

## Legal Considerations of Housing Development on Waqaf Land in Malaysia

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**Abstract:** The State Islamic Religious Council is the sole trustee of waqaf land of the respective states in Malaysia. The Department of Waqaf, Zakat and Hajj (JAWHAR) and its wing Yayasan Waqaf Malaysia are entities at the Federal level that coordinate waqaf administration and development across the States. Some States have established their own waqaf development authority. Administration of waqaf falls under States' matters governed by respective State Islamic Administration Enactment. However, there are five States so far that have treated waqaf under specific Enactments, namely Selangor, Melaka, Negeri Sembilan, Terengganu and Perak. This paper examines the first three States' Waqaf Enactment in relation to housing development on waqaf land. A document analysis was conducted to identify their housing development related provisions. It can be said that there is no provision on housing related in these Enactments other than reference to fatwa committee for determination of *hukum syarak* on any development related to waqaf. Notwithstanding, these Enactments must be read together with other laws related to housing development in Malaysia. Hence, this paper provides an overview of the legal considerations of housing development on waqaf land in Malaysia.

**Key words:** Waqaf • Land • Housing • Law

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### INTRODUCTION

The existence of waqaf land in Malaysia and its development warrants a comprehensive legal framework for its purposes. Besides the current existing law on land development, specific laws on waqaf land are inevitable due to its religious characteristics, namely irrevocability, perpetuity and inalienability, that ought to be preserved. Out of seven categories of waqaf land development, namely [1] commercial and services, [2] housing, [3] religious purposes, [4] health, [5] education, [6] agriculture, [7] infrastructure & facilities, housing is seen as the most complicated type of development to deal with as it involves a kind of ownership transfer of the house while the land must remain as State Islamic Religious Council's (SIRC) in perpetuity as a sole trustee. Meanwhile, other kinds of development are generally ownership transfer evitable, be it operationalised by SIRC itself or entity appointed by SIRC. In fact, within housing development itself, the issue of type of house arises, be it low, medium or high cost. These will determine direct or indirect waqaf's benefits received. In general, low cost housing will confer direct benefits on needy Muslims in concordance with the main objective of waqaf institution to help the needy, otherwise the benefits could be indirect, deriving from the proceeds.

Consequently, it is the aim of this paper to study the laws related to waqaf land development in Malaysia with specific reference to housing. In so doing, laws at the Federal level related to land development and housing will be examined together with laws at the States' level governing religious matters which waqaf land is subjected to. For that matter, this paper is structured into five parts, commencing with the introduction. Part Two explains laws related to waqaf land development in Malaysia, Federal and States' level, with reference to housing. Part Three elaborates the research methodology followed by analysis and discussion in Part Four. Part Five concludes the paper with significant findings.

### Laws Related to Housing Development on Waqaf Land:

MDC Legal Advisers (2000) listed eighteen main laws relating to housing and construction in Malaysia. They are as follows: [1] Housing Developers (Control and Licensing) Act, 1996; [2] Town Planners Act 1995; [3] Town and Country Planning Act 1976; [4] Malaysia Uniform Building By-Laws, 1984; [5] Sewerage Services Act, 1993; [6] Street, Drainage and Building Act, 1974; [7] Drainage Works Act, 1954 (Revised 1988); [8] Local Government Act 1976; [9] Fire Services Act 1988; [10] Architects Act 1967; [11] Occupational Safety and Health Act 1994; [12] Electricity Supply Act, 1994; [13]

Registration of Engineers Act 1967; [14] Strata Titles Act 1985; [15] Quantity Surveyors Act 1967 (Revised 1992); [16] Valuers, Appraisers and Estate Agents Act and Rules; [17] Development of Construction Industry Board Act 1994; [18] National Land Code 1965. Other laws that can be added to this list are Environmental Quality Act 1974, Land Acquisition Act 1960 and Strata Management Act 2013.

In view of the above laws, development of waqaf land is subjected to planning approval based on the local plan prepared (Section 18, Act 172) though waqaf land is not specifically mentioned in the local plan (Syazwan Zayuti, 2017). Figure 1 illustrates the work flow of planning approval practiced by the One Stop Centre at the Local Planning Authority.



Source: MHLG, OSC Manual, 2008

Table 1: States' Enactment governing waqaf administration

NO	STATES	STATES' ENACTMENTS
1	Penang (ss.89-95)	Administration of the Religion of Islam (State of Penang) Enactment 2004
2	Perlis (ss.89-95)	Administration of the Religion of Islam Enactment 2006
3	Kedah (ss.51-58)	Administration of Islamic Law (Kedah Darul Aman) Enactment 2008
4	Perak (ss.78-84)	-Administration of the Religion of Islam (Perak) Enactment 2004 -Wakaf Enactment (Perak) 2015
5	Selangor (ss.89-95)	-Administration of the Religion of Islam (State of Selangor) Enactment 2003 -Perintah Penubuhan Perbadanan Wakaf Selangor 2011 -Wakaf (State of Selangor) Enactment 2015
6	Federal Territories (ss.61-68)	Administration of Islamic Law (Federal Territories) Act 1993
7	Melaka (ss.77-83)	-Administration of the Religion of Islam (State of Malacca) Enactment 2002 -Melaka Wakaf Enactment 2005
8	Negeri Sembilan (ss.89-95)	-Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003 -Negeri Sembilan Wakaf Enactment 2005
9	Johor (ss.89-95)	-Administration of the Religion of Islam (State of Johor) Enactment 2003 -Johor Wakaf Rules 1983
10	Pahang (ss.70-78)	-Administration of Islamic Law Enactment 1991
11	Terengganu (ss.63-69)	-Administration of Islamic Religious Affairs (Terengganu) Enactment 1422H -Terengganu Wakaf Enactment 2015
12	Kelantan (ss.61-66)	-Council of the Religion of Islam & Malay Custom Kelantan Enactment 1994
13	Sabah (ss.51-57)	-Majlis Ugama Islam Negeri Sabah Enactment 2004
14	Sarawak s. 43, ss.51-54)	-Majlis Islam Sarawak Ordinance 2001 (Chap. 41)

Source: Adapted from Sharifah Zubaidah & Nor Asiah, 2017, pg: 92-94.

The figure shows the offices involved and their laws. However, waqaf lands are not governed under the National Land Code (Section 4(2)(e)). They are under the purview of the State Islamic Administration Enactment, as shown in Table 1. There are specific sections on waqaf in the respective Enactments (specified in the brackets) added with specific waqaf Enactment for five States.

## MATERIALS AND METHODS

This paper intended to study the adequacy of the current law provisions governing housing development on waqaf land in Malaysia. It adopted a desk-study approach where analysis of document was carried out to both laws, Federal (21 Acts) and States (19 Enactments). Synthesizing these two sets of literature with specific reference to the three States' Enactment on waqaf, the state of current laws governing housing development on waqaf land in Malaysia was produced as a result.

## RESULTS AND DISCUSSION

Out of fourteen states in Malaysia, there are five states which have enacted specific laws for waqaf development, namely Selangor, Melaka, Negeri Sembilan, Terengganu and Perak. However, the paper focuses on the first three States' wakaf Enactment, presented in Table 2.

Delving into Malacca (52 sections), Negeri Sembilan (60 sections) and Selangor (49 sections), the provisions revolve around the powers and responsibilities of SIRC,

formation of waqaf and its pillars namely *waqif*, *mawquf 'alaih*, *mawquf* and *sighah*, determination of *hukum syarak* and general provisions. The reference to the Fatwa Committee is made clear in the Enactments for any question on *hukum syarak* related to the pillars of waqaf. In relation to the development of waqaf land, the *Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan* for Islamic matters that was held on April 2007 allowed sale of lease to units that were built on waqaf land for a long term, including housing. In this regard, mixed-development on waqaf land Seetee Aisah is taken to demonstrate the pillars of waqaf consequently to exemplify the housing development on waqaf land.

- Waqif – Seetee Aisah
- Mawquf 'alaih – benefits to public
- Mawquf – land (9.274 acres)
- Sighah – stipulated in deed of trust dated 30<sup>th</sup> September 1901

Since SIRC Pulau Pinang, where the waqaf land is located, is the sole trustee, on the 30<sup>th</sup> of November 2006 the *Muzakarah Jawatankuasa Fatwa Pulau Pinang* decided the following:

- The land is developed via joint venture between MAINPP and UDA Land North Sdn Bhd (ULNSB);
- In consideration of this, ULNSB will surrender the commercial building to MAINPP at the same value of the land;
- MAINPP remains the sole trustee to the land.

Table 2: Legal provisions in Malacca, Negeri Sembilan and Selangor's waqaf Enactment

Section	Wakaf (State of Malacca) Enactment 2005	Wakaf (State of Negeri Sembilan) Enactment 2003	Wakaf (State of Selangor) Enactment 2015
1	Short title and commencement	Short title and commencement	Short title and commencement
2	Interpretation	Interpretation	Interpretation
3	Creation of wakaf	Hukum Syarak	Saving of prerogative
4	Commencement of wakaf	Saving of prerogative	Majlis as sole trustee for all wakaf
5	Right of waqif to determine the conditions of mawquf-alaih	Majlis as sole trustee	Vesting
6	Registration of wakaf	Registration of mawquf	Power of Majlis to purchase property
7	Wakaf by a person in a state of marad-al-maut	Court may order mawquf to be registered	Power of Majlis to istibdal
8	Wakaf taklik	Certificate of Mawquf	Delegation of duties or power of Majlis
9	Wakaf irsod, muabbad, musyak or musytarak	Vesting in Majlis	Chief Registrar of Wakaf and Registrar of Wakaf
10	Restrictions on wakaf khas	Wakaf khas.	Pillars of wakaf
11	Non-existence of mawquf-alaih	Wakaf scheme.	Conditions for formation of wakaf
12	When the usufruct or benefit of mawquf to be shared equally, etc.	Power of Majlis to istibdal	Types of wakaf
13	Invalid wakaf	Responsibility of Majlis on mawquf-alaih	Commencement of wakaf
14	Situation when wakaf to some of the beneficiaries entitled to the estate becomes invalid	Rights of Majlis as mawquf-alaih	Restrictions on wakaf khas
15	Conditions of mawquf	Power of Majlis to claim rent or value	Registration of mawquf
16	Wakaf of premise or agricultural harvest or rent or leased land.	Majlis entitled to utilize rent or value including proceeds, to pay administration cost of mawquf	Publication of list of mawquf
17	Wakaf shares	Property to be returned to owner or surrendered to Baitulmal if wakaf is invalid	Wakaf shall not be revoked
18	Right of waqif on the usufruct or benefit of a mawquf.	Appointment of Registrar of Wakaf, Deputy Registrar of Wakaf, officers and servants	Invalid wakaf
19	Power of Majlis to istibdal	Responsibility of Registrar	Conditions of mawquf
20	Development of a mawquf which has been destroyed	Publication of list of mawquf	Types of mawquf
21	Establishment of the Wakaf Management Committee	Establishment of Advisory Panel on Management of Wakaf	Cash wakaf
22	Membership of the Wakaf Management Committee	Functions of Advisory Panel	Wakaf shares
23	Wakaf Management Committee's meeting	Majlis may give general direction to Advisory Panel	Wakaf of shares
24	Powers of Wakaf Management Committee	Establishment of Wakaf Fund	Wakaf of premise proceeds and agriculture produce on acquired, rented or leased land
25	Additional powers of the Wakaf Management Committee with the consent of the Majlis	Conservation of Wakaf Fund	Right of waqif on benefit of mawquf
26	Expenditure	Wakaf Fund	Redevelopment of mawquf
27	Allowance	Expenditure to be charged on Wakaf Fund	Majlis as mawquf 'alaih
28	Vacation of office	Expenditure of Advisory Panel	Determination of specific conditions for mawquf 'alaih
29	Revocation of appointment	Accounts and report of Wakaf Fund	Distribution of benefit, interest or profit
30	Appointment of new member	Statutory Bodies (Accounts and Annual Reports) Act 1980 shall not apply	Non-existence of mawquf 'alaih
31	Application of the Second Schedule	Mawquf-alaih shall not manage the mawquf unless appointed by Majlis	Wakaf to heirs
32	Majlis as sole trustee	Redevelopment of mawquf	Wakaf to non-heirs
33	Powers of Majlis in purchasing property	Appointment of competent person or agent and qualified	Wakaf by way of will
34	Powers of Majlis to appoint Registrar of Wakaf	Majlis shall ensure person or agent performs obligations	Rate of wakaf by way of will
35	Powers of Majlis to give direction	Unlawful occupation of wakaf land or building	Wakaf by way of will which is not executed

Table 2: Continued

Section	Wakaf (State of Malacca) Enactment 2005	Wakaf (State of Negeri Sembilan) Enactment 2003	Wakaf (State of Selangor) Enactment 2015
36	Additional powers of the Majlis on the Wakaf Management Committee	Unlawful use of air space	Wakaf Fund
37	Right of Majlis on the usufruct or benefit from the mawquf of a wakaf khas	Destruction of crops	Benefit or interest from wakaf am and wakaf khas
38	Usufruct or benefit from wakaf am or khas	Alteration, destruction, etc. of mawquf	Utilization of Wakaf Fund
39	Wakaf Fund	Nothing shall affect power of Majlis to make order	Accounts and Reports of Wakaf Fund
40	Power of Majlis to claim the rental or the value on any usufruct or benefit	Preventing mawquf-alaih from enjoying benefit, interest or profit of mawquf	Reference to Fatwa Committee
41	Appointment of officers and servants	Giving false information	Istibdal of mawquf
42	Validity of act and proceedings	Damages shall be paid into Wakaf Fund	Abandoned mawquf wakaf khas
43	Determination of mawquf	Authorisation of enforcement officer	Power to make regulations
44	Construction of instruments of wakaf	Power of investigation	Control by Majlis or Corporation over mawquf
45	Offences on wakaf land	Obstructing enforcement officer	Administration or management of wakaf am or wakaf khas without permission of Majlis or Corporation
46	Hukum Syarak	Prosecution	Construction of instrument or declaration
47	Right of access	Power of Chief Syarie Prosecutor not affected	Hukum Syarak
48	Obstruction an offence	Other order by the Court	Repeal
49	Powers to make rules	Application of Chapter 6 Part VII of the Syariah Criminal Procedure (Negeri Sembilan) Enactment 2003	Saving and transitional
50	Vesting of mawquf	Declaration	
51	Reference to the Fatwa Committee	Construction of instrument by Court	
52	Continuance application of sections 77 to 83 of the Administration Enactment	Power to make regulations	
53		Delegation of powers	
54		Validation of wakaf endowed before commencement of this Enactment	
55		Majlis may apply to the Court to register mawquf if waqif cannot be traced	
56		Certificate of Mawquf for property endowed as wakaf before commencement of this Enactment	
57		Vesting of property endowed as wakaf before commencement of this Enactment	
58		Appointment of trustee, other than Majlis, shall be void	
59		Majlis shall seek opinion of Fatwa Committee if mawquf 'alaih cannot be traced	
60		Things done in anticipation of the enactment of this Enactment	

The said development consists of 76 units of double-storey terrace houses and 9 units of shop lots and 3-storey offices. For the house units, sale of lease to the lessee is made using National Land Code, form 15A (lease) and not 14A (transfer of ownership). The concept of *al-ijarah* is used in the loan financing. The lessee is required to nominate *waris* to the property because that property is subjected to waqaf religious requirements,

namely irrevocability, perpetuity and inalienability (UDA Holdings Sdn. Bhd, 2017).

In this regard, Khairuddin *et al.* (2017) compiled the fatwas related to the development of waqaf land with specific reference to housing and identified the projects themselves in various states of Malaysia. They concluded the permissibility of shariah on this matter and its viability for the implementation.

It is worth noting that the Enactments are well synchronised between the definitions of property, waqaf and *mawquf* that facilitate the bankability of housing development on waqaf land. Waqaf is not restricted only to movable or immovable property, but to include benefit from them, intellectual and expertise or services into their realm. In principle, the benefits of houses on waqaf land are acceptable for transaction.

### **CONCLUSION**

It can be concluded that the laws related to housing development in Malaysia are adequate in terms of planning approval processes, except the provision of waqaf land in the gazetted local plan and the treatment of waqaf land under the National Land Code. Meanwhile, States' Enactments with regard to waqaf, in particular the land, require further refinement for application purposes. While a reference to fatwa committee is made mandatory, specific guidelines on housing development on waqaf land is desirable. This guideline is to include the issue of bankability, inheritance, eligibility of lessee or tenant to those houses, maintenance etc.

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