CASE UPDATE

RESERVED COUNCIL OFFICE UNDER SECTION 53A OF THE BUILDING MAINTENANCE AND STRATA MANAGEMENT ACT 2004

Introduction

1. *The Management Corporation Strata Title Plan No 2553 v Chia Yew Liang and others* [2022] SGHC 290 is the first reported decision by the High Court which considered the proper construction of Section 53A of the Building Maintenance and Strata Management Act 2004 ("BMSMA"), which reserves for each class of use at least one office as member of the council of the qualifying management corporation.

2. In holding that the management corporation ("MCST") of Palm Gardens, a residential development with 694 residential units and 1 shop unit, was correct to reserve a council seat for the subsidiary proprietor ("SP") of the shop unit, the Court set aside the decision of the Strata Titles Board ("STB") on this point in *Chia Yew Liang and others v The MCST Plan No. 2553* [2022] SGSTB 4. As the STB apparently relied partly on its earlier decision in *Bayfront Realty Pte Ltd v MCST Plan No. 4404* [2018] SGSTB 9 ("Urban Vista"), that decision should also be regarded as overruled on this point.

3. This decision in Palm Gardens is of significant importance because it affects the council election process in hundreds of residential developments in Singapore where there are a few shop units within the residential units. The list includes, but is not limited to: Urban Vista, Skies Miltonia, Lilydale, Hillsta, Rio Vista, Citylights, Bayshore Park, Cashew Heights, Mandarin Gardens, Coco Palms, The Dairy Farm, Chuan Park, D'Leedon, High Park Residences, Kallang Riverside, Sims Urban Oasis, Eight Courtyards, Parc Esta, Avon Park, Sommerville Park, Seaside Residences, Costa Del Sol, The Minton, Q Bay Residences, Waterview, Melville Park, The Anchorage, Boathouse Residences, Pandan Valley, Grande Vista, Lake Grande, Lakepoint, Lakeville, Concourse Skyline, Hazel Park, Parc Palais, The Makena, and Double Bay Residences.

4. There were a number of issues and arguments canvassed before the STB and the Court. This case update examines all these issues and arguments, including those that were not discussed in the judgment of the Court.

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Whether the MCST was Entitled to Bring the Appeal

5. The Defendants initially argued that the MCST had no right of appeal as the STB's decision that s 53A of the BMSMA was not applicable was a finding of fact i.e., that Palm Gardens is not a mixed-use development. They relied on s 98(1) of the BMSMA which states as follows:-

   "No appeal shall lie to the General Division of the High Court against an order made by a Board under this Part or the Land Titles (Strata) Act 1967 except on a point of law."

6. However, the Court accepted the MCST's argument that the appeal involved questions of law and not merely factual questions. There were questions as to whether the STB was correct in its interpretation of a "*mixed-use development*" in s 53A of the BMSMA and whether the STB had erred in considering if there needed to be a minimum number of a particular type of unit to constitute a class of use. The Court agreed with the MCST that the allegations raised related to *ex facie* errors of law within the meaning set out by the Court of Appeal in *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Parners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109, in that the STB asked and answered the wrong questions, took into account irrelevant considerations and failed to take into account relevant considerations.

Election of the Shop Unit SP without being Nominated

7. The STB had prefaced its decision by stating that the SP of the shop unit, Mr Zhang, became a confirmed member of the Council "*without having been nominated*". The Defendants also emphasised this point in their supporting affidavit for the appeal hearing, stating that one seat was reserved for the subsidiary proprietor of the shop "*without having been nominated*".

8. However, under s 53(6)(a) of the BMSMA, an SP has a right to run for election without being "*nominated*" by another person. This section states as follows: -

   "A person is ineligible for election as a member of the council of a management corporation unless he or she is an individual of at least 21 years of age and who —

   (a) is a subsidiary proprietor of a lot;
   (b) is nominated for election by a subsidiary proprietor of a lot which is a company; or
   (c) is not a subsidiary proprietor but is a member of the immediate family of a subsidiary proprietor and is nominated for election by that subsidiary proprietor."

9. Alternatively, under s 53B(3)(c) of the BMSMA, an SP can *"nominate"* himself. This section states as follows: -

   "A nomination for election to be a member of the council of a management corporation or the executive committee of a subsidiary management corporation —
   must state –

   (i) the name of the person nominated (called in this Act the candidate); and
   (ii) the name of the person making the nomination (who may or may not be the candidate)."

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10. The above position has been confirmed by the High Court in *Cheng Hiap Choon and others v Management Corporation Strata Title Plan No 3001* [2022] SGHC 1611.

11. Understandably, this point was not pursued by the Defendants during the hearing before the Court.

Proper Construction of 53A BMSMA

12. When interpreting any legal text, the starting point is always the natural and ordinary meaning of the words in their relevant context, taking into account the purpose of the statute. s 53A of the BMSMA is clear and unambiguous and it states as follows: -

    "Council for mixed-use developments

    53A.—(1) This section applies only in relation to a management corporation with more than 3 subsidiary proprietors constituted for a parcel in a strata title plan, whether or not comprising limited common property but consisting of buildings authorised under the Planning Act 1998 for 2 or more of the following classes of use:

    (a) *residence;*
    (b) *office;*
    (c) *commercial (other than as an office), such as a shop, food establishment or theatre;*
    (d) *boarding premises, such as a hotel, serviced apartment or nursing home;*
    (e) *a prescribed purpose.*

    (2) Subject to this section, in the case of a management corporation of a mixed-use development mentioned in subsection (1), there must be reserved for each class of use mentioned in that subsection and authorised for that development under the Planning Act 1998, at least one office as member of the council of that management corporation (called in this Act a reserved council office)."

13. The first step is to consider whether s 53A of the BMSMA is applicable to begin with. Pursuant to s 53A(1) of the BMSMA, s 53A of the BMSMA would only apply in relation to a management corporation which:

    (a) has more than three SPs; and

    (b) consists of buildings authorised under the Planning Act 1998 ("PA") for two or more of the classes of use identified under s 53A(1) of the BMSMA.

14. In relation to the second requirement, the identified classes of use include "*residence*" and "*commercial … such as a shop*". A shop unit would fall under the commercial class of use.

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Whether there must be a Minimum Number of SPs in a Particular Class of Use for the Development to be "Mixed-Use"

15. The STB decided that s 53A(1) of the BMSMA did not specify a minimum number of lots for the constitution of a different class of use, stating: -

    "The statute does not specify the requisite number of lots or units for the constitution of a different class of use, or even whether there is a minimum scale required."

16. Nevertheless, the STB framed the central overarching issue to be addressed as follows: -

    "Whether the presence of one shop unit, particularly one in the form of a minimart or a pizza making and delivery outlet, is sufficient to render an otherwise fully residential development a mixed-use development".

17. S 53A(1) of the BMSMA plainly does not require a development to have a minimum number of strata units in a particular class of use, before it can be considered as a *"mixed-use development"* under s 53A(2) of the BMSMA. Accordingly, the Court agreed with the MCST that there is no legal basis to inject an additional requirement for a minimum number of strata units in order to constitute a class of use.

18. It is perhaps even more important for a single commercial unit in a development that is overwhelming residential to have a voice on the council.

Whether Palm Gardens is a Mixed-Use Development

19. The Court held that a development would be a "*mixed-use development*" under s 53A of the BMSMA, where the two criteria in s 53A(1) of the BMSMA are met. That a "*mixed-use development*" under s 53A(2) of the BMSMA is defined purely with reference to s 53A(1)of the BMSMA, is clear from the phrase in s 53A(2) of the BMSMA: -

    "*in the case of a management corporation of a mixed-use development mentioned in subsection (1)*".

20. The Court also pointed out that, as identified by the STB, such a reading is also consistent with reg 2(1) of the Building Maintenance and Strata Management (Strata Units) Regulations 2005 (S 196/2005), which is substantially similar to s 53A(1) of the BMSMA, and defines a "*mixed-use development*" as "*a development that consists or is to consist of 2 or more different classes of use*".

21. It was not disputed that Palm Gardens is a development with more than 3 subsidiary proprietors. Thus, the only issue was whether Palm Gardens consisted of buildings authorised under the PA for two or more classes of use identified under s 53A of the BMSMA. In relation to this second requirement, the identified classes of use include "*residence*" and "*commercial … such as a shop*". Palm Gardens has 695 strata units in the development, comprising 694 residential units and 1 shop unit. Hence, Palm Gardens has two classes of use identified under s 53A(1) of the BMSMA.

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Parliamentary Intent behind s 53A of the BMSMA

22. Parliament introduced s 53A of the BMSMA in 2017 after a serious of public consultations.

23. At the Second Reading of the Building Maintenance and Strata Management (Amendment) Bill on 11 September 2017, the Second Minister for National Development explained the rationale for the proposed introduction of s 53A of the BMSMA: -

    "On the issue of fair representation, clause 38 or new section 53A provides that each class of use in a mixed-use development will be given a reserved seat in the council. Different classes of uses have different needs, so it is important for each to have a "voice". The classes of use include residential, commercial and single independent lot groups like hotels and serviced residences. There was feedback about a residential and retail development where the council was dominated by retail SPs. This resulted in a skewed decision by the council to lease common property cheaply to the retail shops in the development. The facility of reserved seats for each user class will go some way to address over-domination by any one user class, and put each group in a more equitable position in managing the MCST."

24. This interpretation of Parliament's intention behind enacting s 53A of the BMSMA was approved by the Court. The Judge stated that: -

    "It was thus apparent that the legislative purpose of s 53A of the BMSMA is to ensure adequate representation across different classes of use within a development."

Grant of Written Permission by the Urban Redevelopment Authority

25. It was common ground among the parties that whether a development consists of *"buildings authorised under the Planning Act 1998 for 2 or more of the following classes of use"* was to be assessed by examining the Grant of Written Permission ("WP") issued by the Urban Redevelopment Authority ("URA").

26. The MCST submitted and the Court accepted that the relevant WP to be considered would be the latest grant on record, the WP issued on 14 December 2000 which granted strata subdivision permission for *"695 strata units (comprising 694 residential units and 1 shop unit)"*. The residential units clearly falling under the *"residence"* class of use, and the shop unit falling under the *"commercial"* class of use, Palm Gardens was therefore authorised under the PA for two classes of use – residence and commercial.

27. The Defendants relied on earlier WPs issued on 19 February 1997 and 10 January 2000, and a corrigendum dated 14 February 2000, which showed that written permission was initially granted for the erection of a *"condominium housing development"*, without any commercial use or shop, but subsequently amended to include a shop unit which appears to be part of the club house. The Defendants argued, and this was accepted by the STB, that this did not change the development from "*residential*" to *"mixed-use"*.

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28. The Court pointed out that this misses the question to be examined, which is whether a development, whether described as "*condominium housing development*" or otherwise, is authorised for two or more classes of use under s 53A(1) of the BMSMA. Such information is contained in the latest WP, which clearly stated that Palm Gardens is authorised under the PA for "*695 strata units (comprising 694 residential units and 1 shop unit)*", thus fulfilling the requirements of s 53A of the BMSMA.

29. It should be pointed out that whether a development is considered a "*mixed-use development*" under s 53A of the BMSMA and the regulations is a status that is not permanent. The classes of use that constitute a "*mixed-use development*" under the Building Maintenance and Strata Management (Strata Units) Regulations 2005 can be amended and was in fact amended in 2018. s 53A(1)(e) of the BMSMA also allows the Minister to prescribe additional classes of use.

URA's Land Zoning Categories

30. In deciding whether s 53A of the BMSMA applies, the STB placed much emphasis on the zoning of the land by URA. This is what the STB said: -

    "*Although the BMSMA is administered by the Commissioner of Building of the Building and Construction Authority ("BCA"), the BCA itself does not appear to have an independent authority on use or zoning of land. The absence of such authority is not surprising as land use planning falls under the purview of the URA. Hence, any examination of land zoning should be conducted with reference to the Master Plan published by the URA".*

31. The STB was very much influenced by the fact that Palm Gardens was situated on land zoned as "*residential*".

32. However, the zoning of the land by URA has nothing to do with the application of s 53A of the BMSMA. Nowhere in s 53A of the BMSMA nor anywhere in the BMSMA or the regulations nor in the Parliamentary debates is there any reference to the zoning of the land by URA. If Parliament had intended that the authorised classes of use under the PA for the purposes of s 53A(1) of the BMSMA were to be determined according to the URA land zoning, the provision could have stated so expressly in those terms, but it did not.

33. The Court pointed out that even where a condominium is situated on land that is zoned as "*residential*", the URA guidelines allow for commercial shops to operate in developments built on such land, within certain parameters, such as a maximum of 0.3% of the proposed residential gross floor area. It was thus clear that the URA land zoning of a particular plot of land is not determinative of whether a development has two or more authorised classes of use under the PA. Whether there is such authorization would still have to be assessed with reference to the latest WP issued by the URA.

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34. Moreover, there is in fact no zoning for "*mixed*" or "*mixed-use*" amongst URA's 31 land zoning categories.

1) Residential
2) Residential with Commercial at 1st Storey
3) Commercial & Residential
4) Commercial
5) Hotel
6) White
7) Business Park
8) Business Park – White
9) Business 1 - B1
10) Business 2 – B2
11) Business 1 – White
12) Business 2 – White
13) Residential / Institution
14) Health & Medical Care
15) Educational Institution
16) Place of Worship
17) Civic & Community Institution
18) Open Space
19) Park
20) Beach Area
21) Sports & Recreation
22) Waterbody
23) Road
24) Transport Facilities
25) Rapid Transit
26) Utility
27) Cemetery
28) Agriculture
29) Port / Airport
30) Reserve Site
31) Special Use

35. The term "*mixed development*" is loosely used to refer to land zoned commercial and residential and this appears to be the approach taken by the Defendants and the STB. However, "*mixed-use development*" under s 53A of the BMSMA is more than just mixed commercial and residential use. It is two or more of the 4 or 5 classes of use, not limited to residential and commercial e.g., mixed office and commercial use.

Emails from URA & BCA

36. The STB was influenced by email replies from URA and BCA, obtained by the Defendants, into thinking that s 53A of the BMSMA does not apply to Palm Gardens. The STB stated: -

"Notably, the BCA confirmed that Section 53A BMSMA only applies to mixed-use developments and both the BCA and URA unequivocally indicated that the property is classified as a residential development" and "both the authorities unambiguously stated that the property is classified as a residential development. Notably, BCA in its reply also highlighted that 53(A) of the BMSMA only applies to mixed-use development".

37. The Court agreed with the MCST that these replies were not binding on the Court but nevertheless examined the correspondence for completeness.

38. The URA officer did not say that s 53A of the BMSMA is not applicable to Palm Gardens. All she replied was: -

"Palm Gardens is approved as a Residential (not mixed) development. I am unable to comment on the BMSMA as it is administered by BCA."

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39. The BCA officer did reply: -

"Section 53A of the BMSMA provides for the election of council in a mixed-use development. Based on our records, MCST 2553 is registered as residential development".

40. However, the Court pointed out that the exact question posed to the BCA officer was not disclosed and it was not known what the registration mentioned by the officer relates to. In any event, the central inquiry under s 53A of the BMSMA is not whether the BCA had registered the MCST as residential or otherwise, but whether under the PA, the MCST consisted of buildings authorised for two or more classes of use identified in s 53A(1) of the BMSMA. And that must be answered with reference to the latest WP for Palm Gardens.

41. The Court noted that the STB did not explain why it did not refer to replies from a more senior officer in the BCA. In response to a query on whether s 53A of the BMSMA would apply to a development of 600 plus units with 1 shop unit, the Deputy Director replied: -

"The following is an extract of section 53A(1) & (2) of the BMSMA. You may wish to refer to the Written Permission issued by URA for the development to check what class of use the "shop" comes under."

42. In relation to a more specific query regarding Bayshore Park, a residential condominium (and not mixed development) with more than 1000 residential units and several shops, the Deputy Director said: -

"Under Section 53A of the Building Maintenance and Strata Management Act (BMSMA), a management corporation (MCST) comprising 2 or more classes of use authorised under the Planning Act, should first reserve at least one seat in the council for each class of use listed in the provision. We note that the grant of written permission of 16 May 1983 stated that there were housing units (residence) and shop units (commercial) in the development, which these two types of unit also fall under the classes of use in Section 53A of the BMSMA. Thus, Section 53A applies to this development."

43. The Court agreed that it could not be said that both URA and BCA had stated that s 53A of the BMSMA does not apply to Palm Gardens. On the contrary, the more senior BCA officer had stated that reference should be made to the written permission issued by the URA and that where the written permission stated that there were housing (residence) and shop units (commercial), s 53A of the BMSMA would apply.

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The Concept of Mixed-Use Development

44. Although s 53A of the BMSMA was only introduced in 2017 and came into operation in 2019, the concept of *“mixed-use development”* under the BMSMA and its regulations has been around for many years.

45. The term “*mixed-use development*” appears in both the Building Maintenance (Strata Management) Regulations 2005 and Building Maintenance and Strata Management (Strata Units) Regulations 2005. The STB noted that the definition of “*mixed-use development*” in s 53A of the BMSMA is “*substantially similar*” to the definition in the 2005 regulations and “*need not be distinguished*”.

46. Quite apart from the relatively new concept of reserved council office under s 53A of the BMSMA, a mixed-use development attracts a number of other consequences.

47. Under the Building Maintenance and Strata Management (Strata Units) Regulations 2005, the fee for filing a schedule of strata units for a mixed-use development is double that for a development that does not have mixed-use i.e., single use only (can be residential, office, commercial, hotel or industrial use). Under the Building Maintenance (Strata Management) Regulations 2005, the application fee for Commissioner’s approval to collect maintenance charges is also double for a mixed-use development.

48. BCA’s Guidelines for Filing Schedule of Share Values contain provisions on how to allocate share values for single-use residential developments, single-use non-residential developments and mixed-use developments. The share values for single-use residential developments are allocated purely based on floor area groupings. However, for mixed-use developments, residential units are assigned a weight factor of 1 while shops and offices are assigned a weight factor of more than 1, such that their share values will be higher for the same floor area and they have to pay more in maintenance contributions, on account of their expected higher usage of the common property.

49. The allocation of share values in Palm Gardens, using the actual floor areas and share values of the Defendants and Mr Zhang’s shop unit in Palm Gardens is as follows: -

	Floor Area	Share Value
1st & 2nd Defendants	125.0 Sq M	4 out of 2710
3rd & 4th Defendants	113.0 Sq m	4 out of 2710
5th & 6th Defendants	89.0 Sq M	3 out of 2710
Mr Zhang’s Shop Unit	74.0 sq M	***4 out of 2710***

50. It can be seen that while the three residential units were allocated share values based on floor area, the shop unit was allocated a share value that was disproportionally higher than the residential units, and in quantum higher than the 5th and 6th Defendants’ unit which had a bigger floor area.

51. This is clear indication that Palm Gardens was treated as a mixed-use development. There is absolutely no basis to treat Palm Gardens as a mixed-use development under the BMSMA Regulations but not as a mixed-use development under the BMSMA.

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Crux of the Problem

52. The Defendants, the STB and possibly the BCA officer made the following mistakes: -

    (a) Assuming that "*mixed-use development*" under the BMSMA and "*mixed development*" under URA land zoning mean the same thing; and

    (b) Assuming that if a development is "*residential*", it cannot be a "*mixed-use*" development under s 53A of the BMSMA;

53. They conflated the distinction between "*single use development*" vs "*mixed-use development*" under the BMSMA and its regulations, with the distinction between "*residential development*" vs "*mixed development*" under URA's land zoning categories.

54. The Defendants used the terms "*mixed development*" and "*mixed-use development*" interchangeably and the STB stated that "*there is no meaningful distinction between "mixed-use developments*" and "*mixed developments*". In actual fact, "*mixed development*" and "*mixed-use development*" are two different things. The STB incorrectly stated that the MCST took the position that Palm Gardens is a "*mixed development*" when in fact the MCST's position is that Palm Gardens is a "*mixed-use development*" under s 53A of the BMSMA.

55. The Defendants and the STB also wrongly assumed that a "*residential*" development cannot be a *"mixed-use"* development. Hence, the erroneous conclusion that s 53A of the BMSMA is not applicable since the development is undoubtedly a "*residential*" development. This same misunderstanding was also present in the earlier STB decision in *Urban Vista*, which the Defendants relied on. Insofar as *Urban Vista* stood for the proposition that a residential condominium with a few shop units cannot be a mixed-use development under s 53A BMSMA, that decision must also be regarded as over-ruled.

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