

Town & Country Planning Bill

Supreme Court determines as inconsistent with the Constitution

Government withdraws Bill

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Town & Country Planning Bill, had been placed on the Order Paper of Parliament, as a normal Bill, and had been published in the Gazette in terms of Article 78 of the Constitution, as required at least 7 days before it was placed on the Order Paper, whereby the Bill is made available to the public. This enabled a citizen of the country to challenge before the Supreme Court the constitutionality of the provisions of this Bill, in terms of Article 121 of the Constitution.

This was unlike the instance of the controversial 'Expropriation Bill', which was printed and presented to Parliament only on November 8, and debated and passed by the Parliament on November 9, after an unprinted copy thereof having been sent to the Supreme Court for Determination, as an Urgent Bill by the Cabinet of Ministers, in terms of Article 122 of the Constitution. This constructively denied the right of an opportunity for a citizen to have challenged the constitutionality of the provisions of the Bill, since no copy thereof was made public.

Hence, in the case of the Town & Country Planning Bill, two Petitioners had challenged the Bill, together with an Intervening Petitioner. In this instance, the Supreme Court heard the submissions made on behalf of the 3 Petitioners, in addition to the submissions made by the Deputy Solicitor General. This was unlike in the instance of the 'Expropriation Bill', where submissions had been made to the Supreme Court only by the Deputy Solicitor General.

Having heard the submissions of the Petitioners representing the people and those of the Deputy Solicitor General, the Supreme Court determined that the subject of Land, coming within the Provincial Council List, the Bill shall not become Law, unless the Bill had been referred by the President to every Provincial Council, as required by Article 154 of the Constitution. Since the Bill had been placed on the Order Paper of Parliament, without compliance of Article 154 of the Constitution, the Supreme Court had declined to make a Determination on other grounds of challenge by the Petitioners.

Article 82 of the Constitution stipulates no Bill for the amendment or repeal of any provisions of the Constitution shall be placed on the Order Paper of Parliament, unless stipulations of Article 82 are complied with, and that in the opinion of the Speaker, if a Bill does not comply with the requirements of Article 82, that he shall direct such Bill to be not proceeded with.

The Supreme Court Hearing into the Town & County Planning Bill had been had on November 21, and its Determination communicated to the Speaker on December 2, is given in full below:

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under Article
121 (1) of the Constitution.

A Bill titled "**Town and Country Planning (Amendment)**".

**S.C. Special Determination
No.03/2011**

Before: Dr. Shirani A. Bandaranayake - Chief Justice
K. Sripavan - Judge of the Supreme Court
Chandra Ekanayake - Judge of the Supreme Court

1. Centre for Policy Alternatives (Guarantee) Limited.
24/2, 28th Lane, Off Flower Road, Colombo 7.
2. Dr. Paikiasothy Saravanamuttu,
No.03, Ascot Avenue, Colombo 5.

Petitioners

Counsel: M.A. Sumanthiran with Niran Anketell, Bhavani Fonseka,
and Jerusha Crosette Thambiah.

Sudharshana Gunawardana,
24/13, Vijayaba Mawatha, Nawala Road, Nugegoda.

Intervient-Petitioner

Counsel: J.C. Weliamuna with Maduranga Rathnayake, Pulasthi Hewamanne, Sudharshana
Gunawardane and Senura Abeywardane

Shavindra Fernando DSG with Sanjay Rajaratnam DSG,
Nerin Pulle SSC, Yuresha de Silva SC and Suren Gnanaraj SC

For the Attorney General

Court assembled at 10.30 a.m. on 21.11.2011.

A Bill bearing the title "Town and Country Planning (Amendment)" was published in the Gazette of the Republic of Sri Lanka on 14.10.2011 and placed on the Order Paper of Parliament on 08.11.2011. Two petitioners and an intervenient petitioner have challenged the Constitutionality of this Bill by their petitions presented to this Court and have thereby invoked the jurisdiction of this Court in terms of Article 121 (1) of the Constitution.

Hon. The Attorney General has been given due notice of the petitions.

Learned Counsel representing the petitioners and the intervenient petitioner (hereinafter referred to as the petitioners) and the learned Deputy Solicitor General on behalf of the Hon. The Attorney General were heard before this Bench at the sittings held on 21.11.2011.

The Bill according to its long title is to provide for the "formulation and implementation of a National Physical Planning Policy with the objectives of promoting, preserving, conserving and regulating a system of integrated planning in relation to the economic, social, historic,

environmental, physical and religious aspects of land in Sri Lanka; for the preparation of national physical plan for the purpose of giving effect to the stated objectives; to facilitate the acquisition of land for the purpose of giving effect to the objectives; and to provide for matters connected therewith or incidental thereto."

It is to be noted that the long title in the present Bill referred to above is to replace the long title to the Town and Country Planning Ordinance.

Learned Counsel for the petitioners contended that the Bill cannot become law due to the failure to comply with the procedure laid down in Article 154 (G) (3) of the Constitution. It was also contended that the provisions contained in the Bill are violative of Articles 9 and 10 of the Constitution as the Bill is seeking to vest in the Minister of Buddha Sasana the power to declare (private) lands as 'Sacred Areas' without statutory guidelines violating Articles 9 and 10 of the Constitution which, if carried out, would have a *chilling effect* on religious right.

Submissions were also made to the effect that the contents of the Bill lead to uncertainty and vagueness, which would be violative of Article 12 (1) of the Constitution.

The main contention of the petitioners was that the subject matter of the Bill comes within Item 18 of the Provincial Council List and therefore it is necessary to follow the procedure laid down in terms of Article 154 (G) (3) of the Constitution. It was accordingly decided first to consider the ground of Challenge on the basis of the requirement to comply with Article 154 (G) (3) of the Constitution.

On behalf of the Hon. The Attorney General, learned Deputy Solicitor General contended that there is no necessity to adhere to the provisions stipulated in Article 154 (G) (3) of the Constitution, as the subject matter of the Bill relates to matters connected with the formulation and implementation of a 'National Physical Planning Policy' and a 'National Physical Plan'. It was further submitted that such formulation and implementation of a 'National Physical Planning Policy' and a 'National Physical Plan' was in order to promote, preserve, conserve and regulate a system of integrated planning in relation to economic, social, historic, environmental, physical and religious aspects of land in Sri Lanka. It was therefore submitted that "National Physical Planning Policy" or "National Physical Planning" amounts to dealing with "National Policy" and therefore would not fall within the subjects enumerated either in the Provincial Councils List or the Concurrent List and therefore would not attract Article 154 (G) (3) of the Constitution.

It is therefore apparent that the main question that has to be determined in terms of the provisions of this Bill is the question as to whether the provisions contained in the Bill deal with national policy.

Provincial Councils came into being in the Sri Lankan Island Republic as a result of the introduction of the 13th Amendment to the Constitution in 1987. Article 154 (A) (1) of the Constitution accordingly made provision for a Provincial Council to be established for every Province. The purpose for such introduction was chiefly to devolve power which was vested hitherto in the Central Government to Provincial Councils.

In the Supreme Court Determination in **Re Thirteenth Amendment to the Constitution Bill and the Provincial Councils Bill** (SC SD Nos.7-48/87) it was clearly stated that the introduction of the Provincial Councils was for the purpose of devolution of authority, which included, inter alia, legislative devolution. This position was emphasized by the Supreme Court in **Madduma Bandara v Assistant Commissioner of Agrarian Services** ([2003] 2 Sri LR 80) where it was stated thus:

"The 13th Amendment to the Constitution, which came into effect in November 1987, was chiefly introduced for the purpose of devolving power from the Central Government to the Provincial Councils."

For the said devolution, it was stated that the Provincial Councils would have legislative power in respect of matters enumerated in the Provincial Councils List (List I) and the Concurrent List (List III) of the Ninth Schedule to the Constitution.

In fact clear provision has been made in the Constitution to this effect. Article 154 (G) (1) refers to the making of Statutes by the Provincial Councils and states as follows:

"Every Provincial Council may, subject to the provisions of the Constitution, make Statutes applicable to the Province for which it is established, with respect to any matter set out in List I of the Ninth Schedule (hereinafter referred to as "the Provincial Council List")."

Provision has been made with regard to the making of Statutes under List II of the Ninth Schedule, which is known as the Reserved List and under the Concurrent List. Articles 154 (G) (7) and 154 (G) (5) (a) deal with the Reserved List and the Concurrent List respectively, and are as follows:

"Article 154 (G) (7) -

A Provincial Council shall have no power to make Statutes on any matter set out in List II of the Ninth Schedule (hereinafter referred to as "the Reserved List").

Article 154 (G) (5) (a) -

Parliament may make laws with respect to any matter set out in List III of the Ninth Schedule (hereinafter referred to as "the Concurrent List") after such consultation with all Provincial Councils as Parliament may consider appropriate in the circumstances of each case."

It is therefore significant to note that when there are amendments to legislation, it would first be necessary to be satisfied as to the classification of the subject matter, in terms of the Provincial Council, Reserved and Concurrent Lists, specified in the Ninth Schedule to the Constitution.

The contention of the learned Deputy Solicitor General for the respondent was that the Reserved List of the Ninth Schedule to the Constitution refers to National Policy and such reference clearly states that the said National Policy is on all subjects and functions. The contention therefore is that the National Policy on any subject or function would come within the ambit of the Reserved List in the Ninth Schedule. Accordingly it was submitted that the National Policy on all subjects and functions are within the framework of the Reserved List, and since it has an extremely wide ambit that it should not be interpreted narrowly.

It was not disputed that the Bill had used the terms "National Physical Planning Policy" and "National Physical Planning" on its long title as well as in other Clauses. It was also not disputed that the said phrases has not been used in any one of the three lists contained in the Ninth Schedule to the Constitution.

In such circumstances the question arises as to how the determination should be made as to whether the subject in question would be placed within the ambit of "National Policy" of the relevant subject.

Learned Counsel for the petitioners submitted that the test that should be used for such determination should be a functional test whereas the learned Deputy Solicitor General for the respondent submitted that regard should be given to the purpose and object of the Bill as a whole and not to the particular words that are used in a clause of the Bill.

The functional test which was referred to in the matter concerning the **Water Services Reform Bill** (SC SD 24 and 25/2003), where this Court had stated that,

“On the whole the Bill is pervasive in its content in eroding the functions of local authorities in providing water services to consumers in each area. It seeks to give legislative recognition to local authorities in abdicating their duty to provide an essential public utility service to residents in its area. The provisions of the Bill are functional in nature with specific application to the matters contained in the Bill. Therefore the Bill cannot be considered as laying down national policy so as to come within List II (Reserved List).”

It is to be noted that in the said Determination although the functional test was used, to arrive at that conclusion, the contents of the Bill had been examined and as correctly stated by the learned Deputy Solicitor General, such examination would have to be based on the purpose and object of the Bill as a whole. In referring to the examination of the purpose and object of the Bill as a whole and not of particular words or phrases, learned Deputy Solicitor General referred to the Determination of this Court in the Bill titled **"An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets** (SC SD 02/2011), where it was stated as follows:

"The Thirteenth Amendment to the Constitution, which made provision for the establishment of Provincial Councils that were empowered to make Statutes applicable to the Province, had clearly stipulated that such Councils would have no power to make Statutes on any matter set out in the Reserved List. Accordingly the legislative power with regard to the National Policy on all subjects and functions are vested with the Central Government."

In determining the question as to whether a subject matter is dealing with the National Policy or not, it would therefore be necessary to consider the nature of the provisions contained in the Bill, its purpose and object in the light of the provisions contained in the Thirteenth Amendment to the Constitution and the three Lists enumerated in the Ninth Schedule to the Constitution.

The present Bill is for the purpose of amending the Town and Country Planning Ordinance. Clause I of the Bill referred to the short title and states that;

“This Act may be cited as the Town and Country Planning (Amendment) Act

There are Eight Clauses in the draft Bill, and a statement of the legal effect of all these Clauses are given in the Bill. According to the said statement of legal effect, the purpose of the amendment is to widen the scope of the activities under the Town and Country Planning, which can be implemented in terms of the Act. In Clause 3, reference is made to the establishment of a National Physical (Planning) Council in order to prepare a National Physical Policy and a National Physical Plan to give effect to the objectives of the Bill. The said Clause 3 is to repeal Section 2 of the Town and Country Planning Ordinance and the marginal note of the amendment, clearly states that the new Section is for the "preparation of the National Physical Plan and its scope and objective of the Act". It is therefore apparent that the purpose and the objective of the Bill is to establish a National Physical (Planning) Council in order to prepare the National Physical Plan and as it would be clearly seen, there is no mention regarding a National Policy for the subject of Town and Country Planning.

It is relevant to note that the Town and Country Planning Ordinance had come into being in 1946 and this Ordinance was amended in the year 2000 by Act No. 49 of 2000. Neither the 1946 Ordinance nor the 2000 Act referred to a national Policy.

As stated earlier the long Title to the Town and Country Planning Ordinance is to be repealed and replaced by Clause 2 of the Bill. The said replacement, referred to earlier, clearly shows that the Bill would be dealing with the subject of land.

List I of the Ninth Schedule to the Constitution refers to the subjects that fall within the purview of the Provincial Councils. Item 18 of the Provincial Councils List (List I) refers to Land and states thus:

"18 - Land - Land, that is to say, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement, to the extent set out in Appendix II."

Appendix II refers to Land and Land Settlement. It also specifies that State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33 (d) and written law governing the matter. The said Appendix has also specified that, subject to the aforesaid, land shall be a subject of the Provincial Councils, that would be subject to the conditions laid down under the special provisions specified in Appendix II on different headings. The said headings include State Land Inter-Provincial Irrigation and Land Development Projects and the National Land Commission.

All these provisions clearly indicate that the basic distribution of authority over the subject of land is based on the fact as to whether the land in question belonged to the State or not. State land would continue to vest in the Republic and Provinces would have authority over such land only subject to the special provisions laid down in terms of the Constitution stipulated under Appendix II.

Accordingly, where reference is made to Item 18 of the Provincial Council List and Appendix II of that List, it is clear that under Appendix II directions are given chiefly with regard to State land.

The Bill under review, as stated earlier, deals with integrated planning in relation to the economic, social, historic, environmental, physical and religious aspects of land in Sri Lanka which come within the purview of the subject of land that is referred to in Item 18 of the Provincial Council List which includes rights in or over land, land tenure, transfer and alienation of land, land use, and land improvement.

It is therefore evident that the subject matter referred to in the Bill deals with an item that comes within the purview of Provincial Councils.

Article 154 (G) (3) provides for the making of statutes on any subject, which come within the ambit of the Provincial Councils and reads thus:

"No Bill in respect of any matter set out in the Provincial Council List shall become law unless such Bill has been referred by the President, after its publication in the *Gazette* and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference"

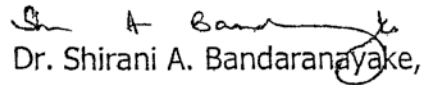
After such reference in terms of Article 154 (G) (3), where every Provincial Council agree to the passing of the Bill, it may be passed by a simple majority in Parliament and in terms of Article 154 (G) (3) (b), where one or two Provincial Councils do not agree to the passing of the Bill, the said Bill has to be passed by the special majority required by Article 82 of the Constitution.

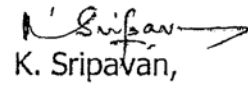
There was no submissions made by the learned Deputy Solicitor General to the effect that the Bill under reference has been referred by His Excellency the President to the Provincial Councils, as stipulated in Article 154 (G) (3) of the Constitution.


Since such procedure has not been complied with, we make a Determination in terms of Article 120 read with Article 123 of the Constitution that the Bill in question is in respect of a matter set out in the Provincial Council List and shall not become law unless it has been referred by His Excellency the president to every Provincial Council as required by Article 154 (G) (3) of the Constitution.

As the Bill has been placed in the Order Paper of Parliament without compliance with provisions of Article 154 (G) (3) of the Constitution no Determination would be made at this stage on the other grounds of challenge, which were referred to earlier.

We shall place on record our deep appreciation of the valuable assistance given by all the learned Counsel for the petitioners and the learned Deputy Solicitor General who appeared on behalf of the Hon. Attorney General.


Dr. Shirani A. Bandaranayake,
Chief Justice


K. Sripavan,
Judge of the Supreme Court


Chandra Ekanayake,
Judge of the Supreme Court

Dicta of Supreme Court Judgment on Land

Nihal Sri Ameresekere in his Fundamental Rights Application on the 'Expropriation Law' has cited the following 'dicta' from the Judgment of the Supreme Court in LMSL Case SC (FR) 209/2007 on the matter of Land.

"In the Agreement to transfer P27 although the CPC is described as the Vendor, it is clear from the terms and conditions of the Agreement itself that the CPC has no title to the land. Hence the Government is brought in with an obligation to ensure the transfer of the land without any payment to JKH. The Agreement is so biased in favour of the JKH that it even includes a clause that the land should be transferred free and all associated costs should be borne by the CPC since the sale of 90% shares of LMSL to JKH was "structured" on such basis. It is significant that this "structuring" was only done in the unauthorized communication made by Jayasundera as evidenced by document Z18 and thereby an illegal obligation was cast on the Government of Sri Lanka to "ensure" the transfer of 8 Acres 2 Roods 21.44 perches of land that comes within the declared limits of the Port of Colombo free of any charge whatsoever, to JKH. The transfer has to be

done within 1 year and to add insult to injury LMSL (now owned by JKH) is entitled to enforce this Agreement by an “order for specific performance”.

The alienation and disposition of the State land is a matter regulated in every step by law, and finally governed by the Constitution and cannot possibly be the subject matter of such an outrageous legal fiction as contained in the Agreement which was admittedly prepared by Jayasundera and the PERC.

JKH/LMSL pursued their ‘rights’ under the Agreement P27 and the Government was compelled to seek extensions of the period of 1 year granted to “ensure” the transfer of the land. There were accordingly 4 amendments to the Agreement. Finally the then President made a Grant under the Public Seal of the Republic in respect of the land to LMSL under the State Lands Ordinance. The Grant P30 states that it is made in consideration of Rs. 1,199,362,500/- paid to the Republic by LMSL. It is common ground that this statement is incorrect. In fact no money was paid by LMSL to the Government. The amount is the same as that paid on 6.9.2002 by JKH to CPC for the purchase of shares of LMSL. Hence the grant is bad in law solely on the ground of the misstatement as to consideration. Any Grant made by the Head of State under the Public Seal of the Republic should have the sanctity of truth in its contents. In normal circumstances a false statement as to a payment to the Government could not be made since, it has to be verified by the Treasury. But regrettably, that check is not there since by now the same Jayasundera who was responsible for the creation of the fiction in favour of the JKH that there would be no additional payment in respect of the land, is now ensconced as the Secretary to the Treasury.

The validity of the Grant P30 has also to be examined in the light of the provisions of the 13th Amendment to the Constitution.

The 13th Amendment to the Constitution certified on 14.11.1987 provided for the establishment of Provincial Councils. Article 154 G(1) introduced by the Amendment vests legislative power in respect of the matters set out in List 1 of the Ninth Schedule (the Provincial Council List) in Provincial Councils. Article 154C vests the executive power within a Province extending to the matters in List 1 in the Governor to be exercised in terms of Article 154F(1) on the advice of the Board of Ministers. In terms of Article 154(F)(6) the Board of Ministers is collectively responsible and answerable to the Provincial Council. Thus it is seen that the 13th Amendment provides for the exercise of legislative and executive power within a Province in respect of matters in the Provincial Council List on a system akin to the “Westminster” model of Government. Item 18 of the Provincial Council List which relates to the subject of land reads as follows:

“Land – Land, that is to say, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement, to the extent set out in Appendix II:

Appendix II referred to in item 18 reads as follows:

“Land and Land Settlement”

“State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) and written law governing the matter. Subject as aforesaid, land shall be a Provincial Council subject, subject to the following:-

1. State Land –

- 1:1 State land required for the purposes of the Government in a Province, in respect of a reserved or concurrent subject may be utilized by the Government in accordance with the laws governing the matter. The Government shall consult the relevant Provincial Council with regard to the utilization of such land in respect of such subject;*
- 1:2 Government shall make available to every Provincial Council State land within the province required by such Council for a Provincial Council subject. The Provincial Council shall administer, control and utilize such State land in accordance with the laws and statues governing the matter.*
- 1:3 Alienation or disposition of the State land within a Province to any citizen or to any organization shall be by the President, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter.”*

It is seen that the power reposed in the President in terms of Article 33(d) of the Constitution read with Section 2 of the State Lands Ordinance to make grants and dispositions of State Lands is circumscribed by the provisions of “Appendix II” cited above.

“Appendix II” in my view establishes an interactive legal regime in respect of State Land within a Province. Whilst the ultimate power of alienation and of making a dispositions remains with the President, the exercise of the power would be subject to the conditions in Appendix II being satisfied.

A pre-condition laid down in paragraph 1.3 is that an alienation or disposition of State land within a Province shall be done in terms of the applicable law only on the advice of the Provincial Council. The advice would be of the Board of Ministers communicated through the Governor. The Board of Ministers being responsible in this regard to the Provincial Council.