

## AN INVENTION OF “BUILD-THEN-SELL” IN MALAYSIA VIA THE HOUSING LAW

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### ABSTRACT

*For years Malaysia has been practicing “sell-then-build” in the housing development and for years also the concept has contributed to various types of problems, mainly to house purchasers. The urge from several quarters especially the National Housebuyers Association, has be part of the cause for the government to initiate few steps in implementing the “build-then-sell” in stages. Besides several incentives in terms of policy, the first step under the law to promote the “build-then-sell” is by introducing schedule I and J in the Housing Development (Control and Licensing) Regulations 1989 (Amendment 2007). It is the aim of this paper to look into the so called “build-then-sell” according to Malaysian style which actually does not reflect the “build-then-sell” in toto. The paper then will analyze both schedule I and J above and also will consider other points that may be relevant to the issue of “build-then-sell”.*

**Keywords:** *(Build-then-sell, Sell-then-build, Buying-Off the Plan, Housing law)*

### 1.0 INTRODUCTION

House is defined as a dwelling place and is constructed as a home for one or more persons. A house provides protection from weather, regardless a crude hut or an elaborate mansion, and whatever degree of intrinsic architectural interest (MacDonald, W. L., 2004). Abdul Majid and Mohd Mustafa (1991) had defined a house as a shelter that should be able to accommodate basic activities of the occupants such as sleeping, cooking and resting. These activities require consideration of the related physical factors which include the well-beings, health and occupants' comfort.

On the other hand, the National Housing Development (NHD) agency of Malaysia suggests that it is crucial to have a comfortable house for occupants because a house fulfils the essence of a good family development. A good family development will contribute to a better society growth (NHD, 1993). Conversely, an uncomfortable house will lead to social problems and low productivity of occupants (Abdul Razak, 2003).

Housing has always been in high demand in Malaysia due to population, economic and industrial growth (Mohd Razali, 2001). Recently, in the 8<sup>th</sup> Malaysian plan (2001-2005) the government had emphasized that houses should be built based on affordability, quality housing and living environment, and not merely to quantity. Furthermore, one of the government's policies to upgrade the quality of residents' lives is to improve the quality of housing and urge the responsible parties in the housing sector to investigate new forms of housing which can offer wider choice of lifestyle (DBKL, 2003). The government had specifically considered this requirement especially to

cater for the lower income group of the society (NHD, April, 2001).

In ensuring the objective of providing quality of live improved through the policy of "1 family, 1 house", there are many sets of laws and regulations governing the housing development and construction in Malaysia was established. However the main law that always been the centre of criticisms and comments by the public i.e. house purchasers is the Housing Development (Control and Licensing) Act, 1966. ("HDA"). When the Act has been first introduced and came into force on 29<sup>th</sup>. August 1969, there was no standard form of agreement has been introduced to govern the sale and purchase of houses between developers and purchasers. Later in 1982 through the enforcement of new Housing Developer (Control and Licensing) Regulations, 1982 that repeal the Housing Developers (Control and Licensing) Rules 1970, the standard form of agreement has been enforced i.e. Form G and H to govern the sale and purchase of the conventional unit of house and subdivided unit respectively. Both schedules G and H of the HDA are used to accommodate the concept of "sell-then-build" that is practicing in Malaysia. The recent development of the housing law and concept in Malaysia that is towards promoting and encouraging the "build-then-sell" has forced the government authority to add the new schedules in the HDA i.e. schedule I and J. The objective of this paper is to look into the so called "build-then-sell" concept of housing development according to Malaysian style which actually does not reflect the actual "build-then-sell". The paper also aims to analyse both schedule I and J as well as to consider other points that may be relevant to the issue of "build-then-sell".

## **2.0 HOUSING BACKGROUND**

Urban centres in Malaysia are experiencing rapid population growth accentuated by the continuing influx of immigrants from the rural area and smaller towns in search of better economic and social opportunities (MoHLG, 1997). The most prominent urban centre facing this phenomenon is Kuala Lumpur, the capital city (Ghani and Lee, 1997). Although several other major towns in the country also experience the problem, the influx is relatively small in magnitude. Therefore, in order to meet this demand, more houses have been planned for construction.

Since independence in 1957, the development of infrastructure and housing in Malaysia become an important social goal in the national development program. The provision of adequate, decent and affordable shelter represents one of the most urgent social-economic issues faced by Malaysia (MoHLG, 1998). The concept of "basic needs" and "human settlement" in the planning and development of housing for the people has been promoted by the Malaysian government.

However, delivery system of the houses is facing critical challenges; for instance abandoned projects, quality of the houses very low, developers disappear even before the project start and constructions of houses do not follow the specifications. The National Housebuyers Association has received complaints from buyers from time to time and in the year of 2006, the association recorded 100 complaints. Those complaints were on strata titles, management & maintenance, late delivery & late assessment damages claims, certificate of fitness, abandoned projects, shoddy workmanship and defects, non-adherence to building plans, infrastructure, failure to recover awards pronounced by the Tribunal and prosecution of awards. Apart from that the statistic from the Tribunal for Homebuyers Claims showed that from 1<sup>st</sup> December 2002 until 31<sup>st</sup> January 2009, there were 25,276 cases have been filed before the Tribunal. One may wonder that why all those problems continue to exist even though there are bulks of laws and regulations available to govern the housing industry in Malaysia.

### 3.0 WHY “BUILD-THEN-SELL”?

At the time when there was a call for the government to enforce one specific law to govern housing developers, the concern was more on the conduct of certain developers who were collecting deposits from purchasers and then disappeared. ( Hansard, 1966, March 25, 7249-7272) In 1960's where housing projects were not so massive as today, the attention was on how to control the housing developer from cheating purchasers in terms of collecting the booking fees or deposits and yet did not proceed with the project. Perhaps that was the reason why at the time when schedule G and H were inserted into the HDA (that inclusive of the schedule of progress payment of the purchase price according to the stages of completion of construction work), the concept of “sell-then build” was adopted. It was mainly to ensure housing developers would really proceed with the project.

However as the time changed, the scenario of housing industry and consumers i.e. house purchasers' awareness of their legal rights also has changed. Their (purchasers) apprehension are far beyond their worry on disappearance of developers after collecting the booking fees or deposits, but extend to credibility of developers to deliver quality houses that are ready to be occupied within the contract time frame. This shows that there is a transformation of the need of purchasers at the time when the HDA was introduced as compare to present.

Purchasers' grievances due to abandoned of housing projects, late delivery of vacant possession, non-issuance of certificate of fitness for occupation, sub-standard material and workmanship and many others have been very rampant and synonym to the housing industry in Malaysia. These complaints and problems have been widely reported in mass-media, debated in forums and meetings and “noises” made in seminars and conferences. Thus when the government authority, in particular the Ministry of Housing and Local Government (“MHLG”) took several steps to protect purchasers, for instance by reviving some of the abandoned housing projects (Nuarrul Hilal, 2006), replacing the process of building certification from certificate of fitness to certificate of completion and certification (Azlinor, 2007) and promoting the “sell-then-build” among housing developers, partly it release the tense some of the aggrieved purchasers and diminish the worry of future purchasers.

Among the administrative approaches taken by the government to promote developers to implement the “build-then-sell” in their housing developments are; giving priority to them (developer) when they make application for conversion and sub-division of land and also by lifting up the requirement of RM250,000 as deposit to the Controller upon submitting application for a license from the MHLG. However as far as the legal approach is concerned, the drastic step to encourage developers to adopt the ‘build-then-sell’ is by introducing schedule I and J through the amendment of the Housing Development (Control and Licensing) Regulations, 1989 in 2007. The new amendment has come into force on the 1<sup>st</sup> January 2008.

### 4.0 SOME THOUGHTS ON SCHEDULES I AND J

There are certain quarters who are confused on the concept of “build-then-sell” that are now implementing in Peninsular Malaysia. The so called “build-then-sell” as provided in both schedules I and J of the Housing Development (Control and Licensing) Regulations, 1989 actually do not reflect the actual “build-then-sell”. This is because the schedules still require a purchaser to pay at least 10% of the purchase price of the house at the time of the signing of the sale and purchase agreement with a developer. The last payment of 90% will have to settle upon completion of the house. In other words a purchaser still has to make a commitment even before the construction begin. It is just a matter of postponing the payment full purchase price. That is why this concept is



sometime known as 10-90's concept. Thus to say Malaysia is implementing the "build-then-sell", is completely wrong.

Even though schedule I and J are considered as the preliminary legal framework to implement the concept of "build-then-sell" of Malaysian style in terms of providing a standard form of contract to accommodate the practice, there are few issues that are still need to be addressed. First, even though a developer utilising this concept, there is no assurance that a developer will complete the project. As mentioned earlier, schedules I and J merely provides for postponement of purchase price of a house until it is completed. The only advantage is that if a developer fails to complete it's project, a purchaser's liability to repay the loan to his end-financier is only extend to the 10% that has been released by his or her end-financier to the developer. (Assuming he is taking a loan from a financial institution). This would certainly provide a better protection for purchasers since in Malaysia the end-financiers never take part in assuring that the project is completed according to the schedule of works before disbursing the money to vendor's stakeholder (developer's stakeholder).

Secondly, schedule I and J do not provide a clause for retention of money even though the defect liability period is yet to be expired. If there is a defect to a house and need a remedial work, a purchaser may not be able to "chase" or indirectly "pressure" a developer to rectify a defect since all monies already released to a developer. This is quite dangerous for house purchasers because it is very common to hear that developers do not rectify the defects accordingly or purchasers dissatisfied with the rectification work done.

Thirdly, schedule I and J do not provide any right for a purchaser to terminate a contract if upon completion; a purchaser finds that the house does not comply with the specifications as stated in the agreement. In other words there is no opportunity for a purchaser to reject delivery of the house even though he is not satisfied with the quality or specifications of the house. This seems to be unfavourable to purchasers since developers may not concern enough as to the quality of houses. Besides that they (developers) also know that, upon completion, purchasers have to accept the delivery of their houses regardless of the standard of quality or non-compliance with the specifications.

## 5.0 LESSONS FROM AUSTRALIA (VICTORIA)

### 5.1 Buying-Off the Plan ("BOP")

Schedule I and J has been adapted from the concept of BOP that is practicing in Australia. Literally BOP is referred to buying the plan of subdivision prior to its registration i.e. prior to the registration of titles. (Lou Farinoti, 2004, p.1.1). Whereby it's technical meaning refers to a situation where a purchaser entering into a contract to purchase a dwelling before it has been built or, before any work has been performed on site. Purchasers enter into "off the plan" contracts with property developers which ordinarily contain plans and specifications which respectively show the layout and design details of the proposed buildings including dimensions and elevations, and the details of the building works to be performed including details of the materials to be supplied. (Tim Graham, 1997,p.2.1)

The BOP has been introduced in Australia to enable developers to get purchasers to sign up contract of purchase before they started developed the land. It means that a development area can be floated and manage to have pre sales even before any investment is actually made. This then allows the developer to obtain finance on the strength of the pre sale made by the developers. The government encourages BOP by allowing purchasers to pay stamp duty at a lesser rate. This is because theoretically the value of the property when the contract of sale is signed is lesser, thus the stamp duty payable will be much lesser compared to the stamp duty that shall be paid when the

building is completed. The BOP also has facilitated property development in Australia since developers will be more confident in taking up new project or development because they would be ready buyers who already committed themselves to the purchase of their properties even before construction of the said buildings.

The BOP is implemented in almost all types of project in Australia. That includes residential and commercial and a combination of residential and commercial, small groups of town house developments, multi storey blocks (for instance within Docklands Towers), golf course estates (for instance at Mornington Peninsula and Ocean Grove), office blocks, serviced apartments, hotels, car parks, storage units and marinas.

Small scale developers are normally self finance in which they develop one project, selling to purchasers and use the proceeds from that project to finance the next project. Alternatively they will develop the project in stages (phase) where the proceeds derived from completion of the first phase is used to finance progressive stages. Whereby, as for high end developers, they would normally have to finance their project by taking a loan from the financiers, apart from having partial self funding. However before obtaining a bridging loan they would launch the project and obtain presales of up to 70% as to show to financiers that their projects are successful development and thus viable. As such, mortgage over the said land as security for loan shall be arranged accordingly.

The legislation enforceable in Victoria relating to BOP are contained in Sale of Land Act 1962 (Victoria), Subdivision Act 1988, Subdivision (Body Corporate) Regulations 2001, Planning and Environment Act 1997, and Domestic Buildings and Contracts Act 1995.

## **5.2 Advantages and disadvantages of BOP for developers and purchasers**

If houses were sold with good price during the healthy economy and later there were problems when the economy stalls (which may cause to the drop of land/houses value) purchasers would still have to pay the price of the house according to the market value of the property at the time the contract of sale and purchase was concluded. This would certainly benefit the developers. On the other hand it is very common to hear that developers were complaining that after the selling of houses, the cost of development increase whereby houses have been sold according to the market price prior to that increase. In such situation developers may not really cover the cost of development even after the whole units of houses were sold.

Besides that there would be a tendency where purchasers are willing to forego the 10% that they have paid and terminate the contract. A developer therefore would have to find a new purchaser. However there are many complaints that under BOP's concept, it is quite difficult for purchasers to envisage the quality of final product when they only view a show house or marketing blurb. The standard of finishing of the completed houses may not conform to the expectation of purchasers. Sometimes purchasers do not realize that the property that they purchased is staged development and there will be on going building works within the area. If there is a decrease in value of the development between the signing of a contract and completion of the property, it may lead to inability of a purchaser to get finance to complete the purchase.

The most interesting part of the BOP is that the right of a purchaser to terminate or not to proceed with the contract, if upon completion, he and his agent find that the completed house does not conform to the specifications and quality as stated in the agreement. The payment of the full purchase price will be made only upon satisfaction of a purchaser and his end-financier that the defects have been rectified (if any).

## 6.0 SUGGESTIONS

The authors are of the view that schedule I and J need to be amended in order to give a better protection to purchasers. It has to be noted that the new concept of housing development as reflected in schedule I and J should not only aiming for successful completion of a project but it shall extend to the satisfaction of purchasers on the quality of house. Thus the following proposal may be relevant:

- a. End-financiers should take part in ensuring that the project is completed accordingly.
- b. The last 15% (at least) of the house purchase price must be retained until the expiry of defect liability period. Alternatively, the last portion to be retained shall be made according to the category of houses i.e. whether it is a low-cost, medium cost or high cost.
- c. Purchasers should be given a statutory right to terminate the contract if the houses completed do not conform to the specifications and/or stated in the agreement.
- d. The developer should be required to have home warranty insurance to cover the case of incompleteness of project or defective houses.

## 7.0 CONCLUSION

No doubt the introduction of schedule I and J to the HDA can be considered as a very good start for the government to show their concern of the purchasers' interest. Nevertheless, the authors still humbly believe that the best concept for housing development in Malaysia is fully "build-then-sell" and not the concept reflected in schedules I and J.

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