

PONDOK" SYSTEM AS A MODEL FOR RETIREMENT VILLAGE IN MALAYSIA: A LEGAL PERSPECTIVE

Sufian, A.^{a*}, and Mohamad, N.A.^b

^aLegal Practice Department, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia

^bCivil Law Department, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia

*Corresponding author: azlinor_s@yahoo.com

ABSTRACT

The Traditional Islamic Educational Institution (hereinafter referred to as "Pondok") has been established as part of formal traditional religious educational system in Malaysia. There are many literatures on Pondok which focussed on syllabus that are taught in Pondok and methodology of teachings that are engaged in Pondok. Albeit none of the available literatures discuss the issues related to the operation of Pondok from a legal perspective whereby it is quite crucial to determine the relationship between the operator (management of the Pondok institution) and occupier (who can be a tenant/lessee/licensee/unit owner/student- depending on the nature of modus operandi of the Pondok). Clear determination of the rights and obligations of these two stakeholders will enhance the protection of interest and welfare of the affected parties as there would be several legal implications that may derived from the establishment of this relationship. The Pondok is generally well received by many Malay Muslims either for young adults or elderlies. Nevertheless the current trend shows that, apart from being a place for seeking education, Pondok has been developed to be a place for elderlies to seek continual religious education as well as a new settlement that suits their needs within a sociable and supportive environment. The aims of this article are to look into the legal set up of the Pondok, rights and duties of the Pondok Operator and the occupiers, legal

status of the occupiers and management of the common properties within the Pondok. The research employs a qualitative approach that involved inter alia analysis of relevant literatures, including applicable statutes covering Malaysia and Australia. Besides that it also utilises a case study of two (2) Pondok that specifically cater the elderlies in two different states in Malaysia and a comparative study with the retirement village law and concept practiced in New South Wales, Australia. The findings of the study reveal that there are various means of operating the PS in Malaysia and it is not governed by any standard rules and procedures. Thus there is a need to have a proper legal framework for the management of Pondok in Malaysia as it involves the management of physical, financial, legal and other matters related thereto.

Keywords: elderly, retirement village, pondok, wakaf, land

1 INTRODUCTION

Pondok system (PS) is seen to be a new concept of accommodation (or housing) which provides for in-house religious education and becoming popular for certain groups of elderly in Malaysia. The PS shares a certain similar concept and practices with the concept of Retirement Village ("RV")

as practiced in few countries like Australia and United Kingdom. These countries have developed statutory as well as administration and management frameworks to support the implementation of RV concept. However the basis for establishment of PS and RV differs where the earlier concept is based on accommodation/housing that is attached with religious orientation while the latter is based on housing with care support or accommodation with facilities suitable for elderly. There are presently no specific legal provisions, no formal requirements or guidelines on the establishment of PS, neither by the planning authorities nor the state religious councils for the elderly. In the absence of laws and regulations to govern the development of PS, it may cause few problems. Firstly, problem to determine the status of proprietorship of the unit purchased from the PS operator. Secondly, problem relating to the ownership of the land as many PS are established on wakaf land; and thirdly, problem in claiming any remedy or insurance, should there be any negligence occurs within the PS.

The objective of this paper is to explore the modus operandi of PS for elderly and analyse the legal structure of its setting, which inter alia includes the land tenure holding. Apart from this, the paper will look into the concept of RV as practiced in Australia since the concept of RV in general is similar to PS that focuses on the needs of the elderly.

It is significant to study the concept of PS for elderly as this would have the implications on the extent of rights and obligations of PS operator and occupants as well as status and liability of an operator towards occupants of PS. In this paper the term occupant and resident will be used interchangeably.

2 LITERATURE REVIEW

PS is not new in Malaysia. It has begun in the 18th century A.D. and developed until the 20th century A.D. After the Bangkok Treaty between Siam and English was sealed in July 1327H/1909 A.D., the pondok system spread widely in Kelantan, Terengganu, Kedah and Perlis[1]. It is known as traditional Islamic education[2]. In fact the record of wakaf in Singapore

when it was part of Malaysia can be traced back to Wakaf of the Omar Mosque of Kampung Melaka which was endowed by the late Syed Omar Ali Aljunied a trader from Indonesia who would probably originate from Yemen in 1820. The first Wakaf legislation was passed by the British legislation in 1905, which was provided under the Muhammedan and Hindu Endowments Ordinance (chapter 27) enacted on 8th September 1905[3].

The term pondok originates from the Arabic word “funduk” which means houses of lodging or small houses (hut), which can accommodate three or four people per house [4]. Nonetheless, the establishment of PS is based on education orientation unlike the concept of RV, where it focuses on the accommodation, housing or the facilities within. The previous literatures focussed mainly on the abovementioned perspectives, and none on the legal aspects of PS, its operator and occupiers. PS has been identified as one of the methods in Islamic education that has linked to the Islamic movement [4a]. It is also recognised as part of the informal institution in the early period of independent. [4b] Discussions on PS has been analysed on its functions and its development, in particular in Kelantan in which Kelantan is normally synonym with PS education [4c].

In this paper PS is discussed in the context of accommodation for elderly that is almost similar to RV concept as practiced in Australia. The paper focuses on the legal structure of PS which includes the issue of land tenure, the relationship, rights and obligations between the operator of PS and the occupants as well as the law governing the administration of PS. Thus the paper will exclude discussions on PS purely as traditional religious education for Muslim, as there are many available writings on this perspective.

3 DATA AND METHODS

This paper is written based on semi qualitative and empirical research as means of data collections in which two (2) PS were taken as case studies. The specific case study involves the Pondok Al Jenderami in Dengkil, Selangor and Al Bakriah Institute of Islamic Study or known as Pondok

Pasir Tumbuh, Kota Bharu, Kelantan. For this purpose, a visit to the place was organised i.e. Pondok Al Jenderami to personally observe the management and the environment of the subject of research. Briefing, interviews and observation involved in the process. A few interviews were conducted with the operator of Pondok Pasir Tumbuh, the owner-operator, the manager as well as the teacher. Phone interview were also conducted with the Islamic Religious Council, Kota Bharu Kelantan, being a body having in-charge on matters pertaining to Islam and Adat(Custom). Another interview was conducted with the Land Officer of Kota Bharu, Kelantan as to inquire the position of land in which PS are built.

Literature review is also done to support the findings. The criteria for the selected PSs are based on various factors such as the accessibility of the data and the availability of respondents to facilitate the interviews as well as the period of the establishment of the PS. Several phone interviews were also made to other various PS in Kelantan and Kedah in order to see the general administration practices of PS and to determine whether different states have different practices of PS. Meanwhile as far as RV is concerned, the materials and sources were based on literature review of several textbooks, conference papers, articles and government documents as well as information that were obtained from relevant websites.

4 RESULTS AND DISCUSSION

4.1 *Modus Operandi of PS*

In general, PS in Malaysia is established under the concept of endowment for charitable and religious purposes (wakaf) and trust. For instance, the first pondok in Kelantan which was situated at Pulai Condong also practices the same concept. These practices could be seen in almost all other PS in other parts of Malaysia and Thailand[5]. Under this concept, the owner of the land or the trustee manages the land as a place for students as well as for the elderly either single or couple. It is also provides a place to seek religious knowledge as well as providing an environment that suits the needs of the people. They may either build a small classroom or musolla or mosque in a plot of land owned by them or pledged by others on a basis of wakaf

(endowment) [6]. These places are also used as venues to teach Islam apart from the normal use as a place of worship. When the classes or mosque could not accommodate the demand, the operators or the teachers invite the Muslim within the community to pledge their lands or properties for wakaf either for the benefit of the public or for a specific purpose. In situations where the financial is sufficient, the operators will buy more land to expand the operation of the PS. The creation and the operation of PS may be implemented through several methods; creation through wakaf, conditional sale of lots/land, voluntary contribution or permission to occupy land, outright sale of lots for PS and sale of buildings on wakaf land.

i. The creation through Wakaf

The creation of wakaf for PS may begin with the commitment from any Muslim who wishes to commit their properties and life for Islam. The common examples are when the teachers, who teach Islam, build either a madrasah or mosque and invited people to seek knowledge. Winzeler writes: A man who has studied and perhaps taught elsewhere and who has aspirations may return to his own village and build a madrasah with the help of other villagers on his own land or on land provided by his father or someone else in the community; or such a man may marry into a village and be assisted by his father-in-law, who may be a pious wealthy man and other villagers to establish a school. Similarly, such a man may marry the daughter of the guru and teach in his pondok and when the guru dies, develop his own school. Once opened on the other hand, the school may grow if a man has or gains a reputation and adolescent boys and young men are attracted to his school as students[6a].

There is no specific fee but the students normally voluntarily contribute to the teacher in kind or in cash. Some owners clearly set a niyyah (religious intention) to create wakaf (wakaf am) indicating that his land is to be used for teaching and learning religious knowledge. To serve the purpose, buildings will be developed on the land and the buildings are not automatically forming part of the land under wakaf[6b]. The application for the creation of wakaf of the landed properties must be made pertaining to the

building or other landed property built on wakaf land. The creation of wakaf in Islam is always subject to several conditions such as:

1. Wakaf should be made permanent without limitation to any particular period (perpetual)
2. Wakaf intents / objectives should be clearly stated and is not valid if not (stated) and should not in contrary to Shariah
3. The Wakaf property that has been intended (for Wakaf) is effective with immediate effect and cannot be withdrawn. Its objective is also not allowed to change and shall not be subject to conditions except through implementation of istibdal. ((substitute of wakaf).

ii. Conditional Sale of lots/lands

Another category is where the operator or individual identifies specific land and negotiate to buy the land from the owner. The potential land will be divided into several lots and the lots will be offered for sale with specific purpose that the land will later use as wakaf either wakaf khas if the buyer/owner wishes to stay on the land or wakaf am if the buyer wishes to contribute to others. The potential buyer will buy the lots subject to certain conditions. The residents who wish to buy lot will be given relevant advice or pre-counsel session so they may understand fully the transaction and its effect. Among others, if the occupants choose not to share the lot thus he may create wakaf khas in which the intention of the wakaf is only for his or her family's benefit. If he chooses to create wakaf am, thus he needs to share the hut with other occupants. Wakaf khas will become wakaf am once the owner dies and the heirs cannot fulfill the condition attached to the wakaf.

Apart from the above two (2) methods, there are other general conditions identified by the operators to facilitate the administration and the monitoring of the PS which include the age limit for the elderlies and other students, the fees, and other housekeeping conditions. In Pondok Al Jenderami, the occupants must show commitment to seek the religious knowledge and thus they are only allowed to take leave up to 80 days a year subject to permission of the operator. In some PS, they may come and go as they like

provided that they contribute to the maintenance of the PS. Most of the PS does not identify the amount of the fee and the residents or occupants shall voluntarily contribute to the PS. In Al Jenderami, the entrance fee is RM500 while other contributions are on voluntary basis. However, the entrance fee shall be waived if the occupant has no means to pay.

In a bigger scenario, al Jenderami is a foundation which manages various types of Islamic traditional education for various groups of people. Being a legal entity, the foundation acts as the operator and is legally registered with the state religious council. Even though the land is registered under the name of the Foundation, but the Foundation is just a trustee to the property. As far as the occupants are concerned, even though they bought the lot but since a wakaf is created thus they become the beneficiaries of the wakaf properties either for both wakaf am or wakaf khas. A wakaf property cannot be sold as it is considered as the property of Allah swt and shall remain forever. Nevertheless, the operator or the trustee can utilise the land either to lease or rent out or make activities that serve the purpose or the intention of the dedicator of the wakaf. It is the duty of the wakaf operator to ensure that all activities and management are done according to Shariah.

iii. Voluntary Contribution or Permission to occupy land

Under this category, the owner of land voluntarily allows the use of his land to serve the activities in PS until a specific notice is given to take back the land. For instance in Al Bakriah Pondok Pasir Tumbuh, according to an interview with Ustaz Hj Wan Qusyairi b Hj Wan Muhammad, the Secretary, Information and Communication Unit on 4th Oct 2012, out of 40 acres of land, only $\frac{3}{4}$ acres are wakaf land while the balance are private land and the owner has pledged the land to be used by the operators.

This practice is common in PS as the volunteer-land owners believe that they will earn the reward in the Hereafter. The operators will allow elderlies, or anyone who is interested to be part of the residents to build a hut on lots that are normally determined by the operators and the cost will be borne by the occupant and he may sell the hut to others who choose to stay and comply to the rules and regulations in the PS. Nevertheless, the operators

also has a guideline which state when the elderlies dies or wishes to leave the PS thus the property will be put under the management of the PS and they will rent out the hut to others with small fee and the money will be utilised for the management of the PS.

iv. Outright Sale of Lots for PS

However the trend to use wakaf instrument as a basis to operate PS has changed where there are certain PS operators that cater the elderlies through the sale of the lots to occupants. Under the scheme, the occupant will buy the lots and has the opportunity to stay in an environment that is conducive to their needs and lifestyle. Moreover the operators will provide the support system for their spiritual, physical and social activities such as regular medical check- up, facilitate any application for grant or assistance from the welfare department as well as other personal needs. Similar to the practice of RV in Australia, the emphasis on independent and healthy occupant is always a priority. For these services, the occupants are required to pay certain fees on monthly basis. The Malaysian experience on this type of PS is generally new and is quite similar to RV in Australia. Nevertheless, the main purpose and priority of the operators of PS in Malaysia is to provide a proper environment to seek and practice religious knowledge.

v. Sale of buildings on wakaf land

As mentioned earlier, any building on wakaf land does not automatically become wakaf properties. If there is no wakaf created thus the building may be sold or transferred to another person but the sale does not affect wakaf land which belongs to Allah. However, if the property has become wakaf properties thus it shall remain permanently as wakaf land and it cannot be sold or transferred unless with a special reason; the property may be sold but to be replaced with land of better value and gives better benefit to the ummah[7a]. In order to facilitate the demand and innovation of wakaf products and properties, the National Council of Fatwa has made a stand to allow for change of use of wakaf through wakaf ibdal or istibdal (substitute of wakaf), deviating from the original intention of the wakaf dedicator. In this matter, the Council has referred to various views of the jurists. Imam

Hanafi promotes for the creation of wakaf ibdal (substitute wakaf) under certain circumstances including to replace wakaf for mosque. Imam Shafei and Imam Malik do not allow wakaf ibdal unless due to necessity and it should not involve wakaf for mosque.

4.2 PS and the law

At the moment, there is no specific law governing the management of PS. In cases where PS is managed based on endowment or wakaf, there are also unsettled legal issues especially on land matters. The creation of wakaf land either for wakaf am or wakaf khas has been administered by various Islamic religious councils in every state thus contributing to different practices. List 2, Schedule Ninth of the Federal Constitution 1957 clearly states that land falls under the jurisdiction of the state and thus the practice varies. If the land owner or the wakaf administrator wishes to register or refer the matter to the religious council or the land office, the creation of the wakaf shall be formalised with the transfer of the land into the religious council of the state and the council will appoint another agency to administer the land or the wakaf may remain in the names as the owner but he becomes the owner-trustee. The transfer is done using Form 14A subject to section 214A of the National Land Code. The registration of wakaf land under the name of the Islamic Religious Council or the agency appointed by the Council is viewed as the best alternative as it provides security to the creation of the wakaf. If the property remains in the names of the owner or his heirs, the problem may occur if the document for the creation of wakaf is lost or the witnesses have died, dispute may arise and the matter needs to be resolved by the authority.

Nevertheless, if the wakaf land is registered in the name of the owner as trustee, they may apply for endorsement to be made on the land title through Vesting Order as provided under section 416(c) of the National Land Code 1965. This process may minimise the future claims from the heirs of the wakaf dedicator. The present management on PS is done based on the concept of amanah (trust). Even though, most of the properties are registered under the name of the teachers or the operators, and the status of the land is made known to others, the possible disputes pertaining to ownership of

wakaf land may occur especially if the heirs of the owner of the land is not aware or refuse to recognise the dedication of wakaf. This has to a certain extent delayed the registration of the wakaf.

The permanent nature of wakaf land may also be defeated by operation of law. As long as the land is identified as alienated land and is not gazetted or endorsed as wakaf land, the land is always subject to be acquired by the state authority for any public purpose via the Land Acquisition Act 1960. If the land is registered under the name of the teachers or the operators or other individuals who act as trustees, the compensation will only be made to the names that are registered as the owner of the land. If the owner of the land has died, the money will be subject to faraid distribution. In this situation, the permanent nature of wakaf properties may be at stake and depends on the willingness of the heirs to hand over the beneficiaries or the religious council as the sole trustee of wakaf property in Malaysia. This is provided under the Administration of Islamic Law Enactment or the Wakaf Enactment in the respective states such as Selangor, Negeri Sembilan and Malacca.

A normal absolute sale of land or hut which gives the purchaser a right to own the property does not apply to occupants of wakaf lots when they have bought the lot of land or the hut. They may possess the land but the sale of lots followed by the creation of wakaf of the lots defeat the rights of a purchaser to become the owner of the property. In such cases, the sale of the lots does not give the purchaser a proprietary rights thus no title is issued to evidence the ownership of the lot. Similarly, the sale and purchase of the lots only binds the vendor who is the owner/trustee in this case to deliver the property to the purchaser who later creates a wakaf over the land. A purchaser who chooses to stay in the lots becomes the occupant or the resident of the PS and the relationship is determined based on the contract or the silent policy translated from the rules and regulations determined by the operator. In the case of PS created under wakaf khas, the occupants are allowed to transfer the benefit of the wakaf to their close family members or friends who are willing to stay and follow the activities in the PS. If the occupants die, the benefit shall go to the successor or the heir with similar conditions. Otherwise, the lot will be put under the administration of the

wakaf administrator and be categorised under wakaf am. The wakaf administrator who is the trustee of the lots will have the right to utilise the lots for the benefit of the ummah (public) subject to the intention of the wakaf dedicator.

In most of PS, the management will take the responsibility to maintain the area outside the occupants lot. The interview with the management of Pondok Pasir Tumbuh reveals that the residents of each pondok or hut has to pay their own utilities bill such as water bill, electricity bill as well as garbage bill as determined by the management. Although they may have areas that are common to all, the areas are not considered as common property that gives rise to common responsibility and shares values as in RV which follows the principles under Strata scheme.

As mentioned earlier, the purchaser has become a licensee since the right to occupy the land comes with several conditions imposed by the operators or the owners. Under the principle of licensee, the license holder must comply with the terms and condition or otherwise it may give right to the other party to invoke the terms and conditions of the contract. In this situation, the defaulting party may be required to compensate the innocent party or they may invoke the remedies as provided under the Specific Relief Act 1950. To some extent, the operators of the PS may give ultimatum to the defaulting party to vacate the land.

In some PS, the residents are required to rent a house or a hut either on sharing basis or single. This is the practice at Pondok Al Bakriah, Pasir Tumbuh. The female students and the aged occupants are required to rent a room or a hut. Only the male students are allowed to stay at the pondok wakaf in order to facilitate the intention of the wakaf dedicator. In this situation, the law pertaining to landlord and tenant applies. The relationship will give rise to rights and duties between both parties including the duties to pay the rental according to the agreed terms. The owner of the lots or land shall have the rights to ask the tenants to vacate the land for breach of the terms or failure to pay the rental upon giving reasonable notice. Nevertheless, in most cases, the PS management as well as the land owner or the lots owner do not have any proper agreement or documentation in

their transactions and in most cases, the relationship lies on trust and religious commitment of the parties.

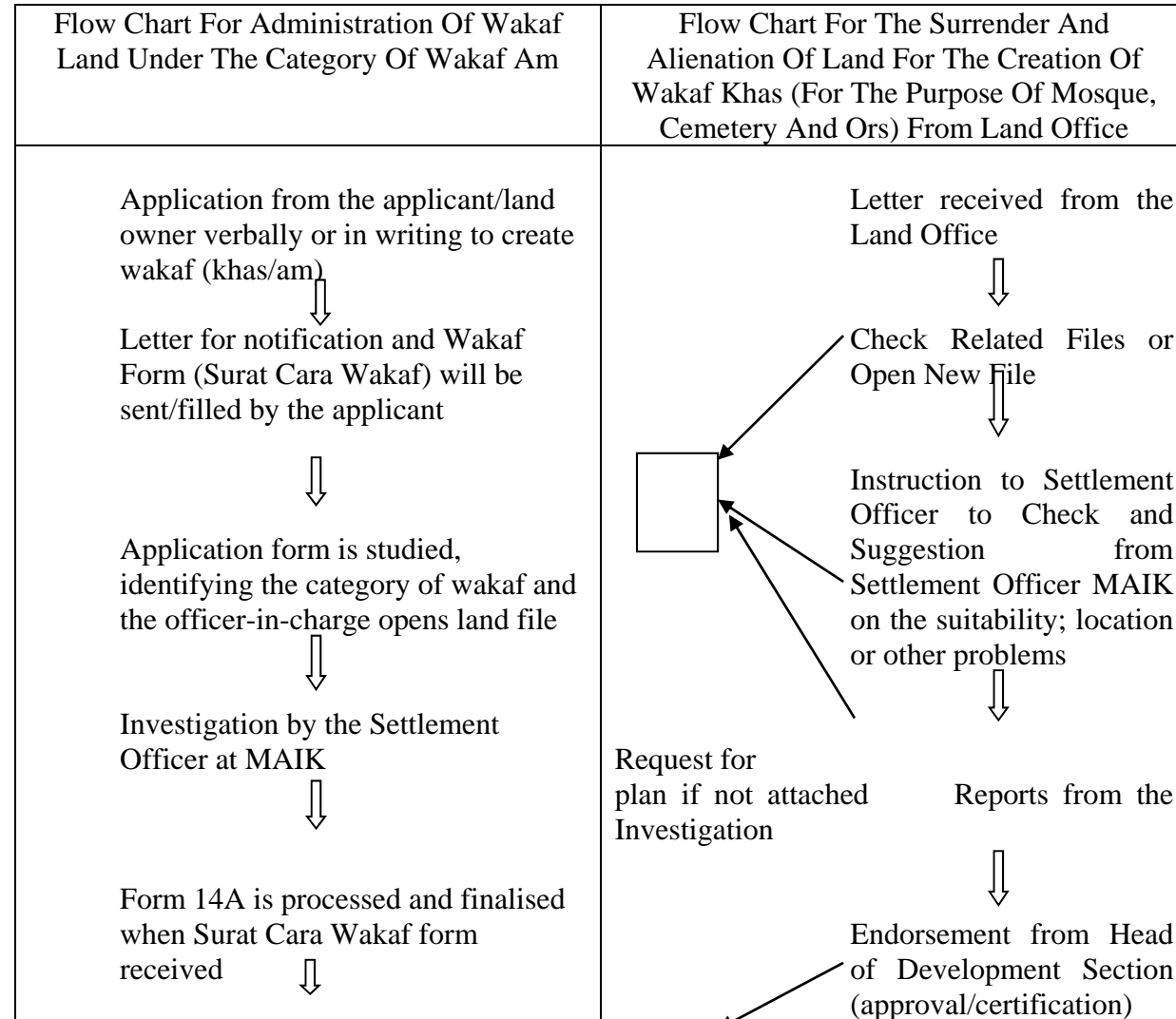
Where the owner of land has voluntarily allowed his land to be used for Islamic traditional education purposes, the occupants may also be considered as a licensee in the land/lots. Under the law of torts, a licensee is defined as someone who is given permission to enter or remain on land because the owner consents to it. This will give rise to a certain rights and duties on both parties such as the landowner or the lot owner shall have the right to forfeit the lots or ask the occupant to vacate the land with proper and reasonable notice subject to what has been agreed in the agreement. In Malaysia, oral contract is valid thus; there are still many contractual agreements which are non-commercial in nature take place without having a proper written document. If the occupant build a hut or pondok on the land, under the Common law principle of fixture and chattel which is also applicable in Malaysia, the building forms part of the land thus the owner of the land will have the right to the building unless proven otherwise. This is the principle that has been established in the case of *Kiah v Som* where the court held that a Malay traditional house built on stilts is not fixture. This decision gives rise to an exception to the general rule on fixture and the justification for the judgement is that the house can be moved and removed from the land without causing any physical damage to the land. In the case of hut or pondok built on private land with the permission of the owner, the owner of the hut can take the hut with him provided that it shall not cause damage to the land[8a].

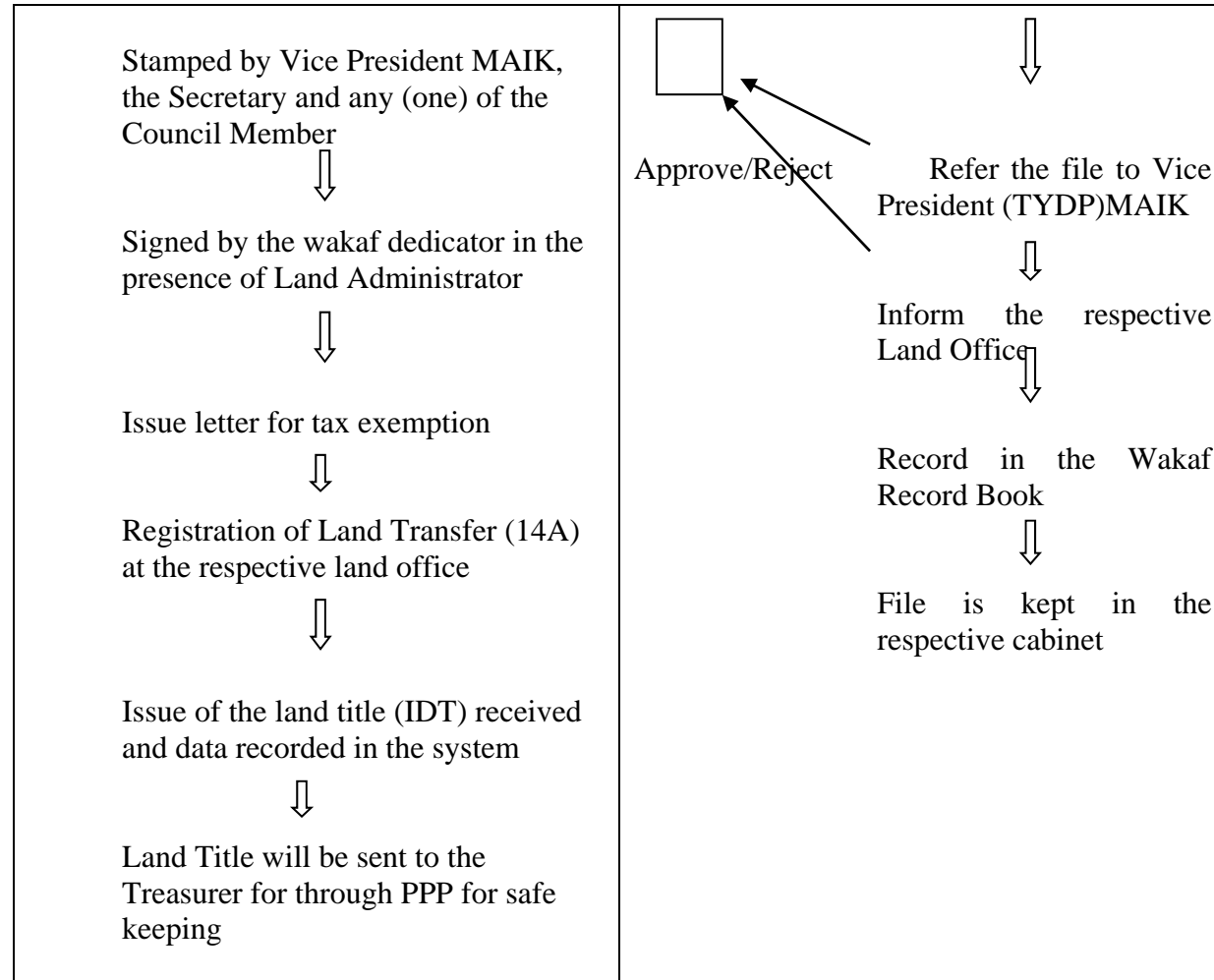
Another issue that comes to light from the interview with the PS administrator is that majority of the PS land are categorised as agricultural land. Therefore, the development of buildings on the land is not within the scope as prescribed under section 115 of the National Land Code 1965. This then may contravene with the law unless an authorisation is received from the State Authority. The efforts to convert the land are sometimes delayed due to other technical requirements such as the compliance to the planning

law and Uniform Building By Laws 1984 which concern about the safety and health aspects of the buildings such as drainage system as well as the reservation of road and etc. In many cases, the PS is managed without having certificate of fitness or certificate of completion and compliance as imposed under Schedule G of the Uniform Building By Laws 1984. However, if the PS is established on wakaf land, it may be legal under the purview of section 4(2) of the National Land Code 1965. The section provides that the provisions of the National Land Code shall not affect the provisions of any law for the time being in force relating to wakaf. Unfortunately most of the states, except for Selangor, Negeri Sembilan and Malacca, do not have a specific enactment for wakaf. Consequently, putting the administration of wakaf land in limbo; overlapping jurisdiction of either the Islamic Religious office or land office or both. Nevertheless, the present Wakaf Enactments also lack in administration of wakaf specifically on PS. In the case of PS, many other bodies may also be responsible, but are found lacking in many ways. It is suggested that each state should have its own wakaf law that shall prescribe all rules and regulation on the administration of wakaf land. In particular, the PS must be subjected to specific laws to take care of all interests of the parties.

Islam prescribes that the benefit of wakaf must be permanent. In relation to this, The 65th Muzakarah (Conference) of the Fatwa Committee of the National Council for Islamic Religious Affairs Malaysia held on 13th October 2004 has made a ruling that despite the limited duration of the land, wakaf of leasehold land is valid and accepted by Islamic law. In relation to this, PS established under wakaf of leasehold land may be converted to become freehold land to facilitate the intention of the wakaf. Furthermore, Section 76(a) of the National Land Code gives power to the State Authority to issue a freehold duration for any land title used for public purpose. The process of creation of Wakaf Am and Wakaf Khas are summarised in the following table:.

Table 1: Process of Creation of Wakaf Am and Wakaf Khas





Source: Rahman, A.R and Kamarul Bahrain, L. n.d. “Sejenak Untuk Memahami Senario Pewakafan Tanah Bagi Tapak Masjid di Kelantan”. Available at: http://www.emaik.my/bi/index.php?option=com_docman&Itemid=1151 retrieved on 6th Oct 2012.

* MAIK-Majlis Agama Islam Kelantan (Religious Council of Kelantan)

4.3 RV in Australia

As a comparison between RV and PS, RV began to be developed in 1980s initially appearing in Victoria and New South Wales[10]. In Australia there are 1850 RV (with a construction value of AUD50 billion) with 160,000 or more residents, the industry represents a critical element and care options for elderlies Australian[11]. The RV living, a model that has emerged over the past 30 years or more and now houses more than five percent of people aged over 65 years (and more than ten percent of those over 75)[12]. RV is described as management intensive operating businesses which happen to have a real estate component[13]. The most common push factors for the living in RV in Australia were health issues and the need for greater assistance; death of a spouse; problems in maintaining the home; the need for a lifestyle change; and a desire to be close to family. The pull factors were identified to include the built environment and affordability; location and convenience of location; and maintenance of existing lifestyle and familiarity[14]. From the interview it was found that the reason why the occupants move to stay in PS because it offers facilities that are suitable to the needs of the elderlies. For instance, most of the residents prefer to spend their golden days in a very peaceful manner so that they may focus on acquiring and practicing religious knowledge without any disturbance. The PS provides conducive environment suitable to the slow pace of the people with utmost concern for the welfare and health of the people. Apart from that, most of the operators focus on providing religious education among the prioritised objectives of the establishment of PS in Malaysia[15]. In general there are two types of retirement villages; that is

- Donor-funded villages are funded by way of charitable and/or government contributions: the residents also make a donation on entering the village, such donation being non-refundable; and
- Resident-funded villages, as the name suggests are villages whose total capital expenditure is obtained from residents by way of ingoing payments for the “purchase” of self-care units or assisted apartments occupied, with such ingoing payments being refundable in full or in part in accordance with the resident’s contract at the commencement of occupation”[9].

If these two types of RV are to be adopted in Malaysia, it may be modified through the existing legal landscape. For example, in the first type of RV, it may be organised by the statutory bodies like Tabung Haji that is regulated by Tabung Haji Act 1995 or State Baitul Mal that are established by state enactments. Similarly as for the second type, it may be done by salaries deduction of the employees who are willing to contribute and planning to stay at PS on their retirement through Employees Provident Fund. This may be done by necessary amendments to the Employee Provident Funds Act 1991.

4.4 Retirements Unit Development in Australia

The development of RV in Australia is well monitored by the local authorities. It has many types that is; the village concept, serviced apartments and independent living units. The first type of retirement house is independent living unit where most of the retirement houses developed are of this type as shown in the following table.

Table 2: Retirements Unit Development in Australia in 2009 (Source: Jones Lang LaSalle Retirement Village Database)

	NSW	QLD	SA	WA	VIC	TAS	ACT	NT	Total
Number of Retirement Villages	600	262	393	192	356	38	28	1	1,870
Number of Serviced Apartments	2,910	1,495	1,071	282	1,672	53	22	0	7,505
Number of Independent Living Units	33,682	21,400	14,199	13,026	21,841	1,390	1407	64	107,009
Total Number of Units	36,592	22,895	15,270	13,308	23,513	1,443	1429	64	114,514

4.5 *Legislative Components Supporting the RV in Australia*

In Australia, especially in New South Wales, the development of RV is controlled by set of laws and regulations and policies namely; the Retirement Villages Act 1999, the Retirement Villages Regulations 2000 and State Environmental Planning Policy (Seniors Living) 2004[8]. RV is defined as a complex containing residential premises that are predominantly or exclusively occupied, or intended to be predominantly or exclusively occupied, by retired persons who have entered into village contracts with an operator of the complex[9]. Retired person is referred to a person who has reached the age of 55 years or has retired from full time employment[10]. RV therefore does not include development of housing for seniors or people with a disability that is governed by Aged Care Act 1997 or a nursing home within the meaning of the Public Health Act 1991[11]. The Retirement Village Act 1999 is administered by the Office of Fair Trading of New South Wales Department of Commerce. The right to occupy the RV is also extended to the spouse of the retired person and de facto partners who continue in occupation after the retired person dies or vacate the RV[12].

In terms of financial, historically, retirement villages were owned and operated by churches and charitable institutions[13]. However, the purchase of housing unit in RV is similar with the purchase of other units but with special facilities. That is why it is the practice to provide with Disclosure Statement for purchaser of housing unit within the RV [14]. This practice is similar to buying of the housing units within the gated communities, where the bundle of rights and obligations of operator of the RV and residents are well stipulated in the act [15].

It seems that management of RV is similar to strata units where there is Village Rules[16]. There are also residents committees that represent the residents[17]. In cases when the well-being and financial security of

residents are at risks the law allows the appointment of administrator to manage the RV[18]. The interesting point is the availability of dispute resolution in case of dispute between operator and resident[19]. Affairs related to RV is treated as similar to other service for consumer where the dispute may be channelled to Consumer, Trader and Tenancy Tribunal. This Tribunal is established under Consumer, Trader and Tenancy Tribunal Act 2001[20].

The operation of RV in Australia is been reviewed by Productivity Commission where RV is considered as part of aged care system. RV is known to be service integrated housing for older people. The commission was entrusted to look into the financial sustainability of the aged care system and its ability to supply an adequately trained workforce and to respond to changing patterns of service demand whereby as far as the RV from legal perspective is concerned, one of the aspects that may need an attention is the issue of security of tenure of the RV occupants[5].

Table 3 is the summary of the legislative frameworks that are available in Australia that regulate the operation of RV. In terms of legislative mechanism, it is proposed that Malaysia may develop PS that is similar to RV concept but has the elements of religious orientation (as established by PS). This is possible by utilising the law and regulations on gated communities that is regulated by the Strata Titles Act 1985. However there is a need to have specific guidelines that may be provided by the Department of Town and Country Planning or any other related departments. At present, there are Guidelines on Building Requirements for Disabled Persons (1999) and Code of Practice on Access for Disabled Person for Public Building. These two planning policies may be used as guidelines to develop the facilities within the PS acknowledging that those who are occupying the PS are elderlies.

Table 3: Australian Legislation Supporting RV

State	Legislation
Australian Capital Territory	Fair Trading Act 1992 Retirement Villages Industry Code of Practice
New South Wales	Retirement Villages Act 1999 Retirement Villages Regulation 2009
Northern Territory	Retirement Villages Act 1995 Retirement Villages Regulations Retirement Villages Code of Practice
Queensland	Retirement Villages Act 1999 Retirement Villages Regulations 2010
Victoria	Retirement Villages Act 1986 Retirement Villages (Contractual Arrangements) Regulations 2006 Retirement Villages (Records and Notices) Regulations 2005
South Australia	Retirement Villages Act 1987 Retirement Villages Regulations 2006
Tasmania	Retirement Villages Act 2004 Retirement Villages Regulations 2005
Western Australia	Retirement Villages Act 1992 Retirement Villages Regulations 1992

Source: Lucy Craddock and Andrea Blake, 2012. *The impact of tenure type on the desire for retirement village living. 18th Annual Pacific-Rim Real State Society Conference, Adelaide, Australia, 15-18 January.*

In terms of legislative mechanism, it is proposed that Malaysia may develop PS that is similar to RV concept but has the elements of religious orientation (as established by PS). This is possible by utilising the law and regulations on gated communities that is regulated by the Strata Titles Act 1985. However there is a need to have specific guidelines that may be provided by the Department of Town and Country Planning or any other related departments. At present, there are Guidelines on Building Requirements for Disabled Persons (1999) and Code of Practice on Access for Disabled Person for Public Building. These two planning policies may be used as guidelines to develop the facilities within the PS acknowledging that those who are occupying the PS are elderlies.

4.6 Modus Operandi of RV

In general there are two types of retirement villages. The first type is "Donor-funded villages are funded by way of charitable and/or government contributions". Under this type the residents also make a donation on entering the village, such donation being non-refundable. While the second type is "Resident-funded villages", are villages whose total capital expenditure is obtained from residents by way of ingoing payments for the "purchase" of self-care units or assisted apartments occupied, with such ingoing payments being refundable in full or impart in accordance with the resident's contract at the commencement of occupation [21]. The second type is for commercial or business where the operator would be similar to

other developers that have involved in housing development. In this regard the land tenure for RV would be in many kinds or methods.

One of the RV units is self-contained independent living unit (SCILU). There are few land tenure methods for SCILU that may be worth to have a

look in order to compare it with the practice of PS in Malaysia. These methods are almost similar to all states in Australia and summarised in the Table 4.

Table 4: Summary of Land Tenure Methods for SCLIU

LAND TENURE METHODS FOR SCLIU (one of the units in RV model)			
Freehold	Leasehold	Loan or/and License	Rental
<ul style="list-style-type: none"> Resident-purchaser will have indefeasibility of title Similar to strata title management where purchasers will pay the maintenance fee for facilities available within the RV 	<ul style="list-style-type: none"> Resident is granted a long term lease (i.e. for 99 years) following the payment of a lump sum lease premium that is the equivalent of the market value of the SCILU. Upon exit, or re-sale, the resident is paid a lease termination payment which is offset by a Deferred Management Fee (DMF) or exit fee. Resident may share in capital gains, or losses. 	<ul style="list-style-type: none"> Resident makes a payment to the RV in the form of an interest free loan when taking up residence in the SCILU. In exchange for this loan the operator village operator then grants a license over the unit for the resident to occupy and permission to access common facilities. The loan is repaid to the resident (or their estate) upon exit from the village on the unit being resold. The departure generally also attracts a DMF which is offset against the loan being repaid. The license agreement is not registered on the State Land Register. 	Resident becomes tenant under the law of landlord and tenant.

5 CONCLUSIONS AND RECOMMENDATIONS

The budget 2013 allocated a huge figure for construction of affordable housing where the target purchasers are young graduates. At present the government does not really focus on the needs of the elderly for housing. This is probably due to the assumption that elderly may have acquired a roof for shelter. Nonetheless the continuous demand on housing and the current trend of the housing development in Malaysia has shown that there is a potential development of RV undertaken by private developers. It is reported in the newspaper that the development in the area of Iskandar development in Johor Bharu may involve development of RV where the target market is for Singaporeans. It shows that Malaysia is moving towards RV and as such there is a possibility of having a proper mechanism to cater this development. At the same time the concept of PS that is based on religious orientation should be promoted as one way of providing conducive environment to Muslim elderlies in Malaysia to live and stay together with their own peers while their ritual needs are not neglected. Nevertheless, the projects the activities must be properly monitored by the government either by providing a clear guideline on the administration and management, provide certainty as to the legal framework as well as lend support in terms of finance. The demand for PS for elderlies seems to be increasing thus there is an urgency to minimise any problems legally or financially.

It is suggested that there is a need to form a proper or organised forum among the stakeholders that may be involved in development of PS. It may involve for instance the local authorities, religious council and any authorities that can advise on the built environment features that are possibly needed by elderlies. This forum will facilitate the enhancement of level of understanding of all authorities involved. This is also to support a better protection for resident-occupants as consumers.

Besides, it is also possible to develop a code of practice and conduct as well as planning guidelines for any developer or PS or RV operators that intended to develop PS. This will ensure quality framework and fulfilment of the basic housing needs for elderlies. The formation of uniform code of

practices and conduct will enable the relevant authorities to monitor and enforce it accordingly. There should be awareness on the importance of health, security as well as rights and obligations of parties involved in the PS or RV projects.

The running of PS in general and for elderlies in particular, must run within a proper and clear legal framework. In meeting this objective, there should be a concerted effort through the establishment of special task to oversee the status of the land and planning. Besides that it is also important to look into their problems and determine the relationship of the parties. Thus it may assist determination of the rights and duties of those involved in PS. All parties concerned should play proactive roles especially the government; in order to improve the administration of PS. RV in Australia may provide a model for a better administration of PS or RV system in Malaysia.

REFERENCES

- [1] Jusoh, A. (1990). *Pengenalan Tamadun Islam di Malaysia*. Dewan Bahasa dan Pustaka: Kuala Lumpur.
- [2] Azraai E. & Ors., (2011). The Influence of Middle East on the Development of Islamic Education in Kelantan, Malaysia. *Middle East Journal of Scientific Research* 7 (Special Issue of Diversity of Knowledge on Middle East) pp. 141-150; Pondok also comes from the Arabic word 'funduk', see also Rosnani, H., (2004). *Educational Dualism in Malaysia Implications for Theory and Practice*. The Other Press: Kuala Lumpur.
- [3] Available at http://www.muis.gov.sg/cms/services/Wakaf_abt_sub.aPSx?id=17060 (accessed 5 October 2012).
- [4] Azraai E. & Ors., (2011). The Influence of Middle East on the Development of Islamic Education in Kelantan, Malaysia. *Middle East Journal of Scientific Research* 7 (Special Issue of Diversity of Knowledge on Middle East) pp. 141-150.
- [4a] Badlisham Mohd Nasir.(2010). Pendidikan dalam Gerakan Islam di Malaysia: Satu Tinjauan. *Journal of Islamic and Arabic Education* 2(1), pp. 1-12.
- [4b] Arba'iyah Mohd Noor. (2008). Perkembangan Pendidikan Islam Di Kelantan, *Journal Malaysia Dari Segi Sejarah, Persatuan Sejarah Malaysia*, Vol 36, pp.68-83.

- [4c] Abdul Wasik & Ors. (2005). *Islamic Education in South and South East Asia (Diversity, Problems and strategy)*. The Ridep Institute –Friedrich Ebert Stiftung, pp. 171-209.
- [5] Ahmad, A. H. (1982). *Pendidikan Islam di Kelantan*. Warisan Kelantan, 1(2), pp. 1-28.
- [6] Madrasah Ad Diniah al Bakriah was established by two brothers, Tuan Guru Haji Mustapha bin Abu Bakar and Tuan Guru Haji Abdul Aziz in 1954 by establishing a wooden classroom that accommodated 50 male students. Available at <http://albakriah.wordpress.com> (accessed 3 October 2012).
- [6a] Winzeler, R.L., (1975). *Traditional Islamic Schools in Kelantan*, Journal of the Malaysian Branch of the Royal Asiatic Society, 47(1), pp. 91-103 cited in Hashim, R., Rufai, S. A., & Nor, M. R. M. (2011). *Traditional Islamic Education in Asia and Africa: A Comparative Study of Malaysia's Pondok, Indonesia's Pesantren and Nigeria's Traditional Madrasah*. World Journal of Islamic History and Civilization, 1(2), pp. 94-107.
- [6b] 77th Muzakarah (Conference) of the Fatwa Committee of the National Council for Islamic Religious Affairs Malaysia held on 10th -12th April 2007.
- [7] Arba'iyah Mohd Noor, 2008)
- [7a] 46th Muzakarah of the Fatwa Committee of the National Council for Islamic Religious Affairs Malaysia held on 22 Apr 1999
- [8a] [1953] MLJ 82.
- [9] Retirement Village Association Ltd (2011) *A Sustainable Population Strategy for Australia-Submission to the Department of Sustainability, Environment, Water, Population and Communities*
- [10] Australian Government (2010) *Caring for Older Australians, Productivity Commission Issues Paper*
- [11] Lennhoffs, (1999). Cited in Elliott, P. & Ors, (2002). *The valuation of self-funded retirement villages in Australia: analysis, reliability and investment valuation methodology*. Pacific Rim Real Estate Society Conference. Christchurch, 21-23 January.
- [12] Stimson, R., McCrea, R., (2004). *A Push-Pull Framework For Modeling The Relocation Of Retirees To A Retirement Village: The Australian Experience, Environment and Planning A, Volume 36, pp. 1451-1479.*
- [13] Stimson, R., McCrea, R., (2004). *A Push-Pull Framework For Modeling The Relocation Of Retirees To A Retirement Village: The Australian Experience, Environment and Planning A, Volume 36, pp. 1451-1479.*
- [14] A glance on the website offering PS shows that the main product of PS is religious education.
- [15] Lister, (1994) cited in Elliott, P. & Ors, (2002). *The Valuation Of Self-Funded Retirement Villages In Australia: Analysis, Reliability And Investment Valuation Methodology*. Pacific Rim Real Estate Society Conference. Christchurch, 21-23 January, p.3.
- [16] Malcolm Gledhill (2006) *Overview of the Retirement Villages Act 1999 and the Aged Care Act 1997*, NSW Young Lawyer, the Law Society of NSW: Sydney
- [17] Section 5(1) Retirement Village Act 1999
- [18] Section 4(1) Retirement Village Act 1997
- [19] Section 5(3) Retirement Village Act 1997
- [20] Section 5(4) Retirement Village Act 1997.
- [21] Department of Commerce, Government of Western Australia (2010) *Statutory Review of Retirement Villages Legislation Final Report*.