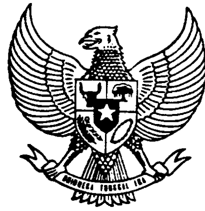

DECISION

Case Number 053/PUU-II/2004

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a decision in a case of petition for judicial review of the Law of the Republic of Indonesia Number 20 Year 2000 regarding Amendment to Law Number 21 Year 1997 regarding Duty on the Acquisition of Rights to Land and Building (BPHTB) against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

MARTO SUMARTONO Occupation President Director of PT. Mustika Lodan, address: Jl. Pinangsia Timur 4H, West Jakarta, in this matter acting for and on behalf of himself, hereinafter referred to as PETITIONER.

Having read the petition of the Petitioner;

Having heard the statements of the Government and the People's Legislative

Assembly of the Republic of Indonesia;

Having read the written statement of the Government;

Having examined the evidence;

Having heard the witnesses and experts;

LEGAL CONSIDERATIONS

Considering whereas the purpose and objective of the *a quo* Petitioner are as mentioned above;

Considering whereas prior to examining the substance or the principal issue of the case, the Constitutional Court (hereinafter referred to as the Court) must first take the following matters into account:

1. Whether or not the Court has the authority to review the petition of the Petitioner;
2. Whether or not the Petitioner has the legal standing to file the *a quo* petition.

Whereas in respect of the abovementioned two issues the Court shall take the following matters into account:

1. Authorities of the Court:

Considering whereas Article 24C of the 1945 Constitution in conjunction with Article 10 Paragraph (1) Sub-Paragraph a of Law Number 24 Year 2003

states that the Constitutional Court has the authority to hear at the first and final level with a final decision to "review a law against the 1945 Constitution".

Considering whereas the law petitioned for judicial review is Law Number 20 Year 2000 regarding Amendment to Law Number 21 Year 1997 regarding Duty on the Acquisition of Rights to Land and Buildings (BPHTB) enacted on August 2, 2000. Notwithstanding the dissenting opinion of the Constitutional Court Justices regarding Article 50 of Law Number 24 Year 2003, the Court has the authority to review the *a quo* Petition.

2. Legal Standing of the Petitioner:

Considering whereas in his petition the Petitioner states that he is the President Director of PT. Mustika Lodan engaged in the Developer's business who felt that his constitutional right has been impaired due to the coming into effect of Law Number 20 Year 2000 namely Article 1 Paragraph (3), Article 2 Paragraph (3), Article 24 Paragraph (2a) which contravene Article 33 Paragraph (4) and Article 2D Paragraph (1) of the 1945 Constitution;

Considering whereas therefore the Petitioner has the legal standing to file for the *a quo* petition to the Constitutional Court.

PRINCIPAL ISSUE OF THE CASE

Considering whereas in his petition the Petitioner argues that the provisions of Article 1 Paragraph (3) and Article 2 Paragraph (3) Sub-Paragraph f

of Law Number 20 Year 2000 which specified a Right to Manage as a right to land is unfair and inefficient since rights on land have been clearly regulated in Law Number 5 Year 1960 regarding Basic Regulations on the Principles of Agrarian Affairs (the Agrarian Law) and contravenes the principle of national economy being carried out on the basis of efficiency with justice and sustainability and does not comply with the protection of human rights which declare legal certainty as specified in Article 33 Paragraph (4) and Article 28D Paragraph (1) of the 1945 Constitution. The Petitioner believes that the lack of justice is due to the lack of legal certainty which causes an enormous economic cost, so that the Petitioner as a developer feels that there is no efficiency in the developer's business;

Considering whereas Article 2 paragraph (1) of the Agrarian Law states that "On the basis of the provision of Article 33 Paragraph (3) of the Constitution and the other matters as referred to in Article 1, land earth, water, and space, including the natural assets contained therein shall be at the highest level controlled by the State, as an organization of the sovereignty of the people", so that the entire Indonesian territory constitutes an integral motherland of all Indonesian people united as the Indonesian nation;

Considering whereas Article 4 paragraph (1) of the Agrarian Law states that "On the basis of the state's right to control as referred to in Article 2, shall be determined various rights to the surface on the earth, referred to as land, which may be given to and possessed by persons, whether individually or collectively

with other people and legal entities, and Article 16 Paragraph (1) of the Agrarian Law states that "The rights to land as referred to in Article 4 Paragraph (1) shall include among other things:

a. Ownership right,
b. Right of Cultivation,
c. Right of Building,
d. Right of Use,
e. Right of Lease
f. Right of Land Clearing,
g. Right to harvest forest products,
h. Other rights not included in the above petitioned rights which shall be stipulated with a law and such rights of temporary nature as specified in Article 53"

Considering whereas the existence of the right to manage in the national law is laid down in the Second General Elucidation to the Agrarian Law which reads "**With the above mentioned objective as a guidance, the State may give such land** to a person or a legal entity with a right according to the purpose and needs, such as ownership right, tight of cultivation, right of building or right of use and may give such rights under management of a Controlling Agency (Department, *Agency* and or Autonomous region) to be used for the performance of their respective duties [Article 2 Paragraph (4)] or give it under the management of a Controlling Agency". Furthermore, the procedures for the

granting of the right to land related to Right to Manage are set forth in Article 28 of Regulation of the Minister of Home Affairs Number 5 Year 1975, and the procedures for the application and settlement of the assignment of the right to portions of land attached with the right to manage and their registration are regulated in Regulation of the Minister of Home Affairs of the Republic of Indonesia Number I Year 1977;

Considering whereas from the above provisions, the acquisition of the right to manage into a tax object as specified in Law Number 21 Year 1977 regarding the Duty on the Acquisition of Rights to Land and Buildings (BPHTB) as amended with Law Number 20 Year 2000 is reasonable, the implementation of which is explained by the government in its written statement which states "Whereas if the government agency holding the Right to Manage later exercises its authority to assign portions of the land to a third party and or collaborates with a third party in land management, then the third party shall be subject to the BPHTB since the third party has enjoyed the benefits from using the land '';

Considering whereas this matter is in line with the statement of the attorney of the Head of the National Land Board which states that "… Right to Manage is not a pure Title on Land, but rather a portion of the State's right to control and therefore in addition to carrying an authority to use the land for the purpose of its business it is also given the authority to carry out activities that constitute a portion of the authorities of the State…";

Considering whereas the granting of the Right of Building (HGB) on the HPL shall remain to be carried out with a decision to give the right by the Minister or his assignee based on the recommendation of the holder of the Right to Manage (as regulated in Regulation of the Minister of Home Affairs Number 1 Year 1977);

Considering whereas the general elucidation of Law Number 20 Year 2000 states that the amendment to Law Number 21 Year 1997 regarding the BPHTB is intended to give further legal certainty and justice for the public engaged in economic activities to participate in the financing of development according to their respective obligations. Therefore, it is necessary to expand the scope of the tax object to anticipate any acquisition of the right to land and or building in a new form and terminology;

Considering whereas the expert statement of Drs. Dasrin Zen in the hearing dated August 11, 2004 explained among other things that since the BPHTB law regulating the Tax on the acquisition of rights to land, such rights to land, in this matter pursuant to the legal provisions therefor must be the rights to land as referred to in the Agrarian law;

Considering whereas from the above mentioned facts the Court is of the opinion that there is no convincing proof pursuant to Law Number 24 Year 2003 that the articles of the *a quo* law contravenes the 1945 Constitution;

Considering whereas the Petitioner argued that Article 9 Paragraph (1) Sub-Paragraph j which states "the granting of a new right to land as a continuation of the release of a right shall be effective from the date of the signing and issuance of the Decree granting the right", and Sub-Paragraph k which reads "the granting of a new right beyond the release shall be effective from the date of the signing and issuance of the Decree granting the right" are contradictory to Article 24 Paragraph (2a) of the *a quo* law which reads "The official who has the authority to sign and issue a decree granting the right to land may only sign and issue the decree in question at the time that the taxpayer submits a proof of tax payment in the form of a Payment Form for the Duty on the Acquisition of Rights to Land and Buildings'

Considering whereas the Court is of the opinion that the inclusion or giving of the requirement for the issuance of the Decree (*beschikking*) is justified by the state administration law. Therefore, the *a quo* Articles do not contradict one another causing the absence of legal certainty and absence of fairness, such that the Court is of the opinion that the *a quo* articles do not contravene Article 28D Paragraph (1) of the 1945 Constitution;

Considering whereas the Petitioner argued that the *a quo* articles are unfair and causing a absence of legal certainty and causing enormous economic cost to the an extent that the Petitioner as a developer believes that there is no efficiency in the developer's business, with respect to which the Court is of the opinion that the "efficiency with justice" in Article 33 Paragraph (4) of the

1945 Constitution does not refer to the of efficiency in a business or company, but rather to a national economic system in which efficiency shall be implemented without causing injustice that contravenes human rights;

Considering whereas from the result of examination before the Court, the *a quo* articles are not proven to have contravened Articles 28A through 28J of the 1945 Constitution. Whereas if the Petitioner objects to the provisions on payable tax, pursuant to the provision of Article 18 of the *a quo* law, the Petitioner may file such objection to the tax court, and in fact in certain circumstances, a tax reduction may even be granted upon a taxpayer's application with a Ministerial Decree pursuant to Article 20 of the *a quo* law;

Considering whereas based on the above considerations, the Court is of the opinion that the Petitioner is unable to prove the arguments of his petition in a convincing manner pursuant to the provisions of Article 24 Year 2003, and therefore the petition of Petitioner must be declared as rejected;

In view of Article 56 Paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court;

PASSING THE DECISION

To declare that the petition of Petitioner is rejected.

Hence the decision was made in the Consultative Meeting of nine (9) Constitutional Court Justices of the Republic of Indonesia on Thursday,

December 9, 2004 and was pronounced in a Plenary Session of the Constitutional Court open for the public on this Friday, December 17, 2004 by us: Prof. Dr. Jimly Asshiddiqie, SH. as the Chairman and concurrent Member and accompanied by Prof. Dr. H.M. Laica Marzuki, SH, Prof. H.A.S. Natabaya, SH, LLM, H. Achmad Roestandi, SH, I Dewa Gede Palguna ,SH, MH, Maruarar Siahaan, SH, and Soedarsono, SH., respectively as Members and assisted by Ina Zuchriyah, SH as Substitute Registrar, and in the presence of the Petitioner and the Government.

Chief Justice,

SIGNED

Prof. Dr. Jimly Asshiddiqie, S.H.

JUSTICES

SIGNED	**SIGNED**
Prof. Dr. H. M. Laica Marzuki, S.H.	**Prof. H.A.S. Natabaya, S.H., LL.M.**
SIGNED	**SIGNED**
Prof. H. Abdul Mukthie Fadjar, S.H., M.S.	**H. Achmad Roestandi, S.H.**
SIGNED	**SIGNED**
Dr. H. Harjono, S.H, M.CL.	**I Dewa Gede Palguna, S.H., M.H.**
SIGNED	**SIGNED**
Maruarar Siahaan, S.H.	**Soedarsono, S.H.**

Subsitute Registrar

SIGNED

Ina Zuchriyah, S.H.