interest or amendment respectively thereof on the document of title. Under this section, the State Authority is granted with the power to approve or reject the application. Chang Min Tat FCJ in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd.*[8] observed that when considering an application under section 124, the Committee:[9]

> "...has the corresponding duty to consider it, properly and reasonably, on its merits. So long as the application fits in with the town planning for the area and makes for reasonable and proper development of the land, the Committee must, if it is to perform its statutory functions, approve it, subject to what conditions it is empowered by law to impose..."[10]

From the above, it can be deduced that the consideration of such application requires a certain amount of discretion to be exercised 'properly and reasonably' and could not therefore be considered purely 'ministerial' in nature.[11] In Selangor, applications under section 124 require deliberation by the Standing Committee for Land Development and State Housing ('STANCO') before approval is given by the State Authority in

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8 [1979] 1 MLJ 135.

9 Meaning the 'Land Executive Committee' in respect of the Federal Territory, see the *Federal Territory (Modification of NLC) Order*, 1974 P.U.(A) 56/1974. The Land Executive Committee is the equivalent of the State Director under the NLC. The federal government (the 'State Authority' in the Federal Territory) has delegated to the Land Executive Committee its powers to decide applications under section 124, see P.U.(B) 597/1974.

10 At p.149, right column, para. F-G.

11 An example of a purely ministerial function is the power of the Registrar of Titles to effect registration of an instrument of dealing, see *T. Damodaran v Choe Kuan Him* [1979] 2 MLJ 270.

accordance with NLC provisions.[12] The STANCO meets upon the instructions of the Mentri Besar and members include:

- The Mentri Besar
- The State Secretary
- The State Legal Advisor
- A Representative from the State Treasury
- The State Director of Lands and Mines
- Two State Executive Councillors
- The District Land Administrator
- The State Director of Town and Country Planning
- The State Director of the Public Works Department

It is apparent from the composition of the STANCO that this is a crucial stage in the approval process where views from various departments are considered before the application is forwarded to the State Executive Council[13] for final approval. Other than the power to approve the application, the State Authority also has the accompanying power to impose further conditions for approval of the application under section 124(5). It has been held that in exercising such power to impose conditions, the approving authority must act reasonably and the conditions must also be reasonable and relate to the permitted development.[14] It cannot be said therefore that a consideration of an application under section 124 requires no special skill.

Sections 204A to 204H provide for the surrender and re-alienation of land. This is an application that enables the proprietor to carry out land development applications more expeditiously. It allows the State Authority to re-alienate the surrendered land in a manner required by the envisaged development. A consideration of an application for surrender and re-alienation also requires special skill concerning land use planning. The provisions of section 124 continue operating[15] in this type of application and the conditions for approval stipulate matters requiring special

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12 See *Circular by the State Director of Lands and Mines, Selangor* No. 4 of 1987.

13 See meaning of 'State Authority' below at n. 20.

14 See the judgment of Suffian, L.P. in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn. Bhd.*, above.

15 See section 204A NLC.

knowledge and skill, for example, to determine that the units of land to be re-alienated conform in shape, area, measurements, location and intended use with a layout plan approved by the appropriate authority.[16]

The above has shown that the power to decide on land development applications is not purely administrative in nature but require a certain degree of 'in-house' knowledge concerning land administration as well as land use planning. Thus, a delegation of powers to decide on land development applications must take into account the capability of the delegate to execute such powers.

(ii) Delegation of Powers

In an effort to achieve its purpose of delivering prompt services in respect of land administration in Selangor, the State Authority there has opted for the administrative technique of delegation of powers. The general rule is 'delegatus non potes delegare' which means an executive under which a power is delegated by a statute may not further delegate that power to another. The law however, recognizes certain exceptions to this rule. In *Rural and Industrial Development Authority v Mohamed bin Daud & Ors.*,[17] Hepworth J., in obiter, remarked as follows:

> "To the maxim *delegates non potest delegare* "there are certain well recognized exceptions, where an authority to delegate will be implied, generally on the ground that there is no personal confidence reposed or skill required, and that the duties are capable of being equally well discharged by any person."[18]

It was held in that case that the power to sue on behalf of the Rural and Industrial Development Authority was clearly a matter in which personal confidence is necessary and skill is required.

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16 See section 204C(1)(a) NLC.

17 [1960] 26 MLJ 176.

18 At p. 177 of the case.

Delegation of powers may be lawful where a statute expressly provides for such delegation.[19] In such a case, the delegation must be in accordance with the mode prescribed by the statute or rules made thereunder.[20] A delegation of powers may also be held lawful even if there is no provision authorizing such delegation.[21] This comes under the obscure exception of administrative necessity. This is also termed as 'the alter ego principle' in administrative law.[22] Delegation is an inevitable aspect of modern administration due to the sheer volume of administrative decisions.[23]

The rationale behind delegation of powers in the administration of government departments can be found in *Carltona Ltd. v Commissioners of Works and Others*[24] where Lord Greene, M.R. observed in respect of the United Kingdom that:

> "In the administration of government in this country the functions which are given to ministers...are functions so multifarious that no minister could ever personally attend to them....The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case."

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19 An example would be section 4(6) of the Federal Capital Act, 1960 which allows the Commissioner of the City of Kuala Lumpur to delegate his powers and duties to any person described by name or office, see *Ganad Media Sdn. Bhd. v Dato' Bandar Kuala Lumpur* (No.1) [2001] MLJU 683.

20 Under the section 4(6) of the Federal Capital Act, 1960, the delegation must be made in writing, *ibid.*

21 See *R. v Birmingham Magistrates Court* [2002] Crim. LR 37 where it was held that the Chief Constable of police could delegate his function to apply for anti-social behaviour orders under section 1(1) of the Crime and Disorder Act 1998 even where the provision does not expressly authorise such delegation.

22 See D. Lanham, "Delegation and the Alter Ego Principle" in (1984) 100 LQR 587.

23 Chan, "Section 13 of the Immigration Ordinance: Is the Power Delegable?" [2001] 31 HKLJ 381.

24 [1943] 2 All ER 560 (CA).

In this respect, delegation of powers is justified on the ground that the actual decision-maker who is granted with statutory powers by Parliament is often a minister who has multifarious functions and that in order that public administration may run smoothly, delegation of these statutory powers to department officials would then be necessary.[25] The House of Lords in *Reg. v Home Secretary, Ex. p. Oladehinde*[26] ('*Oladehinde*') further refined the Carltona principle and restated it as follows:

> "It is well recognized that when a statute places a duty on a minister it may generally be exercised by a member of his department for whom he accepts responsibility: this is the *Carltona* principle."

This paper will examine the appropriateness of using this administrative technique in respect of land decision-making powers under the National Land Code, 1965 (hereinafter referred to as the NLC).

In Selangor land administration, the main purpose for delegation of powers is to reduce delay by speeding up the processing of applications relating to land. Although the effort to minimise delay is a laudable one, it is important to appreciate the special nature of decision-making relating to land development applications which differs substantially from administrative decisions in day to day public administration.

THE DELEGATION OF POWERS PROVISION

The delegation of powers is effected under two statutes:

1) The NLC; and
2) The Delegation of Powers Act, 1956 (Revised 1988)

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25 See also *Re Golden Chemical Products Ltd.* (1976) Ch 300 discussing cases which applied *Carltona*.

26 [1991] 1 AC 254.

Section 13 of the NLC enables the State Authority[27] to delegate to officers in charge of land administration any of its powers under the NLC. The section reads:

> "(1) The State Authority may by notification in the Gazette delegate to the State Director, or to the Registrar, or to any Land Administrator or other officer appointed under sub-section (1) of section 12, the exercise or the performance (subject to such conditions and restrictions as may be prescribed in the notification) of any powers or duties conferred or imposed on the State Authority by or under this Act
> Provided that-
> (i) this section shall not apply to any power of the State Authority under this Act to make rules;
> (ii) this section shall not apply to any power of the State Authority under this Act to dispose of any land-
> (a) within fifty metres of the bank of any such river as may be declared by the State Authority by notification in the *Gazette*;
> (b) within fifty metres from the edge of any such lake or spring as may be declared by the State Authority by notification in the *Gazette*, with the edge of any such lake or spring to be delineated therein; and
> (c) within fifty metres of any shoreline.
> (iii) the giving of a notification under this section with respect to any power or duty shall not prevent the State Authority from itself exercising the power or performing that duty in any case where it appears to the State Authority expedient to do so.

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27 The NLC recognizes the Ruler of the State as the State Authority in section 5. In *Lebbey Sdn. Bhd. v Chong Wooi Leong & Anor. & Other Applications* [1998] 5 MLJ 368, Abdul Wahab J. at p. 374, laid down that: "State authority under the Code is defined, for the purposes of the State of Selangor as the Ruler. For practical purposes, this means the Ruler acting upon the recommendation of the Exco. of the State."

(2) For the purposes of paragraph(ii) of the proviso to subsection (1), "river" includes a reservoir of water resulting from the damming of a river."

Section 13 imposes two limitations. First, the delegation is limited to officers appointed under section 12(1) NLC.[28] Second, the State Authority cannot delegate the power to make rules and the power to dispose of certain types of land.

Where the State Authority wishes to delegate its powers to persons not coming within section 12(1) NLC, the delegation is effected through section 8 of the Delegation of Powers Act, 1956 (Revised 1988). This provision enables the Ruler in Council to delegate, by notification in the Gazette, the exercise of any power or the performance of any duty under any written law to any person. The power or duty delegated may be conditional or restricted in the notification itself. Again the limitation is that there can be no delegation of the power to make regulations.[29]

It must also be noted that section 13 can only be used in respect of a power exercisable by the State Authority and not to powers to be exercised by the State Director or Land Administrator. The NLC is silent as to the mode of delegating powers where the State Authority wishes to direct that the power to approve applications for subdivision or amalgamation is to be exercised by another person or body other than the State Director or Land Administrator. In such cases, clearly, section 13 has no application.

DELEGATION UNDER SECTION 13 NLC

Section 13 of the NLC has been used to delegate the following powers to Land Administrators:

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28 These are the State Director of Lands and Mines, his assistants and deputies; the Registrar of Titles and deputies; the Director of Survey and deputies; Land Administrators, Survey Officers, Settlement Officers and other officers deemed necessary.

29 See section 11 of the Delegation of Powers Act, 1956 (Revised 1988).

- the power to reject applications for land alienation[30]
- the power to approve applications for Temporary Occupation Licence[31]
- the power to approve applications for charging land subjected to restrictions in interest[32]
- the power to approve transfers subjected to restrictions in interest in certain cases[33]

With regard to the disposal of land, the following powers have been delegated:

- the power to approve applications for surrender and re-alienation of lands under 30 year leases and situated within Chinese 'new villages' as well as Indian and Malay "kampungs" as specified by the State Authority[34]
- the power to approve applications for variation of express conditions of agricultural land held under Land Office titles and consequential powers under section 124(5) NLC

The powers delegated to Land Administrators are therefore in respect of clear-cut cases where there need not be any deliberation on 'development policies' before approval is given. Their powers in this regard may be characterized as purely administrative.

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30 These are for clear cut cases of rejection, i.e. application for Malay Reservation Land by non-Malays, for land within the Land (Group Settlement Areas) Act, 1960, etc. see Sl. P.U. 18/ 1984.

31 *Ibid.* This power is limited to only certain types of cases. For areas not exceeding 10 acres, this power is exercised by the State Director, also in respect of certain cases (mainly agriculture).

32 See Sl. P.U. 67/ 1987.

33 The transfers are between those in the immediate family as well as between husband and wife.

34 See Sl. P.U. 23/1986.

DELEGATION UNDER THE DELEGATION OF POWERS ACT, 1956 (REVISED 1988)

The powers delegated under section 8 of the Delegation of Powers Act, 1956 (Revised 1988) are more wide ranging and touch directly on land development. Nearly all the delegation under this Act has been to the Mentri Besar.[35] Powers under the NLC which have been delegated are:[36]

- the power of reservation of State land (Sections 42 and 62)
- the power to lease reserved land (Sections 42 and 63)
- the power to revoke reservations (Sections 42 and 64)
- the power to approve applications for Temporary Occupation Licence (Sections 65 and 67)[37]
- the power to allow extension of time fixed for conditions of positive character (Section 107)
- the power to extend the time period for payment of fees upon alienation (Rule 7 of the Selangor Land Rules, 1966)
- the power to approve dealings on land subjected to restrictions in interest (Section 120)
- the power to approve variation of express conditions in the documents of title in relation to land subject to the category 'building' only and consequential powers under section 124(5) NLC
- the power to approve amalgamation of land (Section 147)
- the power to grant extensions of the period given by the Land Administrator under Rule 11A to pay further premium on conversion[38]
- the power to consider and approve the application for variation of conditions, restrictions and categories under section 124 where the approval has lapsed[39]

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35 The remainder is a delegation of powers to members of the State Executive Council to approve transfers of land subject to restrictions in interest. See Sl. P.U. 51/1991.

36 Vide Sl. P.U. 17/1984.

37 Limited to agriculture, gathering fruits, rubber tapping, etc. for an area of not more than 50 acres and power to renew such licence.

38 Sl. P.U. 72/1987.

39 Supra. n. 11.

From the above, it is apparent that the type of powers delegated to the Mentri Besar involve the making of a decision which is not purely administrative but adjudicatory in nature. There are varied matters to consider for example, before revoking the status of a forest reserve to make way for a housing project. Granted that the Mentri Besar heads the State Executive Council and thus has knowledge of all state policies, this cannot be the overriding criteria to allow him to unilaterally make a decision relating to matters which the NLC has reserved to be made by the State Authority. The argument is that the delegation of the State Authorities' powers to the Mentri Besar is an effort to save time. Despite the rationale behind delegation of powers in *Carltona,*[40] it would not be right to sacrifice the necessary time spent by the State Authority to properly consider an application relating to land development for the sake of administrative efficiency. In *Peter Bazos v Minister of Law, Singapore,*[41] it was observed by the Singapore High Court that:

> "Administrative efficiency or convenience is not a valid reason in law for the Minister or any decision making body in whom a statutory power is vested to delegate such power."

Powers which have been delegated to the Mentri Besar may, if not properly exercised, result in uncontrolled land development. The power to revoke the reservation of land in the State would enable the alteration of the status of forest reserves and 'open spaces' for 'development' upon application by a private developer.[42] The power to approve variation of express conditions for land under the 'building' category would enable the approval of an application to use a residential or industrial premise

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40 Supra. n. 1.

41 [1989] SLR 59.

42 The cabinet seems to be concerned about the revocation of reservations for such development projects as evidenced from a newspaper report that the cabinet has ordered state governments to stop carrying out development in open spaces gazetted for recreation. The Minister for Housing and Local Government has been reported as saying that state governments had been taking land gazetted for recreation to be developed for commercial purposes and had not been able to find replacement for such land, see *The Star*, 'Keep It Open', front page, 13th July 1998.

for commercial purposes. Such unplanned developments, although seen as beneficial to the State at the time these powers are exercised, may in effect contribute to haphazard land development as well as conflict with structure plans and local plans drafted under provisions of the Town and Country Planning Act, 1976 (Act 172).

CHALLENGING THE VALIDITY OF DELEGATION OF POWERS

At the outset, there appears to be three possible grounds to challenge a delegation of power as unlawful delegation. The first and frequently invoked is non-compliance with the formal requirements of the delegation. In *M. Ratnavale v The Government of the Federation of Malaya,*[43] the delegation of powers under the Delegation of Powers Ordinance 1952 was declared void as no notification of the delegation was gazetted as required by section 2 of the Ordinance. In *State Public Services Commission Sarawak v Sarjit Singh Khaira,*[44] the Federal Court held that there had been no proper delegation of power (with regard to the transfer of government officers) from the Public Service Commission (PSC) to the State Secretary as the PSC was required by Article 36(6) of the Constitution of the State of Sarawak to delegate this power through a direction in writing and this had not been done.

The second ground of challenge is where the person or body delegating the power was not the body to whom the power was originally given to by statute. A clear example is the power to approve amalgamation of land under section 146 NLC. Such power is not a power of the State Authority but a power given to the State Director and Land Administrator. It is questionable therefore whether the State Authority may delegate such power to the Mentri Besard:[45] as the State Authority itself is not the body to whom Parliament had conveyed such powers to under the NLC. The exercise of such power by the Mentri Besar could therefore be challenged on the ground of unlawful delegation.

The third ground of challenge is that the power exercised by the delegate has not been included in the instrument of delegation. The power

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43 [1963] 1 MLJ 393.

44 [2000] 4 MLJ 353.

45 This was done under Sl P.U. 72/1987.

delegated must be specified clearly in the instrument of delegation. For a delegation of power under section 13 of the NLC, the gazette notification should stipulate the section numbers under the NLC under which powers are delegated. If the power exercised by the delegate is not included in the gazette notification, the exercise of such power by the 'purported' delegate may well be challenged. In *Chiharu Yabe (Zaugg)(p) & Anor. v Pendaftar Tanah Wilayah Persekutuan Kuala Lumpur*,[46] the appellants were foreign citizens and wanted to purchase a property in the Federal Territory of Kuala Lumpur. This required the approval of the State Authority by virtue of section 433B(1)(b) of the NLC. The appellants were notified that the Land Executive Committee had rejected their application and the appellants appealed to the court. In determining the issue whether the appellants could appeal against the decision of the Land Executive Committee, the court touched on the point of whether the State Authority in the Federal Territory of Kuala Lumpur had in fact delegated to the Land Executive Committee its power to decide upon applications under Section 433B of the NLC. It was observed that in the Federal Territory of Kuala Lumpur, the State Authority under the NLC is the Federal Government and that although the Federal Government has delegated a majority of its powers under the NLC to the Land Executive Committee, the power to decide upon applications under Section 433B had not been expressly included in the gazette notification.[47] Hence, it was held that until there is a delegation under section 13 of the NLC, the Land Executive Committee 'is not invested with the powers.'[48]

CHALLENGING THE LEGALITY OF DELEGATION OF POWERS TO THE MENTRI BESAR

No legal challenge has yet been mounted on the legality of delegation of powers to the Mentri Besar relating to powers of the State Authority under the NLC which is effected through the Delegation of Powers Act, 1956. A novel point would be to examine whether it would be possible to challenge the delegation of powers to the Mentri Besar on

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46 [2002] 4 MLJ 198.

47 See PU (B) 597 of 1974.

48 Per Abdul Aziz, J. at p. 206 of the case.

the ground that provision has already been made for delegation of powers under the NLC. Can the State Authority be allowed to delegate powers conferred by the NLC under two different statutes? In this regard, it may be argued that where Parliament has enacted express provision on delegation of powers under the NLC, it is therefore Parliament's intention to exclude any other type of delegation of powers outside of the NLC. Consequently, we may assume that Parliament by enacting Section 13 NLC, has confined the delegation of powers to certain individuals mentioned therein and a delegation to a person outside of those category of persons would thus go against the intention of Parliament.[49] Support for this view can be found in *Oladehinde*[50] where Woolf, LJ in the court of first instance observed in respect of the application of the Carltona principle as follows:

> "The Carltona principle is therefore, in my view, more correctly regarded as an implication which is read into a statute in the absence of any clear contrary indication by Parliament that the implication is not to apply."[51]

The issue in that case was whether immigration inspectors were entitled to exercise the power to decide on the deportation of the appellants under section 3(5)(a) of the Immigration Act, 1971 (UK) where such power had expressly been given to the Secretary of State for the Home Department. Lord Griffiths, delivering the unanimous decision in the House of Lords, seemed to agree with the above observation of Woolf, J. with regard to the absence of a contrary intention in the statute when he said:

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49 There was no debate on section 13 in the Proceedings of the Dewan Rakyat during the 2nd Reading of the NLC Bill. However, in *Commissioners of Customs and Excise v Cure and Deeley Ltd.* [1962] 1 QB 340, there was express provision for delegation, specifically to senior civil servants and it was held that the alter ego principle had no application. See however, an opposing view in the High Court of Australia's decision of *O'Reilly v Commissioners of State Bank of Victoria* (1982) 44 ALR 27.

50 Above at p. 5.

51 At p. 264 of the case.

> "Parliament can of course limit the minister's power to devolve or delegate the decision and require him to exercise it in person."[52]

It was held that there was no such limitation in respect of the decision to deport and thus the appeal was dismissed. It is important to note that although the House of Lords held the delegation in *Oladehinde* to be lawful, the House of Lords also took cognizance of the capacity of the immigration officers to exercise the power to deport where it was observed:

> "It has been recognized that it would not be right to authorize an inspector to take a decision to deport in any case upon which he had been engaged as an immigration officer for to do so would be too much like asking a prosecutor to be a judge in the same cause. But in a case in which he has been in no way personally involved I am unable to see any good reason why the decision to deport in a section 3(5)(a) case should not be left to an immigration inspector. He will be a person of comparable grade to those who previously took the decision and equally experienced in immigration matters."

Two possible principles from the above decision in *Oladehinde* may be applied to ascertain the lawfulness of a delegation of powers under section 13 of the NLC. Firstly, a delegation of powers would be unlawful where a contrary intention can be found from the empowering statute that Parliament did not intend the power to be exercised by other persons than those named in the statute. Secondly, even if delegation is permissible where no contrary intention is found, the capacity of the person to whom the power is delegated must also be examined.

Indeed such argument may also be forwarded in an application for certiorari to quash any decision of the Mentri Besar in this respect by invoking the principle of substantive ultra-vires. Under this principle, a statutory body must act within the limits and confines of its statutory

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52 At p. 303 of the case.

powers and failure to do so could render the decision void.[53] It may also be contended that since decision-making relating to land development is a special area that should not to be regarded as an exercise of 'purely' ministerial powers[54] but rather 'quasi judicial', such powers should not normally be delegated. While an administrative function can be delegated, a judicial function rarely can be.[55]

Further, where Parliament had given its attention to enacting the NLC to govern powers over land, it may be contentious to allow the executive to delegate powers under the NLC through another general statute.[56] The maxim *generalia specialibus non derogant* would apply, which means special provisions will control general provisions. In *Luggage Distributors (M) Sdn. Bhd. v Tan Hor Teng & Anor,*[57] Gopal Sri Ram JCA delivering the judgment of the Court of Appeal remarked that:

> "Where there are two provisions of written law, one general and the other specific, then whether or not these two provisions are to be found in the same or different statutes, the special or specific provision excludes the operation of the general provision."[58]

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53 See *Fadzil bin Mohammed Noor v Universiti Teknologi, Malaysia* [1981] 2 MLJ 196.

54 Although the determination of whether an instrument of dealing is 'fit for registration' under section 297 and 301 NLC has been held to be purely ministerial, see: *Island & Peninsular Development Bhd. v Legal Adviser Kedah & Ors.* [1973] 2 MLJ 71 and *T. Damodaran v Choe Kuan Him* [1979] 2 MLJ 270, the nature of the power exercised by the State Authority under the NLC concerning applications relating to land development are 'quasi judicial' in character e.g. the power to alienate land (section 76) and the power to approve applications for variation of categories of land use and express conditions (section 124).

55 See Denning LJ's judgment in *Barnard v National Dock Labour Board* [1953] 2 QB 18. The House of Lords in *Local Government Board v Arlidge* [1915] AC 120, however, had allowed the delegation of a judicial duty.

56 See the judgment of Lord Hobhouse in *Barker v Edger & Ors* (1898) AC 748 PO.

57 [1995] 1 MLJ 719.

58 This decision was also cited and followed by the High Court in *Folin Brothers Sdn. Bhd. v Wong Foh Ling & Wong Swee Lin & Ors.* [2001] 2 MLJ 23.

It is also possible to apply the maxim: *leges posteriors priores contraries abrogant* which means later Acts repeal earlier inconsistent Acts.[59] The delegation of powers under the Delegation of Powers Act, 1956 is inconsistent with section 13 of the NLC as it allows delegation of powers to persons outside of those stipulated under section 13 NLC. Thus the court may imply that the delegation of powers provision under section 13 NLC repeals the Delegation of Powers Act, 1956 in respect of such inconsistency above.

Powers of the State Authority under the NLC should not be delegated to persons or bodies outside of those appointed under section 12(1) NLC for two main reasons. Firstly, although government policies play an important role in land decision-making, delegating powers to those holding political posts could result in land decision making becoming too influenced by political considerations thus, outweighing land use and planning considerations. Secondly, the Delegation of Powers Act, 1956 is a statute designed for dignitaries such as the Yang Di Pertuan Agung, the Ruler in Council, Ministers and Chief Ministers to delegate statutory powers conferred on them in order to assist them in the discharge of their 'multifarious' functions. Land decision-making powers should not be granted to those having multifarious functions like the dignitaries under section 8 of the Delegation of Powers Act, 1956. The rationale for delegation of powers in *Carltona*[60] was particularly in respect of 'ministers', thus, it would be possible to argue that an executive body, like the State Authority under the NLC, should avoid delegating its powers to a 'minister' for the classic setting envisions that it is for the minister to delegate. Furthermore, section 8 of the Act empowers the 'Ruler in Council' to exercise the delegation of powers conferred to it by any written law. The NLC uses the term 'State Authority' and not 'Ruler in Council'. Although it may be argued that 'Ruler in Council' is synonymous to the State Authority under the NLC, the Delegation of Powers Act, 1956 should only be used to delegate powers expressly granted by statute to the 'Ruler in Council'.

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59 This was applied by the High Court in the unreported case of *Ridzwan bin Ibrahim* [2002] 418 MLJU 1.

60 Supra n. 1.

CONCLUSION

As it is presently, delegation of powers under the Delegation of Powers Act, 1956 has resulted in excessive concentration of powers over land decision-making in the Mentri Besar. The NLC, however, has clearly envisioned that these powers should be exercised by the State Authority.[61] As discussed above, such decisions are to be arrived at by a committee consisting of policy-makers as well as those knowledgeable in land use planning.

Taking into consideration that there may be circumstances where the State Authority may have to delegate its powers to land administration officers in respect of purely administrative matters, section 13 NLC may still serve that purpose. Nonetheless, that section could be amended to include a provision to exclude any delegation of power outside of that provided in section 13 itself. Hence, a new paragraph (c) could be inserted to read as follows:

> "(c) The powers and duties conferred or imposed on the State Authority by or under this Act shall not be delegated in any manner except as provided under sub-section (1)."

Such provision would have the effect of curtailing the power of the State Authority to delegate its powers to persons outside of those appointed under section 12(1) NLC, thus, effectively rendering illegal, any delegation of power relating to powers exercisable under the NLC made under the Delegation of Powers Act, 1956.

One may ask: why seek to limit the current practice of delegating powers over land matters to the Mentri Besar? If it serves the purpose of 'cutting the red tape' and paves the way to robust land development in the state, then why not just let it be? The purpose of this paper is not to thwart land development. The concern is to ensure that powers given under the NLC are exercised in the proper manner and by the proper authority. When powers of the State Authority under the NLC are delegated to the Mentri Besar without any conditions attached, the Mentri Besar can be said to have a 'discretionary power.' A discretionary power

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61 See sections 42, 64, 65, 67, 120, 124 NLC.

may be subject to abuse and misuse. It is thus crucial to ensure adequate control and safeguards over the exercise of such discretionary power in order to curb arbitrary exercise of such power.

It is important to appreciate the difference between the exercise of a purely administrative power[62] and the power to decide a matter on a 'quasi-judicial' or adjudicatory capacity. As demonstrated at the beginning of this article, powers of the State Authority to decide on land development applications under the NLC to a large extent, involve the latter. 'Cutting the red-tape' may be done in respect of the former through ensuring a more efficient administration. Proper land decision-making to consider land development applications must not be sacrificed at the altar of 'administrative efficiency.'

62 For a discussion on the nature of administrative powers, see Chapter XIII in MP Jain, *Administrative Law of Malaysia and Singapore*, Third Edition, Malayan Law Journal (1997).