G.R. No. 213948 – KNIGHTS OF RIZAL v. DMCI HOMES, INC., DMCI PROJECT DEVELOPERS, INC., CITY OF MANILA, NATIONAL COMMISSION FOR CULTURE AND THE ARTS, NATIONAL MUSEUM, and NATIONAL HISTORICAL COMMISSION OF THE PHILIPPINES.

Promulgated:

April 25, 2017

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DISSENTING OPINION

JARDELEZA, *J.*:

Heritage is our legacy from the past, what we live with today, and what we pass on to future generations. Our cultural and natural heritage are both irreplaceable sources of life and inspiration.[1]

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. –Justice William O. Douglas in Berman v. Parker[2]

To make us love our country, our country ought to be lovely.- Edmund Burke

The Rizal Park and the Rizal Monument lie at the heart of this controversy. Petitioner Knights of Rizal (KOR) instituted this original action for injunction to stop what it views as "an impending permanent desecration of a National Cultural Treasure that is the Rizal Monument and a historical, political, socio-cultural landmark that is the Rizal Park."[3] According to KOR, once finished at its highest level, the Torre de Manila will dwarf all surrounding buildings within a radius of two kilometers and **"completely dominate the vista and consequently, substantially diminish in scale and importance the most cherished monument to the National Hero."**[4] Further alleging that the project is a nuisance *per se* and constructed in bad faith and in violation of the zoning ordinance of the City of Manila, KOR

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1 About World Heritage, UNESCO World Heritage Centre, <http://whc.unesco.org/en/about/> (last accessed June 14, 2016).

2 348 U.S. 26, 33 (1954).

3 *Rollo*, p. 3.

4 *Id.* at 23.

prayed, among others, for the issuance of an injunction to restrain construction of the Torre de Manila, and for an order for its demolition.[5]

In this case of first impression, the Court was asked to determine the constitutional dimensions of Sections 15 and 16, Article XIV of the Constitution. These Sections mandate the State to conserve and protect our nation's historical and cultural heritage and resources. We should decide this case conscious that we here exercise our symbolic function as an aspect of our power of judicial review.[6] Ours is a heavy burden; how we decide today will define our judicial attitude towards the constitutional values of historic and cultural preservation and protection, involving as they often do fragile and irreplaceable sources of our national identity.

The majority has voted to dismiss the petition.

With respect, I dissent.

I

I shall first discuss the procedural issues.

A.

Petitioner KOR filed a petition for injunction, an action not embraced within our original jurisdiction.[7] As correctly pointed out by DMCI-PDI, actions for injunction lie within the jurisdiction of the RTC pursuant to Sections 19 and 21 of Batas Pambansa Blg. 129, otherwise known as the "Judiciary Reorganization Act of 1980," as amended.[8]

Nevertheless, I submit that the circumstances of this case warrant a relaxation of the rule.

First. KOR's petition appears to make a case for *mandamus*.

Section 3, Rule 65 of the Rules of Court provides:

> Sec. 3. *Petition for mandamus*. — When any tribunal, corporation, board, officer or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or unlawfully excludes another from the use and enjoyment of a right or office to which such other is entitled, and there

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5 *Id.* at 27-28.

6 *Alliance of Government Workers v. Minister of Labor and Employment*, G.R. No. L-60403, August 3, 1983, 124 SCRA 1, 9-10.

7 CONSTITUTION, Art. VIII, Sec. 5. The Supreme Court shall have the following powers:
(1) Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for *certiorari*, prohibition, *mandamus*, *quo warranto,* and *habeas corpus*; x x x.

8 *Rollo*, pp. 308-309 citing *Bank of the Philippine Islands v. Hong*, G.R. No. 161771, February 15, 2012, 666 SCRA 71.

> is no other plain, speedy and adequate remedy in the ordinary course of law, the person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered commanding the respondent, immediately or at some other time to be specified by the court, to do the act required to be done to protect the rights of the petitioner, and to pay the damages sustained by the petitioner by reason of the wrongful acts of the respondent.

A writ of *mandamus* is a command issuing from a court of law of competent jurisdiction, directed to some inferior court, tribunal, or board, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed or from operation of law.[9] For a petition for *mandamus* to prosper, petitioner must establish the existence of a clear legal right to the thing demanded and it must be the imperative duty of the respondent to perform the act required.[10] In *University of San Agustin, Inc. v. Court of Appeals*,[11] we stated:

> **While it may not be necessary that the duty be absolutely expressed, it must however, be clear.** The writ will not issue to compel an official to do anything which is not his duty to do or which is his duty not to do, or give to the applicant anything to which he is not entitled by law. The writ neither confers powers nor imposes duties. It is simply a command to exercise a power already possessed and to perform a duty already imposed.[12] (Emphasis supplied).

Here, KOR's case is essentially founded on Sections 15 and 16, Article XIV of the Constitution giving rise to an alleged duty on the part of respondent DMCI-PDI to protect (or, at the very least, refrain from despoiling) the nation's heritage. In *Uy Kiao Eng v. Lee*, we held that *mandamus* is a "proper recourse for citizens who seek to enforce a public right and to compel the performance of a public duty, most especially when the public right involved is mandated by the Constitution."[13]

More importantly, a relaxation of procedural rules is warranted considering the significance of the threshold and purely legal question involved in this case. As identified in the Court's Advisory, this threshold and purely legal question is: "**whether the definition of the Constitutional mandate to conserve, promote and popularize the nation's historical and cultural heritage and resources, includes, in the case of the Rizal Monument, the preservation of its prominence, dominance, vista points,**

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9 *Uy Kiao Eng v. Lee*, G.R. No. 176831, January 15, 2010, 610 SCRA 211, 216-217.

10 *Henares, Jr. v. Land Transportation Franchising and Regulatory Board*, G.R. No.158290, October 23, 2006, 505 SCRA 104, 115 citing *University of San Agustin, Inc. v. Court of Appeals*, G.R. No. 100588, March 7, 1994, 230 SCRA 761, 771.

11 G.R. No. 100588, March 7, 1994, 230 SCRA 761.

12 *Id.* at 771-772.

13 *Uy Kiao Eng v. Lee*, *supra* at 217.

vista corridors, sightlines and setting."[14] Apropos to this, I proposed that the Court also decide: (2) whether there are laws, statutes, ordinances, and international covenants that implement this mandate and which were breached as a result of the construction of the Torre de Manila; and (3) whether *mandamus* lies against public respondents.

In *Gamboa v. Teves,*[15] an original petition for prohibition, injunction, declaratory relief, and declaration of nullity was filed to stop the sale of shares of Philippine Telecommunications Investment Corporation (PTIC) stock to Metro Pacific Assets Holdings, Inc. (MPAH), a foreign owned corporation. The sale, if allowed, would increase to 81% the common shareholdings of foreigners in Philippine Long Distance Telephone Company (PLDT), beyond the allowed constitutional limit on foreign ownership of a public utility. In *Gamboa*, this Court acknowledged that it had no original jurisdiction over the petition for declaratory relief, injunction, and annulment of sale filed by petitioners therein.[16] Nevertheless, in view of the threshold and purely legal issue on the definition of the term "capital" in Section 11, Article XII of the Constitution which had **far-reaching implications to the national economy**, this Court treated the petition as one for *mandamus*.[17]

Gamboa cited two other precedents where we had relaxed procedural rules and assumed jurisdiction over a petition for declaratory relief—*Salvacion v. Central Bank of the Philippines*[18] and *Alliance of Government Workers v. Minister of Labor and Employment.*[19]

Salvacion presented the issue of whether the protection afforded to foreign currency deposits can be made applicable to a foreign transient. *Alliance of Government Workers*, on the other hand, involved the issue of whether government agencies are considered "employers" under a law requiring payment of 13th month pay to certain employees. As in *Gamboa*, in both cases, we ruled that while we had no original jurisdiction over the petitions *as filed*, "exceptions to this rule have been recognized." In *Salvacion*, we declared: "where the petition has far-reaching implications and raises questions that should be resolved, it may be treated as one for *mandamus*."[20] More, as in *Alliance of Government Workers*, "considering the important issues propounded and the fact that constitutional principles are involved," we decided "to give due course to the petition, to consider the various comments as answers and to resolve the questions raised through a full length decision in the exercise of this Court's symbolic function as an aspect of the power of judicial review."[21] *Alliance of Government Workers*,

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14 *Rollo*, pp. 1229-1230.
15 G.R. No. 176579, June 28, 2011, 652 SCRA 690.
16 *Id.* at 705-706.
17 *Id.* at 706-709.
18 G.R. No. 94723, August 21, 1997, 278 SCRA 27.
19 G.R. No. L-60403, August 3, 1983, 124 SCRA 1.
20 *Salvacion v. Central Bank of the Philippines*, *supra* at 39-40.
21 *Alliance of Government Workers v. Minister of Labor and Employment*, *supra* at 9-10.

in turn, cited as precedent the earlier cases *Nacionalista Party v. Bautista*[22] and *Aquino, Jr. v. Commission on Elections*.[23] There we also relaxed the application of procedural rules and treated the petition for prohibition filed as one for *quo warranto* in view of "peculiar and extraordinary circumstances" and "far-reaching implications" attendant in both cases.

Here, the Court's judicial power has been invoked to determine the extent of protection afforded by the Constitution and our laws, if any, over cultural heritage properties. Our resolution of this issue will settle whether the Constitution's heritage conservation provisions are self-executing, and if not, whether the State has translated them into judicially enforceable norms through enabling legislation. Similar to *Gamboa*, *Salvacion*, and *Alliance of Government Workers*, I find that this case presents serious constitutional issues of far-reaching implications and significance warranting a liberal application of procedural rules.

B.

Legal standing (*locus standi*) is defined as "a right of appearance in a court of justice on a given question."[24] In *Belgica v. Ochoa, Jr.*, we explained that "[t]he gist of the question of standing is whether a party alleges such personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court depends for illumination of difficult constitutional questions."[25]

While rules on standing in public suits have in some cases been relaxed especially in relation to non-traditional plaintiffs like citizens, taxpayers, and legislators,[26] we have generally adopted the "direct injury test" to determine whether a party has the requisite standing to file suit. Under this test, for a party to have legal standing, it must be shown that he has suffered or will suffer a direct injury as a result of the act being challenged,[27] that is, he must show that: (1) he has personally suffered some actual or threatened injury because of the allegedly illegal conduct of the government; (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable action.[28]

I am of the view that petitioner KOR sufficiently meets the requirements of the direct injury test.

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22 85 Phil. 101 (1949).

23 G.R. No. L-40004, January 31, 1975, 62 SCRA 275.

24 *Biraogo v. Philippine Truth Commission of 2010* G.R. No. 192935, December 7, 2010, 637 SCRA 78, 149-150 citing *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 216.

25 G.R. No. 208566, November 19, 2013, 710 SCRA 1, 99. (Citations omitted.)

26 *Arigo v. Swift*, G.R. No. 206510, September 16, 2014, 735 SCRA 102, 128.

27 *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 217-218 citing *People v. Vera*, 65 Phil. 56 (1937).

28 *Tolentino v. Commission on Elections*, G.R. 148334, January 21, 2004, 420 SCRA 438, 452.

Petitioner KOR is a public, non-profit organization created under Republic Act No. 646,[29] one of whose main purposes include the organization and holding of programs to commemorate Rizal's nativity and martyrdom.[30] These programs honoring the birth and death of our national hero are held by KOR at the Rizal Park at least twice a year.[31] During oral arguments, counsel for KOR asserted that there is a violation of KOR's legal mandate, as stated in its articles of incorporation, to celebrate the life of Jose Rizal at the Rizal Park insofar as the Torre de Manila mars the Park's previously "unhampered" and "unobstructed" panorama.[32]

Sierra Club v. Morton[33] recognized that "[a]esthetic and environmental wellbeing, like economic wellbeing, are important ingredients of the quality of life in our society," similarly deserving of legal protection such that direct injury may be rooted on the destruction of "the scenery, natural and historic objects and wildlife of the park, and would impair the enjoyment of the park for future generations."[34] While the US Supreme Court refused to grant standing to Sierra Club due to the latter's failure to allege that "it or its members would be affected in any of their activities or pastimes by the [challenged] Disney development,"[35] the same is not true here. KOR has sufficiently demonstrated that it has suffered (or stands to suffer) a direct injury on account of the allegedly "illegal" condominium

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[29] An Act to Convert the "Orden de Caballeros de Rizal" into a Public Corporation to be known in English as "Knights of Rizal" and in Spanish as "Orden de Caballeros de Rizal," and to Define its Purposes and Powers, Sec. 2. See also *Rollo*, p. 5.

[30] Republic Act No. 646, Sec. 2.

[31] TSN, July 21, 2015, p. 13-14.

[32] TSN, July 21, 2015, p. 13-14:

> **JUSTICE JARDELEZA**: Now, do you organize and hold programs to commemorate the birth and death of Dr. Jose Rizal?
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> **ATTY. JASARINO**: Yes, Your Honor, we do.
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> **JUSTICE JARDELEZA**: And where do you hold these programs?
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> **ATTY. JASARINO**: Rizal Park, Your Honor.
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> **JUSTICE JARDELEZA**: You have been there yourself.
>
> **ATTY. JASARINO**: Yes, Your Honor.
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> **JUSTICE JARDELEZA**: How often do you do this?
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> **ATTY. JASARINO**: Talking of nativity and martyrdom, at least, twice a year.
>
> **JUSTICE JARDELEZA**: And how does, again, the Torre injure you or the organization in the [discharge] of this specific corporate purpose?
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> **ATTY. JASARINO**: I cannot imagine having the celebrations, the programs with Torre at the back. I cannot imagine that activity to be inspiring, to be reminding us of Rizal, of his works, of his ideals while looking at Torre marring the background that we used to have, the panorama that is unhampered, that is unobstructed. (Underscoring supplied.)

[33] 405 U.S. 727 (1972).

[34] *Id.* at 734.

[35] *Id.* at 735.

project insofar as KOR's regular commemorative activities in the Park have been (and continues to be) marred by the allegedly unsightly view of the Torre de Manila.

In any case, where compelling reasons exist, such as when the matter is of common and general interest to all citizens of the Philippines;[36] when the issues are of paramount importance and constitutional significance;[37] when serious constitutional questions are involved;[38] or there are advance constitutional issues which deserve our attention in view of their seriousness, novelty, and weight as precedents,[39] this Court, in the exercise of its sound discretion, has brushed aside procedural barriers and taken cognizance of the petitions before us. The significant legal issues raised in this case far outweigh any perceived impediment in the legal personality of petitioner KOR to bring this suit.[40]

II

I shall now discuss the substantive issues raised in the petition.

A.

Petitioner KOR invokes Sections 15 and 16, Article XIV of the Constitution as bases for its claim that there is a constitutional "obligation of the State" to protect the Rizal Monument.[41] The Court has consequently identified the threshold legal issue to be whether Sections 15 and 16, Article XIV of the Constitution extend protection to the Rizal Monument and/or its prominence, dominance, vista points, vista corridors, sightlines, and setting. To me, the resolution of this issue largely depends on whether these sections are self-executing and thus judicially enforceable "in their present form."[42] I will thus discuss these issues together.

Sections 15 and 16, Article XIV of the Constitution read:

> Sec. 15. Arts and letters shall enjoy the patronage of the State. The State shall conserve, promote, and popularize the nation's historical and cultural heritage and resources, as well as artistic creations.
>
> Sec. 16. All the country's artistic and historic wealth constitutes the cultural treasure of the nation and shall be under the protection of the State which may regulate its disposition.

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36 *Oposa v. Factoran, Jr.*, G.R. No. 101083, July 30, 1993, 224 SCRA 792, 802.

37 *Bagong Alyansang Makabayan v. Zamora*, G.R. No. 138570, October 10, 2000, 342 SCRA 449, 480.

38 *Association of Small Landowners in the Philippines, Inc. v. Secretary of Agrarian Reform*, G.R. No. 78742, July 14, 1989, 175 SCRA 343, 364-365.

39 *Tolentino v. Commission on Elections*, *supra* at 453-454.

40 *Gamboa v. Teves*, *supra* note 15, at 713.

41 *Rollo*, pp. 15-16.

42 See *Oposa v. Factoran, Jr.*, *supra* at 816-817 (Feliciano, *J.*, *concurring*).

In constitutional construction, it is presumed that constitutional provisions are self-executing. The reason is that "[i]f the constitutional provisions are treated as requiring legislation instead of self-executing, the legislature would have the power to ignore and practically nullify the mandate of the fundamental law."[43] This, however, does not make *all* constitutional provisions immediately self-executing.

In *Basco v. Philippine Amusement and Gaming Corporation*,[44] we held that Sections 11 (Personal Dignity), 12 (Family), and 13 (Role of Youth) of Article II; Section 12 (Social Justice and Human Rights) of Article XIII and Section 2 (Educational Values) of Article XIV of the 1987 Constitution are merely statements of principles and policies. They are not self-executing and would need a law to be passed by Congress to clearly define and effectuate such principles.

Three years later, in the 1994 case of *Tolentino v. Secretary of Finance*,[45] we held that the constitutional directives under Section 1, Article XIII (Social Justice and Human Rights) and Section 1, Article XIV (Education) to give priority to the enactment of laws for the enhancement of human dignity, the reduction of social, economic and political inequalities, and the promotion of the right to "quality education" were put in the fundamental law "as moral incentives to legislation, not as judicially enforceable rights."[46] In the subsequent case of *Kilosbayan, Inc. v. Morato,*[47] we held that the provisions under Article II (Declaration of State Principles and Policies) of the Constitution are not self-executing provisions, "the disregard of which can give rise to a cause of action in the courts. They do not embody judicially enforceable constitutional rights but guidelines for legislation."[48] In *Tañada v. Angara*,[49] we affirmed that far from being provisions ready for enforcement through the courts, the sections found under Article II are there to be "used by the judiciary as aids or as guides in the exercise of its power of judicial review, and by the legislature in its enactment of laws."[50]

To determine whether a provision is self-executory, the test is to see whether the provision is "complete in itself as a definitive law, or if it needs future legislation for completion and enforcement."[51] In other words, the provision must set forth "a specific, operable legal right, rather than a

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[43] *Manila Prince Hotel v. Government Service Insurance System*, G.R. No. 122156, February 3, 1997, 267 SCRA 408, 431-432.
[44] G.R. No. 91649, May 14, 1991, 197 SCRA 52.
[45] G.R. No. 115455, August 25, 1994, 235 SCRA 630.
[46] *Id.* at 684-685.
[47] G.R. No. 118910, July 17, 1995, 246 SCRA 540.
[48] *Id.* at 564.
[49] G.R. No. 118295, May 2, 1997, 272 SCRA 18.
[50] *Id.* at 54.
[51] *Agabon v. National Labor Relations Commission*, G.R. No. 158693, November 17, 2004, 442 SCRA 573, 688 (Tinga, *J., concurring*).

constitutional or statutory *policy*."[52] Justice Feliciano, in his Separate Opinion in the landmark case of *Oposa v. Factoran*, explained:

> It seems to me important that the legal right which is an essential component of a cause of action be a specific, operable legal right, rather than a constitutional or statutory *policy*, for at least two (2) reasons. One is that unless the legal right claimed to have been violated or disregarded is given specification in operational terms, defendants may well be unable to defend themselves intelligently and effectively; in other words, there are due process dimensions to this matter.
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> The second is a broader-gauge consideration—where a specific violation of law or applicable regulation is not alleged or proved, petitioners can be expected to fall back on the expanded conception of judicial power in the second paragraph of Section 1 of Article VIII of the Constitution x x x.
>
> **When substantive standards as general as "the right to a balanced and healthy ecology" and "the right to health" are combined with remedial standards as broad ranging as "a grave abuse of discretion amounting to lack or excess of jurisdiction," the result will be, it is respectfully submitted, to propel courts into the uncharted ocean of social and economic policy making.** At least in respect of the vast area of environmental protection and management, our courts have no claim to special technical competence and experience and professional qualification. **Where no specific, operable norms and standards are shown to exist, then the policy making departments—the legislative and executive departments—must be given a real and effective opportunity to fashion and promulgate those norms and standards, and to implement them before the courts should intervene.**[53] (Emphasis supplied.)

Following this test, I am of the view that Sections 15 and 16, Article XIV of the Constitution invoked by petitioner KOR are **not** self-executing provisions. These provisions relied upon by KOR, *textually and standing alone*, do **not** create any judicially enforceable right and obligation for the preservation, protection or conservation of the "prominence, dominance, vista points, vista corridors, sightlines and setting" of the Rizal Park and the Rizal Monument.

Similar to those constitutional provisions we have previously declared to be non-self-executing, Sections 15 and 16 are mere statements of principle and policy. The constitutional exhortation to "conserve, promote, and popularize the nation's historical and cultural heritage and resources,"

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52 *Oposa v. Factoran, Jr., supra* note 36, at 817.

53 *Id.* at 817-818.

lacks "specific, operable norms and standards" by which to guide its enforcement.[54] Enabling legislation is still necessary to define, for example, the scope, permissible measures, and possible limitations of the State's heritage conservation mandate. Congress, in the exercise of its plenary power, is alone empowered to decide whether and how to conserve and preserve historical and cultural property. As in the situation posed by Justice Feliciano, Sections 15 and 16, by themselves, will be of no help to a defendant in an actual case for purposes of preparing an intelligent and effective defense. These sections also lack any comprehensible standards by which to guide a court in resolving an alleged violation of a right arising from the same.

The view that Sections 15 and 16 are not self-executing provisions is, in fact, supported by the deliberations of the Constitutional Commission, insofar as they reveal an intent to direct Congress to enact a law that would provide guidelines for the regulation as well as penalties for violations thereof.[55] In particular, during the interpellation of Commissioner Felicitas Aquino, one of the proponents of the provision on heritage conservation, she conceded that there is a need for supplementary statutory implementation of these provisions.[56]

Petitioner KOR also claimed that the Torre de Manila project (1) "violates" the National Historical Commission of the Philippines (NHCP) "Guidelines on Monuments Honoring National Heroes, Illustrious Filipinos and Other Personages" which "guidelines have the force of law" and (2) "runs afoul" an "international commitment" of the Philippines under the International Charter for the Conservation and Restoration of Monuments and Sites, otherwise known as the Venice Charter.[57]

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[54] See *Agabon v. National Labor Relations Commission*, *supra* (Tinga, *J.*, *concurring*).

[55] IV RECORD, CONSTITUTIONAL COMMISSION 558-560 (September 11, 1986).

[56] *Id.*

[57] *Rollo*, pp. 19-20.

> 5.10 This PROJECT blatantly violates the National Historical Commission of the Philippines' "Guidelines on Monuments Honoring National Heroes, Illustrious Filipinos and Other Personages" which guidelines have the force of law. The said guidelines dictate that historic monuments should assert a visual "dominance" over the surroundings by the following measures, among others:
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> DOMINANCE
>
> (i) Keep vista points and visual corridors to monuments clear for unobstructed viewing and appreciation and photographic opportunities;
>
> (ii) Commercial buildings should not proliferate in a town center where a dominant monument is situated;
>
> SITE AND ORIENTATION
>
> (i) The conservation of a monument implies preserving a setting, which is not out of scale. Wherever the traditional setting exists, it must be kept. No new construction, demolition or modification, which would alter the relations of mass and color, must be allowed.
>
> (ii) The setting is not only limited with the exact area that is directly occupied by the monument, but it extends to the surrounding areas whether open space or occupied by other

I disagree.

The NHCP Guidelines is neither law nor an enforceable rule or regulation. Publication[58] and filing with the Law Center of the University of the Philippines[59] are indispensable requirements for statutes, including administrative implementing rules and regulations, to have binding force and effect.[60] As correctly pointed out by respondent DMCI-PDI, no showing of compliance with these requirements appears in this case. The NHCP Guidelines cannot thus be held as binding against respondent.

Similarly, neither can the Venice Charter be invoked to prohibit the construction of the Torre de Manila project. The Venice Charter provides, in general terms, the steps that must be taken by State Parties for the conservation and restoration of monuments and sites, including these properties' setting. It does not, however, rise to a level of an enforceable law. There is no allegation that the Philippines has legally committed to observe the Venice Charter. Neither am I prepared to declare that its principles are norms of general or customary international law which are binding on all states.[61] I further note that the terms of both the NHCP Guidelines and the Venice Charter appear hortatory and do not claim to be sources of legally enforceable rights. These documents only urge (not require) governments to adopt the principles they espouse through implementing laws.[62]

> structures as may be defined by the traditional or juridical expense of the property.
>
> 5.11 The PROJECT also runs afoul of an international commitment of the Philippines, the International Charter for the Conservation and Restoration of Monuments and Sites, otherwise known as the Venice Charter.
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> That agreement says, in part, as follows:
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> ARTICLE 1. The concept of an historic monument embraces not only the single architectural work but also the urban or rural setting in which is found the evidence of a particular civilization, a significant development or a historic event. This applies not only to great works of art but also to more modest works of the past which have acquired cultural significance with the passing of time;
>
> x x x x
>
> ARTICLE 6. The conservation of a monument implies preserving a setting which is not out of scale. Wherever the traditional setting exists, it must be kept. No new construction, demolition or modification which would alter the relations of mass and colour, must be allowed. (Underscoring in the original.)

58 *Tañada v. Tuvera*, G.R. No. L-63915, December 29, 1986, 146 SCRA 446, 453-454.

59 ADMINISTRATIVE CODE, Book VII, Chapter 2, Sec. 3.

60 *Republic v. Pilipinas Shell Petroleum Corporation*, G.R. No. 173918, April 8, 2008, 550 SCRA 680, 689.

61 See *Pharmaceutical and Health Care Association of the Philippines v. Duque*, G.R. No. 173034, October 9, 2007, 535 SCRA 265.

62 The NHCP Guidelines, for example, reads in pertinent part:

> 11. DEVELOPMENT OF THE VICINITY (EXISTING AND FUTURE)
>
> It is highly recommended that towns and cities formulate zoning guidelines or local ordinances for the protection and development of

Nevertheless, the Venice Charter and the NHCP Guidelines, along with various conservation conventions, recommendations, and resolutions contained in multilateral cooperation and agreements by State and non-state entities, do establish a significant fact: **At the time of the enactment of our Constitution in 1987, there has already been a *consistent* understanding of the term "conservation" in the culture, history, and heritage context as to cover not only a heritage property's physical/tangible attributes, but also its settings (*e.g.*, its surrounding neighborhood, landscapes, sites, sight lines, skylines, visual corridors, and vista points).**

The setting of a heritage structure, site, or area is defined as "the immediate and extended environment that is part of, or contributes to, its significance and distinctive character."[63] It is also referred to as "the surroundings in which a place is experienced, its local context, embracing present and past relationships to the adjacent landscape."[64] It is further acknowledged as one of the sources from which heritage structures, sites, and areas "derive their significance and distinctive character."[65] Thus, any change to the same can "substantially or irretrievably affect" the significance of the heritage property.[66]

The concept of settings was first formalized with the Xi'an Declaration on the Conservation of the Setting of Heritage Structures, Sites and Areas adopted by the 15th General Assembly of International Council on Monuments and Sites (ICOMOS) on October 21, 2005. The concept itself, however, has been acknowledged decades before, with references to settings, landscapes, and surroundings **appearing as early as 1962.**[67]

> monument sites and the promotion of a clean and green environment, and strictly implement these laws, especially in places where important monuments and structures are located.
>
> A buffer zone should be provided around the vicinity of monuments/sites, and should be made part of the respective city or municipal land use and zoning regulations through local legislation.
>
> Height of buildings surrounding or in the immediate vicinity of the monument/site should be regulated by local building code regulation or special local ordinance to enhance the prominence, dominance and dignity of the monument, more importantly, the national monuments.

[63] Xi'an Declaration on the Conservation of the Setting of Heritage Structures, Sites and Areas, par 1. [hereinafter "Xi'an Declaration"]

[64] ICOMOS Guidance on Heritage Impact Assessments for Cultural World Heritage Properties, par. 5-3.

[65] Xi'an Declaration, par. 2.

[66] Xi'an Declaration, par. 9.

[67] UNESCO Recommendation concerning the Safeguarding of the Beauty and Character of Landscapes and Sites (1962). See International Charter for the Conservation and Restoration of Monuments and Sites (1964 Venice Charter), UNESCO Recommendation concerning the Preservation of Property Endangered by Public or Private Works (1968), Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage (1972), UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, otherwise known as the World Heritage Convention (1972), Declaration of Amsterdam (1975), UNESCO Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas (1976), ICOMOS Committee for Historic Gardens (1981), Charter for the Conservation of Historic Towns and Urban Areas (1987), among others.

To reiterate, my examination of the various multilateral and international documents on the subject shows a generally-accepted and oft-repeated understanding of "heritage conservation" as covering *more* than a cultural property's physical attributes to include its surroundings and settings.[68] This "understanding" had, unarguably, already acquired "term of art" status even before the enactment of our Constitution in 1987. *Verba artis ex arte.* Terms of art should be explained from their usage in the art to which they belong.[69]

To me, absent proof of a clear constitutional expression to the contrary, the foregoing understanding of heritage conservation provide more than sufficient justification against *a priori* limiting the plenary power of Congress to determine, through the enactment of laws, the scope and extent of heritage conservation in our jurisdiction. Otherwise put, the Congress *can* choose to legislate that protection of a cultural property extends beyond its physical attributes to include its surroundings, settings, view, landscape, dominance, and scale. This flows from the fundamental principle that the Constitution's grant of legislative power to Congress is plenary, subject only to certain defined limitations, such as those found in the Bill of Rights and the due process clause of the Constitution.[70]

B.

Having established that Sections 15 and 16, Article XIV of the Constitution invoked by petitioner KOR are not self-executing constitutional provisions, I will discuss the existing laws or statutes that can be sources of judicially demandable rights for purposes of the ends sought to be attained by petitioner.

a.

Over the years, Congress has passed a number of laws to carry out the constitutional policy expressed in Sections 15 and 16, Article XIV of the Constitution. Conservation and preservation have, notably, been recurring themes in Philippine heritage laws.

Republic Act No. 4368,[71] enacted in 1965 and which created the National Historical Commission, declared it the duty, among others, of the Commission to "identify, designate, and appropriately mark historic places in the Philippines and x x x to maintain and care for national monuments, shrines and historic markets x x x."[72] A year later, Republic Act No. 4846,

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[68] *See* Takahiro Kenjie C. Aman & Maria Patricia R. Cervantes-Poco, *What's in a Name?: Challenges in Defining Cultural Heritage in Light of Modern Globalization*, 60 ATENEO L.J. 965 (2016).

[69] BLACK'S LAW DICTIONARY 1200 (1995). *See* Laurence H. Tribe, I AMERICAN CONSTITUTIONAL LAW 60 (2000). *See also* Dante Gatmaytan, LEGAL METHOD ESSENTIALS 46 (2012) citing *Francisco, Jr. v. House of Representatives*, G.R. No. 160261, November 10, 2003, 415 SCRA 44.

[70] See *Vera v. Avelino*, 77 Phil. 192 (1946).

[71] An Act to Establish a National Historical Commission, to Define Its Powers and Functions, Authorizing the Appropriation of Funds Therefor, and for Other Purposes (1965).

[72] Republic Act No. 4368, Sec. 4(e).

otherwise known as the "Cultural Properties Preservation and Protection Act," was passed declaring it an explicit state policy to "preserve and protect the important x x x cultural properties x x x of the nation and to safeguard their intrinsic value."[73]

Republic Act No. 7356[74] (RA 7356) later declared that culture is a "manifestation of the freedom of belief and of expression," and "a human right to be accorded due respect and allowed to flourish."[75] Thus, it was provided that:

> Sec. 3. *National Identity.* — Culture reflects and shapes values, beliefs, aspirations, thereby defining a people's national identity. **A Filipino national culture that mirrors and shapes Philippine economic, social and political life shall be evolved, promoted and conserved.**
>
> Sec. 7. *Preservation of the Filipino Heritage.* — **It is the duty of every citizen to preserve and conserve the Filipino historical and cultural heritage and resources.** The retrieval and **conservation** of artifacts of Filipino culture and history shall be vigorously pursued. (Emphasis and underscoring supplied.)

With RA 7356, Congress created the National Commission for Culture and the Arts (NCCA) which had, among its principal mandates, the **conservation** and promotion of the nation's historical and cultural heritage.[76] Later on, Republic Act No. 8492[77] (RA 8492) was enacted, converting the National Museum (NM) into a trust of the government whose primary mission includes the acquisition, **preservation**, and exhibition of works of art, specimens and cultural and historical artifacts.[78] Our National Building Code also prohibits the construction of signboards which will "obstruct the natural view of the landscape x x x or otherwise defile, debase, or offend the **aesthetic and cultural values** and traditions of the Filipino people."[79]

Republic Act No. 10066[80] (RA 10066) and Republic Act No. 10086[81] (RA 10086) are heritage laws of recent vintage which further affirm the mandate to protect, **preserve**, **conserve**, and promote the nation's historical

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73 Republic Act No. 4846, Sec. 2.
74 Law Creating the National Commission for Culture and the Arts (1992).
75 Republic Act No. 7356, Sec. 2.
76 Republic Act No. 7356, Sec. 12(b).
77 National Museum Act of 1998.
78 Republic Act No. 8492, Sec. 3.
79 Republic Act No. 6541, Chapter 10.06, Sec. 10.06.01: *General*—
(a) No signs or signboards shall be erected in such a manner as to confuse or obstruct the **view** or interpretation of any official traffic sign signal or device.
(b) No signboards shall be constructed as to unduly obstruct the **natural view of the landscape**, distract or obstruct the view of the public as to constitute a traffic hazard, or **otherwise defile, debase, or offend the aesthetic and cultural values and traditions of the Filipino people.** (Emphasis supplied.)
80 National Cultural Heritage Act of 2009.
81 Strengthening Peoples' Nationalism Through Philippine History Act (2009).

and cultural heritage and resources.[82] Section 2 of RA 10066, for example, reads:

> Sec. 2. *Declaration of Principles and Policies.* – Sections 14, 15, 16 and 17, Article XIV of the 1987 Constitution declare that the State shall foster the preservation, enrichment and dynamic evolution of a Filipino culture based on the principle of unity in diversity in a climate of free artistic and intellectual expression. The Constitution likewise mandates the State to conserve, develop, promote and popularize the nation's historical and cultural heritage and resources, as well as artistic creations. It further provides that all the country's artistic and historic wealth constitutes the cultural treasure of the nation and shall be under the protection of the State, which may regulate its disposition.
>
> In the pursuit of **cultural preservation as a strategy for maintaining Filipino identity**, this Act shall pursue the following objectives:
>
> **(a) Protect, preserve, conserve and promote the nation's cultural heritage, its property and histories, and the ethnicity of local communities;**
> (b) Establish and strengthen cultural institutions; and
> (c) Protect cultural workers and ensure their professional development and well-being.
>
> The State shall likewise endeavor to create a balanced atmosphere where the historic past coexists in harmony with modern society. **It shall approach the problem of conservation in an integrated and holistic manner, cutting across all relevant disciplines and technologies.** The State shall further administer the heritage resources in a **spirit of stewardship** for the inspiration and benefit of the present and future generations. (Emphasis and underscoring supplied.)

According to the City of Manila, "[u]nobstructed viewing appreciation and photographic opportunities have not risen to the level of a legislated right or an imposable obligation in connection with engineering works or even cultural creations."[83] The NHCP, for its part, claims that there is "no law or regulation [which] imposes a specific duty on [the part of] the NHCP to issue a Cease and Desist Order (CDO) to protect the view of the Rizal Monument and Rizal Park."[84] Even assuming that views are protected, the NHCP claims that it is the City of Manila in the exercise of its police

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82 Republic Act No. 10066, Sec. 2 and Republic Act No. 10086, Sec. 2.
83 *Rollo*, p. 435.
84 *Id.* at 2428.

power—not the NHCP—that should pass legislation to protect the Rizal Park and Rizal Monument.[85]

DMCI-PDI maintains that there is "absolutely no law, ordinance or rule prohibiting the construction of a building, regardless of height, at the background of the Rizal Monument and the Rizal Park."[86] It argues that RA 10066, the law passed by Congress to implement the constitutional mandate of heritage conservation, "does not include provisions on the preservation of the prominence, dominance, vista points, vista corridors, sightlines, and settings of historical monuments like the Rizal Monument."[87] It further claims that what RA 10066 protects is merely the *physical* integrity of national cultural treasures and important cultural properties "by authorizing the issuance of CDOs pursuant to Section 25 of the law."[88]

In my view, respondents are only PARTLY correct.

My reading of the foregoing statutes shows no *clear and specific* duty on the part of public respondents NCCA, NM, or NHCP to regulate, much less, prohibit the construction of the Torre de Manila project on the ground that it adversely affects the view, vista, sightline, or setting of the Rizal Monument and the Rizal Park.[89]

Nevertheless, there *is* to me existing *local* legislation implementing the constitutional mandate of heritage conservation. Ordinance No. 8119 provides for a clear and specific duty on the part of the City of Manila to regulate development projects insofar as these may adversely affect the view, vista, sightline, or setting of a cultural property within the city.

b.

Republic Act No. 7160, otherwise known as the Local Government Code, vests local government units with the powers to enact ordinances to promote the general welfare, which it defines to include:

> Sec. 16. *General Welfare.* — Every local government unit shall exercise the powers expressly granted, those necessarily implied therefrom, as well as powers necessary, appropriate, or incidental for its efficient and effective governance, and those which are essential to the promotion of the general welfare. **Within their respective territorial jurisdictions, local government units shall ensure and support, among other things, the preservation and**

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85 *Id.* at 2440.
86 *Id.* at 3213.
87 *Id.* at 1279.
88 *Id.*
89 Considering the pendency of Civil Case No. 15-074 (before the Regional Trial Court in Makati City) and G.R. No. 222826 (before this Court), we shall refrain from discussing the matter of the propriety of the NCCA's issuance of a CDO at this time.

> **enrichment of culture**, promote health and safety, **enhance the right of the people to a balanced ecology,** encourage and support the development of appropriate and self-reliant scientific and technological capabilities, improve public morals, enhance economic prosperity and social justice, promote full employment among their residents, maintain peace and order, and preserve the comfort and convenience of their inhabitants. (Emphasis supplied.)

It also provides that zoning ordinances serve as the primary and dominant bases for the use of land resources.[90] These are enacted by the local legislative council as part of their power and duty to promote general welfare,[91] which includes the division of a municipality/city into districts of such number, shape, and area as may be deemed best suited to carry out the stated purposes, and within such districts "regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied x x x."[92]

Ordinance No. 8119 is a general zoning ordinance similar to the one upheld by the United States Supreme Court in the case of *Village of Euclid v. Ambler Realty Co.*[93] as a valid exercise of police power. The validity of a municipal ordinance dividing the community into zones was challenged in that case on the ground that "it violates the constitutional protection 'to the right of property x x x by attempted regulations under the guise of the police power, which are unreasonable and confiscatory."[94] The US Supreme Court there stated that:

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90 Republic Act No. 7160, Sec. 20(c).

91 The pertinent portions of the Local Government Code provide:

> Sec. 458. *Powers, Duties, Functions and Compensation.* – **The sangguniang panlungsod, as the legislative body of the city, shall enact ordinances, approve resolutions and appropriate funds for the general welfare of the city and its inhabitants pursuant to Section 16 of this Code** and in the proper exercise of the corporate powers of the city as provided for under Section 22 of this Code, and shall:
>
> (1) Approve ordinances and pass resolutions necessary for an efficient and effective city government, and in this connection, shall:
>
> x x x
>
> (ix) Enact integrated zoning ordinances in consonance with the approved comprehensive land use plan, subject to existing laws, rules and regulations; establish fire limits or zones, particularly in populous centers; and regulate the construction, repair or modification of buildings within said fire limits or zones in accordance with the provisions of the Fire Code;
>
> x x x
>
> (4) **Regulate activities relative to the use of land, buildings and structures within the city in order to promote the general welfare**
>
> x x x. (Emphasis supplied.)

92 Donald G. Hagman & Julian Conrad Juergensmeyer, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 55 (1986) [hereinafter "HAGMAN & JUERGENSMEYER"].

93 272 U.S. 365 (1926).

94 *Id.* at 386.

> Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. x x x[95]

This Court has similarly validated the constitutionality of zoning ordinances in this jurisdiction.[96] In *Victorias Milling Co., Inc. v. Municipality of Victorias, Negros Occidental*,[97] we held that an ordinance carries with it the presumption of validity. In any case, the validity of Ordinance No. 8119, while subsequently raised by petitioner KOR as an issue, can be challenged only in a direct action and not collaterally.[98] While the question of its reasonableness may still be subject to a possible judicial inquiry in the future,[99] Ordinance No. 8119 is presumptively valid and must be applied.

Ordinance No. 8119, *by its terms,* contains specific, operable norms and standards that implement the constitutional mandate to conserve historical and cultural heritage and resources. **A plain reading of the Ordinance would show that it sets forth specific historical preservation and conservation standards which *textually* reference "landscape and streetscape,"[100] and "visual character"[101] in specific relation to the**

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[95] *Id.* at 386-387.

[96] *Gancayco v. City Government of Quezon*, G.R. No. 177807, October 11, 2011, 658 SCRA 853; *Social Justice Society v. Atienza, Jr.*, G.R. No. 156052, February 13, 2008, 545 SCRA 92; *United BF Homeowners' Association, Inc. v. City Mayor of Parañaque*, G.R. No. 141010, February 7, 2007, 515 SCRA 1; *Sangalang v. Intermediate Appellate Court*, G.R. No. 71169, December 22, 1988, 168 SCRA 634; *People v. De Guzman*, 90 Phil. 132 (1951); *Tan Chat v. Municipality of Iloilo*, 60 Phil. 465 (1934); *Seng Kee & Co. v. Earnshaw*, 56 Phil. 204 (1931); *People v. Cruz*, 54 Phil. 24 (1929).

[97] G.R. No. L-21183, September 27, 1968, 25 SCRA 192 cited in *Smart Communications, Inc. v. Municipality of Malvar, Batangas*, G.R. No. 204429, February 18, 2014, 716 SCRA 677.

[98] *Solicitor General v. Metropolitan Manila Authority*, G.R. No. 102782, December 11, 1991, 204 SCRA 837, 842.

[99] *Id.*

[100] Ordinance No. 8119, Sec. 47(7).

[101] Ordinance No. 8119, Sec. 47(9).

conservation of historic sites and facilities located within the City of Manila. We quote:

> Sec. 47. Historical Preservation and Conservation Standards. – **Historic sites and facilities shall be conserved and preserved.** These shall, to the extent possible, be made accessible for the educational and cultural enrichment of the general public.
>
> The following shall guide the development of historic sites and facilities:
>
> 1. **Sites** with **historic** buildings or **places** shall be developed to conserve and enhance their **heritage values**.
>
> 2. Historic sites and facilities shall be adaptively re-used.
>
> 3. Any person who proposes to add, to alter, or partially demolish a **designated heritage property** will require the approval of the City Planning and Development Office (CPDO) and shall be required to prepare a heritage impact statement that will **demonstrate to the satisfaction of the CPDO that the proposal will not adversely impact the heritage significance of the property and shall submit plans for review by the CPDO in coordination with the National Historical Institute (NHI).**
>
> 4. Any proposed alteration and/or re-use of designated heritage properties shall be evaluated based on criteria established by the **heritage significance** of the particular property or site.
>
> 5. Where an owner of a heritage property applies for approval to demolish a designated heritage property or properties, the owner shall be required to provide evidence to satisfaction that demonstrates that rehabilitation and re-use of the property is not viable.
>
> 6. Any designated heritage property which is to be demolished or significantly altered shall be thoroughly documented for archival purposes with a history, photographic records, and measured drawings, in accordance with accepted heritage recording guidelines, prior to demolition or alteration.
>
> 7. Residential and commercial infill in heritage areas will be sensitive to the existing scale and pattern of those areas, which **maintains the existing landscape and streetscape qualities of those areas,** and which does not result in the **loss of any heritage resources.**
>
> 8. Development plans shall ensure that parking facilities (surface lots, residential garages, stand-alone parking

> garages and parking components as parts of larger developments) are compatibly integrated into heritage areas, and/or are compatible with adjacent heritage resources.
>
> 9. Local utility companies (hydro, gas, telephone, cable) shall be required to place metering equipment, transformer boxes, power lines, conduit, equipment boxes, piping, wireless telecommunication towers and other utility equipment and devices in locations **which do not detract from the visual character of heritage resources, and which do not have negative impact on its architectural integrity.**
>
> 10. **Design review approval shall be secured from the CPDO for any** alteration of the heritage property to ensure that design guidelines and standards are met and shall promote preservation and conservation of the heritage property. (Emphasis and underscoring supplied.)

Section 47, *by its terms*, provides the standards by which to "guide the development of historic sites and facilities," which include, among others, consideration of the "existing landscape, streetscape and visual character" of heritage properties and resources. Under Section 47, the following matters are issues for consideration: (1) whether a certain property is considered a historic site, area and facility which has heritage value and significance; (2) whether the proposed development adds to or alters a historic site, area and facility; (3) whether a proposed development adversely impacts the heritage significance of a historic site, area or facility; (4) whether a project proponent needs to submit a heritage impact statement (HIS) and plans for review; and (5) whether the CPDO is required to coordinate with the respondent NHCP in assessing a proposed development's adverse impact, if any, to the heritage significance of a historic site, area, and facility.

Petitioner KOR asserted that the Rizal Park is "sacred ground in the historic struggle for freedom"[102] and the Rizal Monument is a "National Cultural Treasure."[103] It alleged that respondent DMCI-PDI's Torre de Manila condominium project will have an "adverse impact" by ruining the sightline of the Rizal Park and Rizal Monument thereby diminishing its value,[104] scale, and importance.[105] To my mind, petitioner's foregoing allegations should be sufficiently addressed by the City upon due consideration of the standards expressed under Section 47.

In fact, Ordinance No. 8119 contains *another* provision that declares it in "the public interest" that all projects be designed in an "aesthetically pleasing" manner. It makes express and specific reference to "existing and

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[102] *Rollo*, p. 10.
[103] *Id.* at 12.
[104] *Id.* at 13.
[105] *Id.* at 23.

intended character of [a] neighborhood,"[106] "natural environmental character" of its neighborhood, and "skyline,"[107] among others. Section 48 mandates consideration of skylines as well as "the existing and intended character of the neighborhood" where the proposed facility is to be located, thus:

> Sec. 48. Site Performance Standards. – The City considers it in the **public interest** that all **projects** are designed and developed in a safe, efficient and **aesthetically pleasing manner**. Site development shall consider the environmental character and limitations of the site and its adjacent properties. All project elements shall be in complete harmony according to good design principles and **the** subsequent development must be **pleasing** as well as efficiently functioning especially in relation to the adjacent properties and bordering streets.
>
> The design, construction, operation and maintenance of every facility shall be in harmony with the existing and intended character of its neighborhood. It shall not change the essential character of the said area but will be a substantial improvement to the value of the properties in the neighborhood in particular and the community in general.
>
> Furthermore, designs should consider the following:
>
> > 1. Sites, buildings and facilities shall be designed and developed with regard to safety, efficiency and high standards of design. **The natural environmental character of the site and its adjacent properties shall be considered in the site development of each building and facility.**
> >
> > 1. The height and bulk of buildings and structures shall be so designed that it does not impair the entry of light and ventilation, cause the loss of privacy and/or create nuisances, hazards or inconveniences to adjacent developments.
> >
> > x x x
> >
> > 8. No large commercial signage and/or pylon, which will be detrimental **to the skyline,** shall be allowed.
> >
> > 9. Design guidelines, deeds of restriction, property management plans and other regulatory tools that will ensure high quality developments shall be required from developers of commercial subdivisions and condominiums. These shall be submitted to the City Planning and Development

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[106] Ordinance No. 8119, Sec. 48(2).
[107] Ordinance No. 8119, Sec. 48(8).

> Office (CPDO) for review and approval. (Emphasis and underscoring supplied.)

Under the pertinent provisions of Section 48, the following items must be considered: (1) whether a proposed development was designed in an aesthetically pleasing manner in relation to the environmental character and limitations of its site, adjacent properties, and bordering streets; (2) whether the proposed development's design (including height, bulk and orientation) is in harmony with the existing and intended character of its neighborhood; (3) whether the development will change the essential character of the area; and (4) whether the development would be akin to a large commercial signage and/or pylon that can be detrimental to the skyline.

I find that Section 48 appears relevant especially considering petitioner KOR's allegations that the Torre de Manila sticks out "like a sore thumb"[108] and respondent NHCP's statement to the Senate that "the Commission does find that the condominium structure (Torre de Manila) "look[s] ugly,"[109] and "visually obstructs the vista and adds an unattractive sight to what was once a lovely public image x x x."[110] The foregoing allegations should likewise be sufficiently addressed by the City of Manila upon due consideration of the standards stated under Section 48.

Finally, Ordinance No. 8119, *by its terms*, contains specific operable norms and standards that protect "views" with "high scenic quality," **separately and independently** of the historical preservation, conservation, and aesthetic standards discussed under Sections 47 and 48. Sections 45 and 53 obligate the City of Manila to protect views of "high scenic quality" which are the objects of "public enjoyment," under explicit "environmental conservation and protection standards:"

> Sec. 45. Environmental Conservation and Protection Standards. – It is the intent of the City to protect its **natural resources**. In order to achieve this objective, all *development* shall comply with the following *regulations*:
>
> 1. **Views** shall be preserved for public enjoyment especially in sites with **high scenic quality** by closely considering building **orientation**, **height, bulk**, fencing and **landscaping**.
>
> x x x
>
> Sec. 53. Environmental Compliance Certificate (ECC). - Notwithstanding the issuance of zoning permit (locational clearance) Section 63 of this Ordinance, no **environmentally critical projects** nor projects located in **environmentally critical areas** shall be commenced,

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108 *Rollo*, p. 13.
109 *Id.* at 172.
110 *Id.*

> developed or operated unless the requirements of ECC have been complied with. (Emphasis and italics supplied.)

I note that the Torre de Manila is in a University Cluster Zone (INS-U), which is assigned a permissible maximum Percentage Land Occupancy (PLO) of 0.6 and a maximum Floor-Area Ratio (FAR) of 4. Applying these Land Use Intensity Controls (LUICs), petitioner KOR claims that the City of Manila violated the zoning restrictions of Ordinance No. 8119 when it: (1) permitted respondent DMCI-PDI to build a structure beyond the seven-floor limit allowed within an "institutional university cluster;" and (2) granted respondent DMCI-PDI a variance to construct a building "almost six times the height limit."[111] Petitioner KOR asserts that even at 22.83% completion, or at a height of 19 floors as of August 20, 2014, the Torre de Manila already obstructs the "view" of the "background of blue sky" and the "vista" behind the Rizal Park and the Rizal Monument.[112]

I am aware that KOR does not in its petition invoke the constitutional right of the people to a balanced and healthful ecology,[113] other environmental protection statutes, or Sections 45 and 53 of Ordinance No. 8119. Considering, however, the language of the petition's allegations, the texts of Sections 45 and 53, and the greater public interest in the just and complete determination of all issues relevant to the disposition of this case, I include the following consideration of Sections 45 and 53 in my analysis.

In my view, Section 45 in relation to Section 53, *by their terms*, provide standards by which "views" with "high scenic quality" enjoyed by the public should be preserved, *i.e.*, "all developments shall comply with x x x regulations" including those relating to "building orientation, height, [and] bulk x x x."

To me, these Sections thus present the following questions for the City of Manila to consider and decide: (1) whether the Rizal Park and the Rizal Monument generate a view of high scenic quality that is enjoyed by the public;[114] (2) whether this view comes within the purview of the term "natural resources;" (3) whether the orientation, height, and bulk of the Torre de Manila, as prescribed in its LUIC rating under the University Cluster Zone, or as approved by the variance granted by the City of Manila, will impair the protection of this view; and (4) whether the Torre de Manila is an environmentally critical project or is a project located in an

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[111] *Rollo*, p. 22.
[112] *Id.* at 23.
[113] CONSTITUTION, Art. II, Sec. 16.
[114] The Rizal Park is described by the National Parks Development Committee, the entity tasked with Rizal Park's maintenance and development, as "the Philippine's premier open space, the green center of its historical capital" and the "central green of the country." NATIONAL PARKS DEVELOPMENT COMMITTEE, PARKS FOR A NATION 11 (2013).

environmentally critical area, as to require compliance with the requirements of an ECC.[115]

C.

The majority states that the main purpose of zoning is the protection of public safety, health, convenience, and welfare. It is argued that there is no indication that the Torre de Manila project brings any harm, danger or hazard to the people in the surrounding areas except that the building allegedly poses an unsightly view on the taking of photos or the visual appreciation of the Rizal Monument by locals and tourists.

I disagree.

The modern view is that health and public safety do not exhaust or limit the police power purposes of zoning. It is true that the concept of police power (in general) and zoning (in particular) traditionally developed alongside the regulation of nuisance and dangers to public health or safety. The law on land development and control, however, has since dramatically broadened the reach of the police power in relation to zoning.

The protection of cultural, historical, aesthetic, and architectural assets as an aspect of the public welfare that a State is empowered to protect *pursuant to the police power* would find its strongest support in *Berman v. Parker*.[116] This 1954 landmark case broke new and important ground when it recognized that public safety, health, morality, peace and quiet, law and order—which are some of the more conspicuous examples of the traditional application of the police power—merely illustrate the scope of the power and do not limit it.[117] Justice William O. Douglas in his opinion famously said:

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of

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[115] The record shows that an Environmental Compliance Certificate was issued by the DENR to the City of Manila. (*Rollo*, p. 385) However, the record does not contain the Environmental Impact Statement (EIS) on which the ECC was based, and whether the EIS considered the impact of the Torre de Manila on the Rizal Park land and the Rizal Monument, under the terms of Sections 45 and 53. It is well to remember that it was the concern of the Environmental Management Bureau-National Capital Region, over the impact of the Torre de Manila on the setting of the Rizal Park and the Rizal Monument that triggered the first contact of DMCI-PDI with NHCP. The ECC refers to an Initial Environmental Examination (IEE) Checklist which was submitted and intended to protect and mitigate the Torre de Manila's adverse impacts on the environment. The IEE Checklist Report, which the DENR uses for projects to be located within Environmentally Critical Areas (ECA), is not itself part of the record. The IEE Checklist Report form requires the DENR to consider, under Environmental Impacts and Management Plan, "possible environmental/social impacts" in the form of "impairment of visual aesthetics." The record is bereft of information on how this possible impact to the visual aesthetics of the Rizal Park and the Rizal Monument was considered or handled.

[116] *Supra* note 2. See Terence H. Benbow & Eugene G. McGuire, *Zoning and Police Power Measures for Historic Preservation: Properties of Nonprofit and Public Benefit Corporations*, 1 PACE L. REV. 635 (1981).

[117] *Berman v. Parker*, *supra* note 2, at 32-33.

> legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well nigh conclusive. x x x
>
> **The concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.**[118] (Emphasis supplied. Citations omitted.)

Building on *Berman* and later statutes, courts would, over time, accept newer definitions of the public welfare in support of expansive zoning laws. Some of the most significant applications of this expansion will occur in the use of zoning to effect public welfare interests in historical preservation, protection of the environment and ecology, and aesthetics.[119]

At this juncture, I would like to put into historical perspective the development of, and inter-relation between, town planning, police power and zoning.

a.

Town planning, at least in the United States, traces its origins from early colonial days. Civil engineers and land surveyors dominated the design of frontier settlements.[120] The advent of widespread land speculation then triggered the era of city-building. When unplanned growth led to disease, poor sanitation, and problems of drainage and disposal of waste, the "water-carriage sewerage system" was invented, paving the way for what we now know as the era of the Sanitary Reform Movement.[121]

After the Civil War, American cities rapidly grew, leading to "an increased awareness of the need for civic beauty and amenities in America's unplanned urban areas."[122] With the growing agitation for "greater attention to aesthetics in city planning" came the City Beautiful Movement, whose debut is commonly attributed to the Chicago World Fair of 1893.[123] This Movement is considered the precursor to modern urban planning whose hallmarks include "[w]ell-kept streets, beautiful parks, attractive private residences, fresh air and sanitary improvements."[124] In the 1890s, townspeople formed *ad hoc* "village improvement associations" to

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118 *Id.*
119 HAGMAN & JUERGENSMEYER, *supra* note 92, at 378-388, 446-472.
120 *Id.* at 13-14.
121 *Id.* at 14-16.
122 *Id.* at 16.
123 *Id.*
124 *Id.* at 17.

propagate the movement.[125] Over time, the village improvement associations would give way to planning commissions. Much later, local governments adopted city plans which they eventually incorporated into comprehensive zoning ordinances.[126] Thereafter, the United States Supreme Court in 1926 would uphold the constitutionality of a general zoning ordinance in *Village of Euclid.*

b.

Historic preservation and conservation has a long history. It is said to have started in the United States in the mid 1800's, with efforts to save Mt. Vernon, the home of George Washington. Before the Civil War, the United States (US) Congress initially harbored "strong doubts" as to the constitutional basis of federal involvement in historic preservation.[127] Since the government at the time was not financing the acquisition of historic property,[128] a group of ladies organized a private effort to acquire the property and save it from ruin.[129] The US Congress injected itself into the preservation field only when it began purchasing Civil War battlefield sites. Sometime in 1893, the US Congress passed a law which provided for, among others, the acquisition of land to preserve the lines of the historic Battle of Gettysburg. This law was challenged on constitutional grounds and gave rise to the landmark decision in *United States v. Gettysburg Elec. Ry. Co.*[130]

Gettysburg Electric Railway Co., a railroad company which acquired property for its railroad tracks that later became subject of condemnation, filed a case questioning the kind of public use for which its land is being condemned. In unanimously ruling in favor of the federal government, the United States Supreme Court held that the taking of the property "in the name and for the benefit of all the citizens of the country x x x seems x x x not only a public use, but one so closely connected with the welfare of the republic itself x x x"[131] With this Decision, historic preservation law was

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[125] *Id.*

[126] *Id.* at 18-24.

[127] Richard West Sellars, *Pilgrim Places: Civil War Battlefields, Historic Preservation, and America's First National Military Parks, 1863-1900*, 2 CRM: THE JOURNAL OF HERITAGE STEWARDSHIP 45-47 (2005) [hereinafter "SELLARS"].

[128] HAGMAN & JUERGENSMEYER, *supra* note 92, at 461.

[129] Seth Porges, *The Surprising Story of How Mount Vernon Was Saved From Ruin*, FORBES, January 14, 2016, <http://ift.tt/1SkfcVp> (last accessed April 5, 2017).

[130] 160 U.S. 668 (1896).

[131] *Id.* at 682. The US Supreme Court held:

> Upon the question whether the proposed use of this land is public one, we think there can be no well founded doubt. And also, in our judgment, the government has the constitutional power to condemn the land for the proposed use. x x x
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> The end to be attained by this proposed use, as provided for by the act of Congress, is legitimate, and lies within the scope of the Constitution. **The battle of Gettysburg was one of the great battles of the world. x x x Can it be that the government is without power to preserve the land** and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments

"canonized by the legislative, executive, and judicial branches of the Federal Government"[132] and given "a constitutional foundation."[133]

On the other hand, environmental aspects of land use control were scarcely a concern before the 1960s.[134] This, however, would change in 1969 with the passage of the federal National Environmental Policy Act[135] (NEPA) which mandated that federal agencies consider the environmental effects of their actions. The policy goals as specified in the NEPA include "responsibilities of each generation as trustee of the environment for succeeding generations"[136] and to "assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings"[137] through the preparation of environmental impact statements on major federal actions which may have a significant impact on the environment, natural or built.[138]

The NEPA later led to the adoption of similar laws in over 75 countries.[139] In the Philippines, President Marcos in 1977 issued Presidential Decree No. 1151, entitled "Philippine Environmental Policy," declaring it the responsibility of the government to, among others, "preserve important historic and cultural aspects of the Philippine heritage." It declared that an impact statement shall be filed in every action, project, or undertaking that significantly affects the quality of the environment. Presidential Decree No. 1586,[140] issued in 1978, then authorized the President to declare certain projects, undertaking, or areas in the country as "environmentally critical." Pursuant to this authority, President Marcos, under Proclamation No. 1586, declared areas of unique historic, archaeological, or scientific interests as among the areas declared to be environmentally critical and within the scope of the Environmental Impact Statement System.[141]

> provided for by these acts of Congress, **or even take possession of the field of battle in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country**. x x x (*Id.* at 680-682. Emphasis supplied.)

[132] SELLARS, *supra* at 46-47.

[133] J. Peter Byrne, *Hallowed Ground: The Gettysburg Battlefied in Historic Preservation Law*, GEORGETOWN LAW FACULTY WORKING PAPERS, Paper 91 (2008), <http://scholarship.law.georgetown.edu/fwps_papers/91> (last accessed July 25, 2016). See also SELLARS, *supra*.

[134] HAGMAN & JUERGENSMEYER, *supra* note 92, at 378.

[135] Pub. L. No. 91-190, 83 Stat. 852, codified at 42 U.S.C §§4321-4361.

[136] 42 USC §4331.

[137] *Id.*

[138] HAGMAN & JUERGENSMEYER, *supra* note 92, at 382.

[139] Larry W. Canter, ENVIRONMENTAL IMPACT ASSESSMENT 35 (1996).

[140] Establishing an Environmental Impact Statement System Including Other Environmental Management Related Measures and for Other Purposes.

[141] See HAGMAN & JUERGENSMEYER, *supra* note 92, at 385-386:

> Alternatives are at the heart of the EIS [requirement]. All reasonable alternatives are to be described and analyzed for their environmental impacts. Alternatives include abandonment of the project and delay for further study. Even those alternatives which are not within the preparing agency's powers are to be discussed. x x x

The broadening concept of the public welfare would also extend to considerations of aesthetics. The traditional rule has been that the authority for statutes and ordinances is the state's police power to promote the public safety, health, morals, or general welfare.[142] Aesthetic considerations as a "primary motivation" to the enactment of ordinances are "insufficient" where they are only "auxiliary or incidental" to the interests in health, morals and safety.[143]

In early court decisions concerning aesthetic regulation, the US Supreme Court viewed aesthetics as "not sufficiently important in comparison with traditional police power uses."[144] At that time, the US Supreme Court would hold that aesthetic values were not important enough to warrant an infringement of more highly valued property rights.[145] Aesthetic regulations were perceived to carry "great a danger of unbridled subjectivity, unlike other areas of state regulation, where objective evaluation of the governmental purpose is possible."[146] The lack of any objective standard to determine what is aesthetically pleasing created a real danger that the state will end up imposing its values upon the society which may or may not agree with it.

As earlier noted, this would change in 1954 with *Berman*. Courts would thereafter take a more liberal and hospitable view towards aesthetics.[147] "The modern trend of judicial decision x x x is to sanction aesthetic considerations as the sole justification for legislative regulation x x x."[148] Writers and scholars would articulate the bases for extending to aesthetic stand-alone acceptance as a public welfare consideration. Newton D. Baker, a noted authority in zoning regulations, argued that beauty is a valuable property right.[149] Professor Paul Sayre argued that since "aesthetics maintains property values," the greater the aesthetic value of property the more it is worth, therefore it will generate more taxes to fund public needs "thereby making aesthetics a community need worthy of the protection of the police power."[150] DiCello would make the formulation thus: "consequently, the general welfare may be defined as the health, safety and

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> Properly utilized, the EIS process achieves two goals. First, it forces agencies to consider the environmental effect of their decisions. Second, it provides a disclosure statement showing both the environmental consequences of the proposed action and the agency's decision-making process.

142 *Aesthetic Purposes in the Use of the Police Power*, 9 DUKE L.J. 299, 303 (1960).

143 Robert J. DiCello, *Aesthetics and the Police Power*, 18 CLEV. MARSHALL L. REV. 384, 387 (1969) [hereinafter "DICELLO"].

144 James Charles Smith, *Law, Beauty, and Human Stability: A Rose Is a Rose Is a Rose*, 78 CAL. L. REV. 787, 788 (1990) [hereinafter "SMITH"] *reviewing* John Costonis, ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE (1989).

145 *Id.* at 788-789.

146 *Id.* at 789.

147 *Id.* at 790-791.

148 *Aesthetic Purposes in the Use of the Police Power*, 1960 DUKE L.J. 299, 301.

149 DICELLO, *supra* at 380-390.

150 *Id.* at 390 citing Paul Sayre, *Aesthetics and Property Values: Does Zoning Promote the Public Welfare?*, 35 A.B.A. J. 471 (1949).

morals or aesthetics of the public."[151] Costonis[152] proposed that the legal justification for aesthetic laws is not beauty but rather our individual and group psychological well-being.[153] Bobrowski argued that visual resource protection supports tourism which has undeniable economic benefits to the society; the protection of the visual resource is related to the preservation of property values.[154] "Scenic quality is an important consideration for prospective purchasers. Obstruction of views, and noxious or unaesthetic uses of land plainly decrease market value."[155] Coletta explained that "an individual's aesthetic response to the visual environment is founded on the cognitive and emotional meanings that the visual patterns convey."[156]

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[151] *Id.*

[152] *See* John Costonis, ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE (1989).

[153] *See* SMITH, *supra* at 793.

[154] *See* Mark Bobrowski, *Scenic Landscape Protection Under the Police Power*, 22 B.C. ENVTL. AFF. L. REV. 697 (1995).

[155] *Id.*

[156] *See also* J.J. Dukeminier, Jr., *Zoning For Aesthetic Objectives: a Reappraisal*, 20 LAW & CONTEMPORARY PROBLEMS 218 (1955), which confronts squarely the problem raised by the subjective quality of the central element of aesthetics: what is beauty?:

> Now it seems fairly clear that among the basic values of our communities, and of any society aboriginal or civilized, is beauty. Men are continuously engaged in its creation, pursuit, and possession; beauty, like wealth, is an object of strong human desire. Men may use a beautiful object which they possess or control as a basis for increasing their power or wealth or for effecting a desired distribution of any one or all of the other basic values of the community, and, conversely, men may use power and wealth in an attempt to produce a beautiful object or a use of land which is aesthetically satisfying. It is solely because of man's irrepressible aesthetic demands, for instance, that land with a view has always been more valuable for residential purposes than land without, even though a house with a view intruding everywhere is said to be terribly hard to live in. Zoning regulations may, and often do, integrate aesthetics with a number of other community objectives, but it needs to be repeatedly emphasized that a healthful, safe and efficient community environment is not enough. More thought must be given to appearances if communities are to be really desirable places in which to live. Edmund Burke-no wild-eyed radical-said many years ago, "To make us love our country, our country ought to be lovely." It is still so today.
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> x x x x
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> Furthermore, in specifying and evaluating indices of attractive environments, it is important that community decision-makers—judges and planning officials—realize that they must promote land use which in time will succeed in appealing to people in general. In public planning that environment is beautiful which deeply satisfies the public; practical success is of the greatest significance. In the long run, what the people like and acclaim *as* beautiful provides the operational indices of what is beautiful so far as the community is concerned. All popular preferences will never be acceptable to connoisseurs who urge their own competence to prescribe what is *truly* beautiful, yet it seems inescapable that an individual's judgment of beauty cannot be normative for the community until it is backed with the force of community opinion. History may be of some comfort to the connoisseurs: widely acknowledged *great* artists and *beautiful* architectural styles produced popular movements and not cults. A great age of architecture has not existed without the popular acceptance of a basic norm of design. (Emphasis in the original.)

c.

In the Philippines, this Court, in the 1915 seminal case of *Churchill v. Rafferty*,[157] declared that objects which are offensive to the sight fall within the category of things which interfere with the public safety, welfare, and comfort, and therefore, within the reach of the State's police power. Thus:

> Without entering into the realm of psychology, we think it quite demonstrable that sight is as valuable to a human being as any of his other senses, and that the proper ministration to this sense conduces as much to his contentment as the care bestowed upon the senses of hearing or smell, and probably as much as both together. x x x Man's [a]esthetic feelings are constantly being appealed to through his sense of sight. x x x[158]

Forty years later, in *People v. Fajardo,*[159] we would hold that "the State may not, under the guise of police power, permanently divest owners of the beneficial use of their property and practically confiscate them **solely** to preserve or assure the aesthetic appearance of the community."[160] In that case, we invalidated an ordinance that empowered the Municipal Mayor to refuse to grant a building permit to a proposed building that "destroys the view of the public plaza." In the more recent case of *Fernando v. St. Scholastica's College*,[161] this Court struck down a Marikina City ordinance which provided, among others, a six-meter setback requirement for beautification purposes. There, we held: "the State may not, under the guise of police power, permanently divest owners of the beneficial use of their property solely to preserve or enhance the aesthetic appearance of the community."[162]

Of course, *Churchill* and *Fajardo* were decided under the 1935 Constitution which simply provided that arts and letters shall be under the State's patronage.[163] The 1973 and 1987 Constitutions would change this. The 1973 Constitution provided that "Filipino culture shall be preserved and developed for national identity."[164] Then, in 1987, the Constitution devoted a whole new sub-section to arts and culture, including Sections 15 and 16 of Article XIV, which are subjects of this case. More than that, it provided for a right of the people to a balanced and healthy ecology, which spawned *Oposa v. Factoran, Jr.*[165]

As also previously noted, Congress in 1991 enacted the Local Government Code which specifically defined as concerns of the public

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157 32 Phil. 580 (1915).
158 *Id.* at 608.
159 104 Phil. 443 (1958).
160 *Id.* at 447-448.
161 G.R. No. 161107, March 12, 2013, 693 SCRA 141.
162 *Id.* at 160.
163 1935 CONSTITUTION, Art. XIII, Sec. 4.
164 1973 CONSTITUTION, Article XV, Sec. 9(2).
165 *Supra* note 36.

welfare, the preservation and enrichment of culture and enhancing the rights of the people to a balanced ecology.

Then in 2006, the City of Manila enacted Ordinance No. 8119, which amended Ordinance No. 81-01[166] of the Metropolitan Manila Commission. A "City Beautiful Movement," appears as one of the five-item "Plan Hi-Lights" of Ordinance No. 8119 and includes, among others, "city imageability."[167] I quote:

> This promotes the visual "imageability" of the City according to the Burnham Plan of 1905. As per plan recommendation from Daniel Burnham, it gives emphasis on the creation and enhancement of wide boulevards, public buildings, landscaped parks and **pleasant vistas**. It also encourages the connectivity of spaces and places through various systems/networks (transport/parkways). But **most of all, it is the establishment of a symbolic focus that would identify the City of Manila as well as become its unifying element.** These are the main themes for Place Making revolving around creating a "sense of place" and distinction within the City. (Emphasis and underscoring supplied.)

I have compared the provisions of Ordinance No. 8119 with those of Ordinance No. 81-01 and find that they are both general zoning ordinances. Both similarly divide the City of Manila into zones, prescribe height, bulk and orientation standards applicable to the zones, and provide for a procedure for variance in case of non-conforming uses. They, however, differ in one very significant respect relevant to the determination of this case. **Ordinance No. 8119 provides for three completely new standards not found in Ordinance No. 81-01, or for that matter, in any of the other current zoning ordinances of major cities within Metro Manila, such as Marikina,[168] Makati,[169] or Quezon City.**[170] These, as discussed, are: (a) the historical preservation and conservation standards under Section 47; (b) the environmental conservation and protection standards under Sections 45 and 53; and (c) the aesthetic/site performance standards under Section 48. **To my mind, these sets of distinctive provisions introduced into Ordinance No. 8119 constitute indubitable and irrefutable proof that the City of Manila has aligned itself with jurisdictions that have embraced the modern view of an expanded concept of the public welfare.** For this reason, I cannot accept the majority's view that zoning as an aspect of police power covers only "traditional" concerns of public safety, health, convenience, and welfare.

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[166] Comprehensive Zoning Ordinance for the National Capital Region (1981).

[167] II MANILA COMPREHENSIVE LAND USE PLAN AND ZONING ORDINANCE 2005-2020, Sec. 3. "Imageability" was defined as "that quality in a physical object which gives it a high probability of evoking a strong image in any given observer."

[168] Ordinance No. 161 (2006).

[169] Ordinance No. 2012-102.

[170] Ordinance No. SP-2200, S-2013.

I am also of the view that *mandamus* lies against respondents.

Generally, the writ of *mandamus* is not available to control discretion nor compel the exercise of discretion.[171] The duty is ministerial only when its discharge requires neither the exercise of official discretion nor judgment.[172] Indeed, the issuance of permits *per se* is not a ministerial duty on the part of the City. This act involves the exercise of judgment and discretion by the CPDO who must determine whether a project should be approved in light of many considerations, not excluding its possible impact on any protected cultural property, based on the documents to be submitted before it.

Performance of a duty which involves the exercise of discretion may, however, be compelled by *mandamus* in cases where there is grave abuse of discretion, manifest injustice, or palpable excess of authority.[173] In *De Castro v. Salas*,[174] a writ of *mandamus* was issued against a lower court which refused to go into the merits on an action "upon an **erroneous view of the law or practice.**"[175] There, it was held:

> No rule of law is better established than the one that provides that mandamus will not issue to control the discretion of an officer or a court, when honestly exercised and when such power and authority is not abused. A distinction however must be made between a case where the writ of mandamus is sought to control the decision of a court upon the merits of the cause, and cases where the court has refused to go into the merits of the action, upon an erroneous view of the law or practice. If the court has erroneously dismissed an action upon a preliminary objection and upon an erroneous construction of the law, then mandamus is the proper remedy to compel it .to reinstate the action and to proceed to hear it upon its merits.[176]

In *Association of Beverage Employees v. Figueras*,[177] the Court *en banc* explained:

> That mandamus is available may be seen from the following summary in 38 C. J. 598-600, of American

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[171] *Metropolitan Bank and Trust Company v. Reynado*, G.R. No. 164538, August 9, 2010, 627 SCRA 88, 106.

[172] *Civil Service Commission v. Department of Budget and Management*, G.R. No. 158791, July 22, 2005, 464 SCRA 115, 133-134.

[173] See *M.A. Jimenez Enterprises, Inc. v. Ombudsman*, G.R. No. 155307, June 6, 2011, 650 SCRA 381, 399; *Corpuz v. Sandiganbayan*, G.R. No. 162214, November 11, 2004, 442 SCRA 294, 308; *Civil Service Commission v. Department of Budget and Management*, *supra*. See also *Licaros v. Sandiganbayan*, G.R. No. 145851, November 22, 2001, 370 SCRA 394, 411; *Angchangco, Jr. v. Ombudsman*, G.R. No. 122728, February 13, 1997, 268 SCRA 301, 306; *Antiquera v. Baluyot*, 91 Phil. 213, 220 (1952).

[174] 34 Phil. 818 (1916).

[175] *Id.* at 823-824. See also *Eraña v. Vera*, 74 Phil. 272 (1943).

[176] *De Castro v. Salas*, *supra* at 823-824.

[177] 91 Phil. 450 (1952).

decisions on the subject, including a U. S. Supreme Court decision:

> While the contrary view has been upheld, the great weight of authority is to the effect that an exception to the general rule that discretionary acts will not be reviewed or controlled exists when the discretion has been abused. **The discretion must be exercised under the established rules of law, and it may be said to be abused within the foregoing rule where the action complained of has been arbitrary or capricious, or based on personal, selfish, or fraudulent motives, or on false information, or on a total lack of authority to act, or where it amounts to an evasion of a positive duty, or there has been a refusal to consider pertinent evidence, hear the parties when so required, or to entertain any proper question concerning the exercise of the discretion, or where the exercise of the discretion is in a manner entirely futile and known by the officer to be so and there are other methods which if adopted would be effective. If by reason of a mistaken view of the law or otherwise there has been in fact no actual and *bona fide* exercise of judgment and discretion,** as, for instance, where the discretion is made to turn upon matters which under the law should not be considered, or where the action is based upon reasons outside the discretion imposed, **mandamus will lie.** So where the discretion is as to the existence of the facts entitling the relator to the thing demanded, if the facts are admitted or clearly proved, mandamus will issue to compel action according to law. x x x[178] (Emphasis and underscoring supplied.)

I find that the aforementioned provisions of Ordinance No. 8119 set out clear duties on the part of public respondent City of Manila for purposes of resolving whether the Torre de Manila construction project should be allowed and that the City, by reason of a mistaken or erroneous construction of its own Ordinance, had failed to consider its duties under this law when it issued permits in DMCI-PDI's favor.[179] Thus, while a writ of *mandamus* generally only issues to compel the performance of a ministerial duty, where, as in this case, there is a neglect or failure on the part of the City to consider the standards and requirements set forth under the law and its own comprehensive land use plan and zoning ordinance, *mandamus* may lie to compel it to consider the same for purposes of the exercise of the City's discretionary power to issue permits.

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[178] *Id.* at 455. See also *Rene de Knecht v. Desierto*, G.R. No. 121916, June 28, 1998, 291 SCRA 292 and *Eraña v. Vera*, *supra* (where the Court held that a mistaken or erroneous construction of the law may be a ground for the issuance of a writ of *mandamus*).

[179] Ordinance No. 8119, Sec. 47.

I have earlier shown that Ordinance No. 8119 contains three provisions which, *by their terms,* must be considered in relation to the determination by the City of Manila of the issue of whether the Torre de Manila condominium project should be allowed to stand as is. Article VII (Performance Standards) of Ordinance No. 8119 provides the standards under which "[a]ll land uses, developments or constructions *shall* conform to x x x." The Ordinance itself provides that in the construction or interpretation of its provisions, "the term 'shall' is always mandatory."[180] These standards, placed in the Ordinance for specific, if not already expressed, reasons must be seriously considered for purposes of issuance of building permits by the City of Manila.

Sections 43 in relation to 53, and 47 and 48, however, were not considered by the City of Manila when it decided to grant the different permits applied for by DMCI-PDI. The City has, in fact, adamantly maintained that there is no law which regulates, much less prohibits, such construction projects.[181] While I hesitate to find grave abuse of discretion on the part of the City of Manila in its actuations relating to its issuance of the permits and the variance, this is due to the disputed facts respecting these issues. There is, for example, a serious allegation of non-compliance with FAR and variance requirements under the Ordinance; this issue was, in fact, discussed and debated at great length during oral arguments.[182] While I believe that the Court should refrain from making a determination of this particular issue, involving as it does findings of fact and technical matters, I do not hesitate to find that the City was **mistaken in its view** that there was no law which regulates development projects in relation to views, vista points, landscape, and settings of certain properties.

This law, as I have earlier sought to demonstrate, is Ordinance No. 8119, whose purposes include the protection of the "character" of areas within the locality and the promotion of the general welfare of its inhabitants.[183] The standards and requirements under Ordinance No. 8119 were included in the law to ensure that any proposed development to be approved be mindful of the numerous public welfare considerations involved. **Ordinance No. 8119 being the primary and dominant basis for all uses of land resources within the locality, the City of Manila, through the CPDO, knows or ought to know the existence of these standards and ought to have considered the same in relation to the application of DMCI-PDI to construct the Torre de Manila project.**

Worse, the City has apparently been "suspending" the application of several provisions of the Ordinance purportedly to follow the more desirable standards under the National Building Code. In a letter dated October 10,

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[180] Ordinance No. 8119, Sec. 6(f).

[181] *Rollo*, p. 434.

[182] See interpellations by Justices Diosdado Peralta and Francis Jardeleza, among others. TSN, August 11, 2015, pp. 6-7, 20-36, 48-52, 65-67; TSN, August 18, 2015, pp. 26-onwards.

[183] Ordinance No. 8119, Sec. 3.

2012, the Manila CPDO wrote DMCI-PDI stating that while Torre de Manila exceeded the FAR allowed under the Manila Zoning Ordinance, it granted DMCI-PDI a zoning permit "because the FAR restriction was **suspended** by the executive branch, for the City Planning Office opted to follow the National Building Code."[184] Neither does it appear that compliance was made pursuant to the requirements of Section 47(b) of Ordinance No. 8119 on the submission of a heritage impact statement (*i.e.*, that the project will not adversely impact the heritage significance of the cultural property) for review by the CPDO in coordination with the NHCP.

Ordinance No. 8119's inclusion of standards respecting historic preservation, environmental protection, and aesthetics puts the City of Manila at the forefront of local governments that have embraced the expanded application of the public welfare. It is thus a major source of bafflement for me as to how the City of Manila could have missed these distinctive features of Ordinance No. 8119 when it processed DMCI-PDI's applications, up to and including its grant of the variance. The City of Manila's selective attitude towards the application of its *own* rules reminds of Justice Brion's statement in *Jardeleza v. Sereno*:[185]

> The JBC, however, has formulated its own rules, which even commanded that a higher standard for procedural process be applied to Jardeleza. But even so, by opting to selectively apply its own rules to the prejudice of Jardeleza, the JBC not only violated the precepts of procedural due process; it also violated the very rules it has set for itself and thus violated its own standards.
>
> **This kind of violation is far worse than the violation of an independently and externally imposed rule, and cannot but be the violation contemplated by the term grave abuse of discretion. The JBC cannot be allowed to create a rule and at the same time and without justifiable reason, choose when and to whom it shall apply, particularly when the application of these rules affects third persons who have relied on it.**[186] (Emphasis and underscoring supplied.)

The City of Manila may have been of the honest belief that there was no law which requires it to regulate developments within the locality following the standards under Sections 45, 47, and 48. Still, the Court, without offending its bounden duty to interpret the law and administer justice, should not permit a disregard of an Ordinance by diminishing the duty imposed by Congress, through the local legislature, to effectuate the general welfare of the citizens of the City of Manila. The protection of general welfare for all citizens through the protection of culture, health and safety, among others, is "an ambitious goal but over time, x x x something

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184 *Rollo*, p. 302. (Emphasis supplied.)
185 G.R. No. 213181, August 19, 2014, 733 SCRA 279.
186 *Id.* at 427 (Brion, *J.*, *concurring*).

that is attainable."[187] To me, such mandate is as much addressed to this Court, as it is to the other branches of Government. For this reason, I hesitate for the Court to allow the resulting effective disregard of the Ordinance (on the guise of technicalities) and be ourselves a stumbling block to the realization of such a laudable state goal.

Under Section 75 of Ordinance No. 8119, responsibility for the administration and enforcement of the same shall be with the City Mayor, through the CPDO.[188] For as long as it has not been repealed by the local *sanggunian* or annulled by the courts, Ordinance No. 8119 must be enforced.[189] The City of Manila cannot simply, and without due justification, disregard its obligations under the law and its own zoning ordinance. Officers of the government from the highest to the lowest are creatures of the law and are bound to obey it.[190] In this *specific* sense, enforcement of the ordinance has been held to be a public duty,[191] not only ministerial,[192] the performance of which is enforceable by a writ of *mandamus*.

I hasten to clarify that, by so doing, the Court would **not** be directing the City of Manila to exercise its discretion in one way or another. That is not the province of a writ of *mandamus*.[193] Lest I be misconstrued, I propose that the writ of *mandamus* issued in this case merely compel the City of Manila, through the CPDO, to *consider* the standards set out under Ordinance No. 8119 in relation to the applications of DMCI-PDI for its Torre de Manila project. It may well be that the City of Manila, *after exercising its discretion*, finds that the Torre de Manila meets any or all of the standards under the Ordinance. The Court will not presume to preempt the action of the City of Manila, through the CPDO, when it re-evaluates DMCI-PDI's application with particular consideration to the guidelines provided under the standards.

The majority makes much of the grant of a variance in respondent DMCI-PDI's favor and views the same as *the exercise of discretion by the City of Manila* which can only be corrected where there is a showing of grave abuse of discretion. This is inaccurate on two counts.

First, the rule that *mandamus* only lies to compel the performance of a ministerial duty has several exceptions; it is not limited to a case of grave abuse of discretion. As I have tried to discuss in detail, where respondent's

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[187] Aquilino Pimentel, Jr., THE LOCAL GOVERNMENT CODE REVISITED 70 (2011).

[188] Ordinance No. 8119, Sec. 75. Responsibility for Administration and Enforcement. — This Ordinance shall be enforced and administered by the City Mayor through the City Planning and Development Office (CPDO) in accordance with existing laws, rules and regulations. For effective and efficient implementation of this Ordinance, the CPDO is hereby authorized to reorganize its structure to address the additional mandates provided for in this Ordinance.

[189] *Social Justice Society v. Atienza*, G.R. No. 156052, March 7, 2007, 517 SCRA 657, 665-666.

[190] *Id.* at 666 citing *Dimaporo v. Mitra, Jr.*, G.R. No. 96859, October 15, 1991, 202 SCRA 779, 795.

[191] *Miguel v. Zulueta*, G.R. No. L-19869, April 30, 1966, 16 SCRA 860, 863.

[192] See *Social Justice Society v. Atienza Jr.*, *supra* at 665-666.

[193] *Angchangco, Jr. v. Ombudsman*, G.R. No. 122728, February 13, 1997, 268 SCRA 301, 306 citing *Kant Kwong v. Presidential Commission on Good Goverment*, G.R. No. L-79484, December 7, 1987, 156 SCRA 222, 232-233.

exercise of discretion was based on an erroneous or mistaken view of the law, *mandamus* may be the proper remedy to compel it to reinstate the action and to proceed to hear it upon its merits.[194]

Second, the majority's view fails to appreciate the province of a variance, which is, essentially an exemption, under certain specified and stringent conditions, from compliance with the corresponding land use intensity controls (LUICs) provided for a specific zone, in this case, an institutional university cluster zone.

Ordinance No. 8119 seeks to "[p]rotect the character and stability of residential, commercial, industrial, institutional, urban, open spaces and other functional areas within the locality "[195] and "[p]romote and protect public health, safety, peace, morals, comfort, convenience and general welfare of the inhabitants of the City."[196] It divided the City of Manila into 11 types of zones or districts,[197] each assigned with their corresponding LUIC ratings.[198] LUICs, in turn, specifically relate/pertain to percentages of land occupancy (PLO), floor-area ratios (FAR), and building height limits (BHL).

At this point, some discussion of the zoning concepts of orientations, height, and bulk of buildings will be helpful.

Building height limits can be regulated in several ways. One involves the prescription of maximum building heights in terms of feet or stories or both:

> Height regulations state maximum heights either in terms of feet or number of stories or both. Their general validity was accepted by *Welch v. Swasey*, and most litigation questions their validity as applied. The regulations are imposed to effectuate some of the purposes, as stated in the Standard Act, namely "to secure safety from fire," "to provide adequate light and air" and "to prevent the overcrowding of land." They also are adopted for aesthetic reasons."[199] (Citation omitted.)

Building height can also be regulated through a combination of bulk and floor limits. The PLO, for example, sets the maximum bulk of the building, or how much of the land a proposed building can occupy. The FAR, on the other hand, provides the maximum number of floors a building can have relative to its area. The zoning control devices for bulk (PLO) and

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[194] See *De Castro v. Salas*, *supra* note 174, at 823-824 (1916).
[195] Ordinance No. 8119, Sec. 3(2).
[196] Ordinance No. 8119, Sec. 3(3).
[197] Namely: high density residential/mixed use; medium intensity commercial /mixed use; high intensity commercial/mixed use; industrial; general institutional; university cluster; general public open space; cemetery; utility; water, and overlay. (Ordinance No. 8119, Sec. 7.)
[198] The LUIC ratings are in the form of prescribed percentage of land occupancy and floor area ratio maximums.
[199] HAGMAN & JUERGENSMEYER, *supra* note 92, at 82.

floor (FAR) limits jointly determine height. These concepts are explained as follows:

> Bulk zone regulations are those which provide a zoning envelope for buildings by horizontal measurement. They include such regulations as minimum lot size, minimum frontage of lots, the area of a lot that may be covered, yard requirements and setbacks. FAR, meaning floor-area ratio, is a device that combines height and bulk provisions.
>
> x x x
>
> Under the FAR, the ordinance designates a floor-area ratio for a particular zone. If the ratio is 1:1, for example, a one-story building can cover the entire buildable area of the lot, a two-story building can cover one-half of the buildable area, a four-story building can cover one-fourth of the buildable area and so on. In commercial office building areas in large cities the ratios may be 10:1, which would permit a twenty[-]story building on half of the buildable area of the lot.
>
> FAR may be used in conjunction with maximum height limits and other bulk controls, so that in a 10:1 area, it may not be possible to build a 200-story building on 1/20th of the buildable area of a lot or to eliminate yards entirely and build a 10-story building up to all lot lines. Nevertheless, FAR does give the builder some flexibility. In effect[,] it provides an inducement to the builder to leave more of his lot open by permitting him to build higher."[200]

Following this, a zoning ordinance can prescribe a maximum height for buildings: (1) directly, that is, by expressly providing for height limits in terms of feet or number of stories or both; or (2) indirectly, by employing a combination of bulk and floor limits.

Ordinance No. 8119 does not provide for an express BHL.[201] Neither, for that matter, does the Building Code.[202] Instead, Ordinance No. 8119 sets up a system whereby building height is controlled by the **combined** use of a prescribed maximum FAR and a prescribed maximum PLO. Theoretically, a property owner can maximize the allowed height of his building by reducing the area of the land which the building will occupy (PLO). This process, however, can only achieve an allowed height up to a certain point as the allowable number of floors is, at the same time, limited by the FAR. Beyond the allowable maximum PLO or FAR, the property owner must avail of a mitigating device known in zoning parlance as a variance.

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[200] *Id.* at 83.

[201] Ordinance No. 8119, Sec. 27. *Height Regulations.* – Building height must conform to the height restrictions and requirements of the Air Transportation Office (ATO), as well as the requirements of the National Building Code x x x.

[202] NATIONAL BUILDING CODE, Sec. 3.01.07.

Variances are provided under zoning ordinances to meet challenges posed by so-called "nonconforming uses," a generic term covering both nonconforming buildings and nonconforming activities.[203] A nonconforming building, in the context of Ordinance No. 8119, is one that exceeds the LUIC rating, *i.e.*, PLO and FAR limits, assigned to its zone. The Ordinance allows the City of Manila to grant a variance, provided the project proponent complies with the stringent conditions and the procedure prescribed by Sections 60 to 62.[204] Section 60 provides in pertinent part:

> Sec. 60. Deviations. – Variances and exceptions from the provisions of this Ordinance may be allowed by the Sangguniang Panlungsod as per recommendation from the Manila Zoning Board of Adjustment and Appeals (MZBAA) through the Committee on Housing, Urban Development and Resettlements only when all the following terms and conditions are obtained/existing:
>
> 1. Variance – all proposed projects which do not conformed (*sic*) with the prescribed allowable Land Use Intensity Control (LUIC) in the zone.
>
> a. The property is unique and different from other properties in the adjacent locality and because of its uniqueness, the owner/s cannot obtain a reasonable return on the property.
>
> This condition shall include at least three (3) of the following provisions:
>
> - Conforming to the provisions of the Ordinance will cause undue hardship on the part of the owner or occupant of the property due to physical conditions of the property (topography, shape, etc.), which is not self created.
>
> - The proposed variance is the minimum deviation necessary to permit reasonable use of the property.

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[203] See HAGMAN & JUERGENSMEYER, *supra* note 92, at 114-129.

[204] Sec. 61. Procedures for Granting Variances and Exceptions. – The procedure for the granting of exception and/or variance is as follows:

1. A written application for an exception for variance and exception shall be filed with the Manila Zoning Board of Adjustment and Appeals (MZBAA) through the CPDO citing the section of this Ordinance under which the same is sought and stating the ground/s thereof.
2. Upon filing of application, a visible project sign, (indicating the name and nature of the proposed project) shall be posted at the project site.
3. The CPDO shall conduct studies on the application and submit report within fifteen (15) working days to the MZBAA. The MZBAA shall then evaluate the report and make a recommendation and forward the application to the Sangguniang Panlungsod through the Committee on Housing, Urban Development and Resettlements.
4. A written affidavit of non-objection to the project/s by the owner/s of the properties adjacent to it shall be filed by the applicant with the MZBAA through the CPDO for variance and exception.
5. The Sangguniang Panlungsod shall take action upon receipt of the recommendation from MZBAA through the Committee on Housing, Urban Development and Resettlements.

Sec. 62. Approval of the City Council. – Any deviation from any section or part of the original Ordinance shall be approved by the City Council.

- The variance will not alter the physical character of the district/zone where the property for which the variance sought is located, and will not substantially or permanently injure the use of the other properties in the same district or zone.

- That the variance will not weaken the general purpose of the Ordinance and will not adversely affect the public health, safety, and welfare.

- The variance will be in harmony with the spirit of this Ordinance.

Thus, "deviations," "variances and exceptions" from the standard LUICs of the Ordinance may be allowed by the *Sangguniang Panlungsod* as per "recommendation" from the Manila Zoning Board of Adjustment and Appeals (MZBAA) through the Committee on Housing, Urban Development and Resettlements only when specified conditions are obtained.

As earlier explained, LUICs specifically relate and pertain to PLOs, FARs, and BHLs. Variances, on the other hand, are essentially exemptions from the prescribed LUICs within a specific zone. By their terms, these standards and the considerations for the grant of a variance from the same are starkly different from the heritage, environmental, and aesthetic factors for consideration under Section 45 in relation to Sections 53, 47, and 48.

The first set of considerations governs the determination of the question of whether a property, in the first instance, is so physically "unique" in terms of its topography and shape that a strict enforcement of the standard LUICs in the area will deprive its owner from obtaining a "reasonable return" on the property. The second set of considerations, on the other hand, pertains to the standards of heritage conservation, environmental protection, and aesthetics required from a developer as conditions to the issuance of a zoning and building permit. Compliance with one does not necessarily presuppose compliance with the other. For these reasons, I cannot accept the majority's view that the grant of a variance in this case should be treated as the City's exercise of discretion *insofar as the standards under Section 45 in relation to Section 53, and Sections 47 and 48 are concerned.*

Nevertheless, I wish to emphasize that while different, these two sets of considerations work to further general welfare concerns as seen fit by the local legislature. To my mind, these standards are inextricably intertwined and mutually reinforcing zoning concepts that operate as enforcement mechanisms of Ordinance No. 8119. Where the standards contained under these Sections represent the rule, a variance defines the exception. In the context of an actual case, such as the litigation before us, where a deviation (*i.e.*, variance) from prescribed standards is invoked, its legality as based on the facts must be established. Variances exist to mitigate the harsh

application of the rule, but they were not invented to operate as ruses to render the rule inutile. The determination of how the balance is struck between law and equity will require a judicious appreciation of the attendant facts.

The record, however, is absolutely bereft of evidence supporting the City of Manila's approval of the variance. By its terms, Section 60 of Ordinance No. 8119 allows for only a single instance when a variance from the prescribed LUICs can be allowed: the property must be "unique and different from other properties in the adjacent locality and because of its uniqueness, the owners cannot obtain a reasonable return on the property." To hurdle this, an applicant for the variance must show at least three of the express qualifications under Section 60. These qualifications, we reiterate, are as follows: (1) conforming to the provisions of the Ordinance will cause undue hardship on the part of the property owner or occupant due to physical conditions of the property (*i.e.*, topography, shape, *etc.*) which are not self-created; (2) the proposed variance is the minimum deviation necessary to permit reasonable use of the property; (3) the variance will not alter the physical character of the district/zone where the property for which the variance sought is located, and will not substantially or permanently injure the use of the other properties in the same district or zone; (4) that the variance will not weaken the general purpose of the Ordinance and will not adversely affect the public health, safety, and welfare; and (5) the variance will be in harmony with the spirit of this Ordinance.

Significantly, none of the documents submitted by DMCI-PDI show compliance with any of the foregoing qualifications. The record does not refer to any piece of evidence to show how: (1) the DMCI-PDI's property is physically "different" in topography and shape from the other properties in its zone; and (2) the DMCI-PDI cannot obtain a "reasonable return" on its property if it was compelled to comply with the prescribed LUICs in the area.

While I hesitate, at this time, to find the City of Manila's grant of the zoning and building permits and the variance to be unlawful or made in grave abuse of discretion, I do **not** endorse a finding that the City of Manila, under the facts of the case, acted in compliance with the requirements of Ordinance No. 8119. On the contrary, I would like to note a concern raised by Justice Peralta, during the oral arguments, that the grant of the permits for the Torre de Manila development *may* have violated the LUIC requirements of Ordinance No. 8119 from the very beginning. His concern is expressed in the following exchanges he had with respondent DMCI-PDI's counsel:

(a) On the allowable seven-storey building based on FAR 4 without a variance:

JUSTICE PERALTA:

Allowable storeys, so, you have gross floor area divided by building footprint or 29,900 square meter in slide number 4, over 4,485 square meters, you are only allowed to build 6.6 storeys rounded up to 7 storeys. My computation is still correct?

ATTY. LAZATIN:

On the assumption that your building footprint is 4,485, Your Honor. Meaning, your building is fat and squat.

x x x

JUSTICE PERALTA:

That's correct. That's why I'm saying your maximum building footprint is 4,845. So, your gross floor area of 29,000 over 4,000... 'yun na nga ang maximum, eh, unless you want to rewrite it down, where will you get the figure? *Yan na nga ang* maximum, *eh*. So, you got 6.6 storeys rounded up to 7 storeys. That's my own computation. I do not know if you have your own computation.

ATTY. LAZATIN:

Your Honor, that is correct but that is the maximum footprint.[205]

(b) On the resulting 49-storey building based on FAR 13, with the variance:

JUSTICE PERALTA:

So, the building permit official here knew already from the very beginning that he was constructing, that DMCI was constructing a 49-storey?

ATTY. LAZATIN:

That's correct, Your Honor.

x x x

JUSTICE PERALTA:

It's even bigger no. So, your FAR, your FAR is 13, based on [these] documents, I'm basing this from your own documents, *eh*, because the zoning permit is based on the application of the builder, *eh, diba*? Am I correct, Atty. Lazatin?

ATTY. LAZATIN:

That's correct, Your Honor, except that ...

JUSTICE PERALTA:

So your FAR exceeded the prescribed FAR of 4 because your FAR is now [13.05]?[206]

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[205] TSN, August 11, 2015, pp. 25-26.

[206] See also following interpellation by Justice Marvic Leonen:

JUSTICE LEONEN:

x x x Okay, now, in the zoning permit if you look at the floor area, it says, "97,549 square meters," do you confirm this Counsel?

ATTY. LAZATIN:
Without any variance, that is correct, Your Honor.[207]

(c) How adjusting the building footprint enables a developer, by means of a variance, to increase height of a building from FAR 4 to FAR 13:

JUSTICE PERALTA:
I think there is no prohibition to build a 30-storey as long as you do not violate the FAR.

ATTY. LAZATIN:
That is correct, Your Honor. The height will be dependent on the so called building footprint. We can have like in the example that we gave, Your Honor, if you have a building of what they call the maximum allowable footprint, then the building that you will build is short and squat. But if you have a smaller building footprint, then you can have a thin and tall building, Your Honor.

JUSTICE PERALTA:
A higher building?

ATTY. LAZATIN:
Yes, Your Honor. That's exactly ...

JUSTICE PERALTA:
So, it's not accurate to say that just because there is a proposed 30-storey building, we will be violating this ordinance, is it right?

ATTY. LAZATIN:

ATTY. LAZATIN:
I confirm that, Your Honor.

JUSTICE LEONEN:
And the land area is 7,475 square meters. I understand that this includes right of way?

ATTY. LAZATIN:
That's correct, Your Honor, until an additional lot was added that made the total project area to be 7,556.

JUSTICE LEONEN:
Okay. So, the floor area divided by the land area is 13.05, is that correct? You can get a calculator and compute it, it's 13.05 correct?

ATTY. LAZATIN:
That's correct, Your Honor.

JUSTICE LEONEN:
That is called the FAR?

ATTY. LAZATIN:
Yes, Your Honor. (TSN, August 11, 2015, pp. 48-49).

[207] TSN, August 15, 2015, pp. 22-24.

That's exactly our point, Your Honor.[208]

Certainly, the variance cannot be declared legal simply because it was already issued. On the contrary, the circumstances thus far shown appear to support a view that the general presumption of regularity in the performance of official duties should **not** be applied here:

> **JUSTICE PERALTA:**
>
> You include that in the memorandum. It should be able to convince me that your computation is accurate and correct. Now, so, after all, from the zoning permit up to the building permit, the public officials here already knew that the DMCI was actually asking for permission to build 49-storeys although it is covered by the university cluster zone?
>
> **ATTY. LAZATIN:**
>
> Yes, Your Honor. All the plans submitted to all the regulatory agencies show that it was for a 49-storey building, Your Honor.
>
> **JUSTICE PERALTA:**
>
> But using the computation in the building code, I mean, in the city ordinance, it could seem that the application should not have been approved from the very beginning because it violates the zoning law of the [C]ity of Manila?
>
> **ATTY. LAZATIN:**
>
> The client DMCI was aware, Your Honor, that there have been other developers who have been able to get a variance, Your Honor.
>
> **JUSTICE PERALTA:**
>
> You know I'm not talking about the variance ....
>
> **ATTY. LAZATIN:**
>
> That's why there are so many buildings in Manila, Your Honor, that are almost 50-storeys high, Your Honor.
>
> **JUSTICE PERALTA:**
>
> I will go into that. I will go into the variance later. My only concern is this, presumption of regularity in the performance of duty is not conclusive, you understand that, right? Presumption of regularity in the performance of duty is not conclusive, that is always disputable.
>
> **ATTY. LAZATIN:**
>
> Agree, Your Honor, but ....
>
> **JUSTICE PERALTA:**

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[208] TSN, August 15, 2015, p. 21.

> If the public officials themselves do not follow the procedure, the law or the ordinance, are they presumed to [] have performed their duties in the regular manner?[209]

Justice Leonen would have even stronger words, suggesting that the grant of the permits, long prior to the grant of the variance, violated not only Ordinance No. 8119 but even Republic Act No. 3019, the Anti-Graft and Corrupt Practices Act.[210]

More importantly, I would like to emphasize the difference in opinions as to the correct application of the FAR provisions of Ordinance No. 8119. For example, respondent DMCI-PDI, during the oral arguments, claimed that it is allowed to build up to 66 storeys under the National Building Code and 18 storeys under the Ordinance *even without a variance.*[211] *Amicus curiae* Architect Emmanuel Cuntapay posits that with

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[209] TSN, August 11, 2015, pp. 30-31.

[210] TSN, August 11, 2015, pp. 52-53.

> **JUSTICE LEONEN:**
> Did you sell your property before the action of the Sangguniang Panlungsod?
>
> **ATTY. LAZATIN:**
> Your Honor, there is a difference between the approval of the ... (interrupted)
>
> **JUSTICE LEONEN:**
> Did you build prior to the approval of the Sangguniang Panlungsod as per recommendation of the Manila Zoning Board of Adjustment Appeals?
>
> **ATTY. LAZATIN:**
> Your Honor, if I may be allowed to...?
>
> **JUSTICE LEONEN:**
> No, I have a pending question, did you build prior to the issuance of that resolution or ordinance allowing the variance?
>
> **ATTY. LAZATIN:**
> We build, Your Honor, in accordance with what was permitted, Your Honor.
>
> **JUSTICE LEONEN:**
> I am again a bit curious. Section 3 (J) of Republic Act 3019, the Anti-graft and Corruption Practices Law, it says, "knowingly approving or granting any license, permit, privilege or benefit in favor of any person not qualified for or not legally entitled to such license, permit, privilege or advantage," that's a crime, correct?
>
> **ATTY. LAZATIN:**
> Your honor, may I be allowed to explain?
>
> **JUSTICE LEONEN:**
> No, I'm just confirming if there is such a Section 3, paragraph (J)?
>
> **ATTY. LAZATIN:**
> Your Honor, right now I cannot confirm that, Your Honor.
>
> **JUSTICE LEONEN:**
> Okay.

[211] DMCI Handout on the Computation of Building Height Limit.

the maximum FAR of 4, respondent DMCI-PDI "is allowed to construct 18.24 habitable stories or floors for Torre de Manila" or up to 25 actual floors if we add the seven floors allotted as parking areas, even without a variance.[212] The OSG, on the other hand, would argue that DMCI-PDI is entitled to build only up to seven floors without a variance.[213] Meanwhile, Acting Executive Director Johnson V. Domingo of the Department of Public Works and Highways computes the BHL at 7, 19, or 56 storeys, depending on the factors to be considered.[214] All told, the issue as to the correct application of the FAR provisions and the resulting maximum allowable building height of the Torre de Manila *sans variance* is a technical issue which this Court is not equipped to answer at this time. This issue is separate and distinct (albeit, admittedly related) to the issue regarding the propriety of the grant of the variance, which as earlier explained also involves the resolution of certain factual issues attending its grant. Thus, I find that a remand to the City of Manila is all the more appropriate and necessary in view of the critical questions of fact and technical issues still to be resolved.

In any case, the City of Manila would be well advised to note that many of the textual prescriptions of Sections 45, 53, 47, and 48 are also textually imbedded in the terms of Section 60.

The first condition requires a showing that conforming to the provisions of the Ordinance will cause "undue hardship" on the part of the owner due to the physical conditions of the property, *e.g.*, topography, shape, *etc.*, which are not "self-created." Petitioner KOR has alleged that the Torre de Manila, because of its height, will have an "adverse impact" on the Rizal Park and the Rizal Monument by "diminishing its value," "scale and importance." Section 47 of Ordinance No. 8119, on the other hand, prohibits any development that will "adversely impact" the heritage significance of a property. Correlating the foregoing to this first condition of Section 60, the City of Manila should *consider* what is it in the physical (and not self-created) conditions of the lot on which the Torre de Manila stands will cause undue hardship to DMCI-PDI unless a variance is granted. The City of Manila should also *consider* whether granting the variance will be consistent with the heritage, environmental and aesthetic standards of the Ordinance, including Section 47.

The second condition requires a showing that the proposed variance is the "minimum deviation necessary to permit reasonable use of the property." Petitioner KOR alleges that the Torre de Manila, at 19 floors, obstructs the view of the Rizal Monument, among its other allegations relating to the height of the Torre de Manila. The City of Manila should thus *consider* what the minimum deviation from the prescribed FAR 4 may be allowed the

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[212] According to Architect Cuntapay, this is because the GFA computation in the IRR of the Building Code excludes non-habitable areas such as covered areas for parking and driveways, among others. (*Rollo*, pp. 2749-2750.)

[213] *Id.* at 2884.

[214] *Id.* at 2974-2977.

project, again *consistent* with the heritage, environmental, and aesthetic standards of Ordinance No. 8119. This includes a determination of the maximum number of storeys Torre de Manila may be allowed to have that would cause: (1) minimum deviation from the prescribed FAR; and (2) minimal to no adverse effect on the heritage significance of nearby cultural properties.

The third condition requires a showing that the variance will not "alter the physical character of the zone, or substantially or permanently injure the use of the other properties in the zone." Petitioner KOR has alleged that the Torre de Manila has diminished the scale and importance of the Rizal Park and the Rizal Monument. Section 48, on aesthetic considerations, requires that all projects be designed in an "aesthetically pleasing manner" and that their "natural environmental character" be considered especially in relation to "adjacent properties." In these lights, the City of Manila should *consider* the FAR variance that may be allowed the Torre of Manila, if any, which will not injure or alter the physical character of the zone and its adjacent properties, pursuant to the standards both laid down by Section 48.

The fourth condition requires a showing that the variance will not "weaken the general purpose of the Ordinance" or "adversely affect the public health, safety, and welfare." The fifth condition requires that the variance will be in "harmony with the spirit of the Ordinance." These two conditions encapsulate my view that the City of Manila has purposively embraced the modern, expanded concept of police power in the context of zoning ordinances. To my mind, they stand as shorthand instructions to the City of Manila in deciding the balance between enforcing the standards set forth in Sections 45, 53, 47 and 48; and Sections 60 to 62, to *consider* the Ordinance's overriding heritage, environmental, and aesthetic objectives.

Further, I would like to emphasize that my view and proposed disposition of the case do **not** entail a finding that Section 45, in relation to Section 53, and Sections 47 and 48, are already applicable for purposes of prohibiting the Torre de Manila construction project. On the contrary, the proposed ruling is limited to this: that Section 45 in relation to Sections 53, 47, and 48, *by their terms and express intent,* must be **considered** by the City of Manila in making its decisions respecting the challenged development. I propose that the City of Manila must *consider* DMCI-PDI's proposal against the standards clearly set by the provisions before it makes its decisions. The standard under Section 47 is clear: that the proposed development will **not adversely impact** the heritage significance of the heritage property. Section 48 is also clear when it states that it is "in the public interest that all projects are designed and developed in a safe, efficient and **aesthetically pleasing manner**." Section 53 also clearly characterizes the protection of view enjoyed by the public as a "regulation." These are standards textually operating as regulations and not mere guidelines.

To clarify, I do not propose that the Court rule on the legality or propriety of the variance granted to DMCI-PDI under Section 60. Rather, I propose that the ruling be limited thus: the City of Manila must *consider* whether DMCI-PDI's proposed project meets the definition and conditions of a "unique" property under Section 60, standing alone by the terms of Section 60, but also *in relation* to the heritage, environmental, and aesthetic standards of Sections 45, 53, 47 and 48. Without controlling *how* its discretion will thereafter be exercised, I vote that the Court direct the **re-evaluation** by the City of Manila, through the CPDO, of the permits previously issued in favor of the Torre de Manila project, including conducting a hearing, receiving evidence, and deciding compliance with the foregoing standards/requirements under Ordinance No. 8119.

I also do not propose a *pro hac vice* conversion of the proceedings into a "contested case" under the terms of the Administrative Code.[215] I do, however, believe that notice and hearing requirements[216] must be observed, with all concerned parties given the opportunity to present evidence and argument on all issues.[217] Section 77 of Ordinance No. 8119 allows for the filing of a verified complaint before the MZBAA for any violation of any provision of the Ordinance or of any clearance or permits issued pursuant thereto, including oppositions to applications for clearances, variance, or exception. Otherwise put, I believe that the requirements of *Ang Tibay v. Court of Industrial Relations*[218] and *Alliance for the Family Foundation, Philippines, Inc. v. Garin*[219] are deemed written into Section 77.

With these clarifications, I vote that the City, through the Mayor and his representatives, be compelled by *mandamus* to consider its own conservation standards and LUIC requirements.

I find the concern about estoppel irrelevant inasmuch as petitioner KOR's alleged development proposals appear to have been made more than five decades ago, and long before either the 1987 Constitution or Ordinance No. 8119 were ever conceived.

Finally, it may well have been Rizal's wish to be buried a certain place and in a certain way. If we were to pursue this line of reasoning to its logical conclusion, this argument would forbid the establishment of a Rizal

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[215] ADMINISTRATIVE CODE, Book VII, Chapter 1, Sec. 2(5). "Contested case" means **any proceeding**, including licensing, in which the legal rights, duties or privileges asserted by specific parties as required by the Constitution or by law are to be determined **after hearing**. (Emphasis supplied.)

[216] ADMINISTRATIVE CODE, Book VII, Chapter III, Sec. 11. Notice and Hearing in Contested Cases.–
(1) In any contested case, all parties shall be entitled to notice and hearing. The notice shall be served at least five (5) days before the date of the hearing and shall state the date, time and place of the hearing.
(2) The parties shall be given opportunity to present evidence and argument on all issues. If not precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement or default.
(3) The agency shall keep an official record of its proceedings.

[217] See *Alliance for the Family Foundation, Philippines, Inc. v. Garin*, G.R. No. 217872, August 24, 2016.

[218] 69 Phil. 635 (1940).

[219] *Supra.*

Monument, a Rizal Park, and celebration of Rizal Day. In any case, and while not blind to history, we must be reminded that this Court, in the words of Justice Tinga, is a judge not of history but of the Constitution and the law.[220]

To reiterate, I do not propose to resolve the factual issues raised by the parties regarding DMCI-PDI's alleged violation of existing regulations under Ordinance No. 8119 (including compliance with the FAR and variance requirements), whether the Torre de Manila is a nuisance, and whether DMCI-PDI acted in good faith in the construction of the project. The constitutional guarantee of due process requires that such matters first be heard and resolved by the City of Manila, the appropriate administrative agency, or the courts.

I realize that, for all the debates during the oral arguments, it was only *after* the case has been submitted for resolution that the Court was first made aware, through the writer of this Dissenting Opinion, of the existence of Section 45 in relation to 53, and Sections 47 and 48 of Ordinance No. 8119, and their relevance in the resolution of this case. **No party to the case or member of this Court had previously raised the applicability of these Sections of Ordinance No. 8119.** I argued to remand the case to the City of Manila precisely for it to re-evaluate the grant of the permits to DMCI-PDI in light of the cited Sections and to hear the parties thereon.

A careful reading of the *Decision* would show that the majority concedes that there *is* a law that "provides for standards and guidelines to regulate development projects x x x within the City of Manila."[221] However, instead of a remand, they went on to find that the standards and guidelines do not apply to "the construction of a building outside the boundaries of a historic site or facility, where such building may affect the background of a historic site."[222] With respect, I disagree with the majority's **peremptory dismissal** of the case on the basis of such finding, considering that none of the parties were ever heard on this specific issue, *i.e.*, the application of Section 45 in relation to 53, and Sections 47 and 48 of Ordinance No. 8119 based on the facts of the case.

The constitutional guarantee of due process dictates that parties be given an opportunity to be heard before judgment is rendered. Here, the parties were not heard on the specific subject of the performance standards prescribed by Ordinance No. 8119, insofar as they appear relevant to this case. A remand would have been the just course of action. The absence of such a hearing, I would like to emphasize, is precisely the reason why I hesitate to attribute bad faith or grave abuse of discretion, at this point, on the part of any one party. A remand would have allowed for the building of a factual foundation of record with respect to underlying questions of fact (and

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220 *Gudani v. Senga*, G.R. No. 170165, August 15, 2006, 498 SCRA 671, 698-699.
221 Decision, p. 9.
222 Decision, pp. 11,12-13.

even policy) not appropriate to be decided, in the first instance, by the Court. I imagine that a remand would provide the opportune venue to hear and receive evidence over alternate/moderate views, including, as I said, the maximum number of storeys the Torre de Manila may be allowed that would pose minimal deviation from the prescribed LUICs and still be considered consistent with the other performance standards under the Ordinance.

Furthermore, while the majority insists on according respect to the City of Manila's exercise of discretion, it seems to me that **their finding *at this point* that the standards provided under Ordinance No. 8119 are not applicable does more to preempt the City of Manila in the exercise of its discretion than an order requiring it to *merely consider* their application.** This, despite clear indications that they have not been considered at all during the processing of DMCI-PDI's application. That the City of Manila has not considered these standards is a finding of fact that the Court can make because this was **admitted** as much by the local government itself when, based on its erroneous reading of its own zoning ordinance, it claimed that there is no law which regulates constructions alleged to have impaired the sightlines of a historical site/facility. At the risk of sounding repetitive, I believe a remand would, at the very least, allow the City of Manila to consider and settle, at the first instance, the matter of whether the Sections in question are applicable or not.

To end, I am reminded of the view, first expressed in *Tañada v. Angara,*[223] that even non-self-executing provisions of the Constitution may be "used by the judiciary as aids or as guides in the exercise of its power of judicial review."[224] More than anything, this case presented an opportunity for the Court to recognize that aspirational provisions contained in Article II (Declaration of Principles and State Policies) and many more similar provisions spread in the Constitution, such as Sections 14 and 15, Article XIV, are **not**, in the words of Chief Justice Reynato Puno, "meaningless constitutional patter."[225] These provisions have constitutional worth. They define our values and embody our ideals and aspirations as a people. The command under Section 15, Article XIV of the Constitution for the State to conserve the nation's historical and cultural heritage is as much addressed to this Court, as it is to Congress and to the Executive. We should heed this command by ordering a remand, more so where there is an obvious intent on the part of the City of Manila, in the exercise of its delegated police power from Congress, to incorporate heritage conservation, aesthetics, and environment protection of views into its zoning ordinance.

In this modern world, heritage conservation has to constantly compete with other equally important values such as property and property development. In litigations involving such clash of values, this Court sets the tone on the judicial solicitude it is duty-bound to display towards

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223 *Supra* note 49.
224 *Id.* at 54.
225 *Agabon v. National Labor Relations Commission*, *supra* note 51, at 634 (Puno, *J.*, *dissenting*).

aspirational constitutional values, especially when implemented by specific and operable legislation. Here, we had the unique opportunity to give the value of heritage conservation, involving as it does the preservation of fragile and vulnerable resources, all the breathing space[226] to make its case. This Decision, however, seems to have achieved the complete opposite.

For all the foregoing reasons, I vote to PARTIALLY GRANT the petition.

FRANCIS H. JARDELEZA
Associate Justice

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FELIPA B. ANAMA
CLERK OF COURT, EN BANC
SUPREME COURT

[226] See *Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Co., Inc.*, G.R. No. L-31195, June 5, 1973, 51 SCRA 189.