ABSTRACT: Policymakers often use Special Economic Zones (SEZs) as a strategy to boost micro and macroeconomist. Its successful global implementation can still be questioned with frequent development operational problems, specifically from the legal perspective. Therefore, this paper explores the loopholes in the development plan implementation in exercising land use planning for SEZs' development in Malaysia. Two significant legal issues in implementing the development plan and land use planning control based on the statutory provision and legal cases have been identified using qualitative textual analysis. Findings show a lack of empowerment of statutory development plans and local authorities' decisions on land use planning management-related matters. Therefore, further understanding of the land use planning implementation's legal issues is vital in formulating SEZs development's regulatory framework in Malaysia.

KEYWORDS: Special Economic Zones, Free Trade Zone, Development Plan, Land Use Planning.

1.0 INTRODUCTION

Malaysia being one of the developing countries in Southeast Asia, has effectively opened up its economy to meet new global challenges and opportunities. To ensure that economic growth can give way to the worldwide economy, Malaysia's Government has established many incentives to attract foreign investors to be part of Malaysia's business circle. Special Economic Zones (SEZs) policy has also been implemented to boost economic growth through the outward-looking approach. In Malaysia, SEZs started in the 1970s, whereby the first Free Trade Zone was established in Bayan Lepas, Penang (now known as Free Industrial Zone) [1]. The establishment of this FTZ was governed by the Free Trade Zone Act 1971 (Act 438). SEZs development in Malaysia has undergone tremendous changes until today.

In Malaysia itself, the SEZs not only focus on a dedicated or demarcated exclusive area, but in 2005, the government presented five Regional Economic Corridor to address the rural-urban disparities within the country. These Regional Economic Corridors have introduced their blueprint, which has identified several SEZs as part of their growth nodes. It is one of the most special tools used to promote the urban expansion and integration between the cities and become the designation of large-
scale special development zones. The special zones and economic corridors have significantly contributed to the national “Open-door” strategy and local economic growth. One of the most leading economic corridors, Iskandar Malaysia, has a cumulative investment of approximately MYR332 billion (USD82.12 billion) since 2006 [2],[3].

2.0 RESEARCH PROBLEM

The Special Economic Zones (SEZs) concept, without a doubt, has been verified by most of the countries to boost their economic growth, i.e., China, India, Africa, Malaysia, United States, Europe and many others. However, behind all these successes lie many issues that can affect SEZs’ execution in the long run. The lack of regulation or policy implementation for SEZs can somehow create much confusion and affect the investors' confidence towards the host country. Issues and problems such as strategic planning of SEZ, bureaucratic redundancy in registration, the unattractive package offered, customs clearance, taxation disadvantages, foreign exchange and economic instability, long-process for development, immigration issues with foreign workers and many other items have indirectly hampered the overall SEZ environment and deterred the prospective investors. The problems have been documented in relevant to the SEZs worldwide, such as in China, Australia, Africa, the United States and Poland [4]–[7].

In economic development, SEZs’ establishment also involves physical development similar to its definition of ‘demarcated geographic areas within countries’ [8]. This indicates that SEZs do not only focus on economic growth per se, but they also affect other aspects such as the physical and social development of the involved area. Thus, SEZs’ establishment will bring the land-use changes structure of a particular area, simultaneously bringing development spillover on the surrounding area. Therefore, understanding the development plan’s roles in land use planning is essential to incorporate SEZs’ future development in Malaysia. This paper aims to discuss and highlight the loophole of current development plans' role in land use planning law and policy in Malaysia and provide suggestions to improve the current practices and policy.

3.0 METHODOLOGY

This study employs doctrinal research methods through a qualitative textual legal analysis approach over the primary and secondary data. It involves a literature review from articles, books, journals, and reported case law relating to land use planning. The library research was conducted by examining the primary data: the Federal Constitution, Town and Country Planning Act 1976 (Act 172) and National Land Code (Act 56 of 1965). While the secondary data includes the decided case law and articles from scholarly journals. The stages are as follows:

Stage One

Identification of the related statutory legal provision and relevant case law on Land Use Planning in Malaysia. The provisions of the Federal Constitution and Act 172 were further analysed and explored to understand Malaysia's land use planning practice better, as discussed in section 4.0.
Stage Two

Identification of legal cases related to the development plan and planning control in Malaysia. The judgement of the cases related to the development plan and planning control are analysed and discussed in section 5.0. A holistic and in-depth understanding of the legal issues related to land use planning is important for the comprehensive and successful development of SEZs in Malaysia.

4.0 LITERATURE REVIEW

4.1 Town and Country Planning in Malaysia

Urban planning in Malaysia has started in the year 1890s, which has undergone tremendous changes until today. To govern the planning system in the country, the Town and Country Planning Act 1976 ("Act 172") was enacted in 1976 pursuant to Article 76 (4) of the Federal Constitution. Act 172 vests wide powers and responsibilities in the authority to manage and carry out the daily administrations, including the development control and land use planning decision-making process [9]. Several provisions and legislation govern development control and land use planning activities in Malaysia. Its legislation is strongly influenced by the colonial ruler, which is British. Act 172 is originated from the Federal Constitution under the following clause:

Article 74 (1):

"Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List."

As mentioned in the above clause, Act 172 was established to ensure uniformity of law and policy regulating town and country planning practice in Peninsular Malaysia. This Town and Country Planning is prescribed in List III (5) to the Ninth Schedule of the Federal Constitution.

Article 76 (4) reads:

"Parliament may, for the purpose only of ensuring uniformity of law and policy, make laws with respect to land tenure, the relations of landlord and tenant, registration of titles and deeds relating to land, transfer of land, mortgages, leases and charges in respect of land, easements and other rights and interests in land, compulsory acquisition of land, rating and valuation of land, and local government; and paragraph (b) of Clause (1) and Clause (3) shall not apply to any law relating to any such matter."

Article 80 (2) states:

"The executive authority of the Federation does not extend to any matter enumerated in the State List, except in so far as is provided in Articles 93 to 95, nor to any matter enumerated in the Concurrent List, except in so far as may be provided by federal or State law; and so far as federal or State law confers executive authority on the Federation with respect to any matter enumerated in the Concurrent List it may do so to the exclusion of the executive authority of the State."
The initial Town and Country Planning practice was introduced in 1917 via Town Improvement Enactment, which gave the power to authority to exercise urban development and redevelopment. This enactment focuses on introducing back lanes and open areas that were needed to create a level of good and comfort public health and the facilities within the neighbouring area [10]. In 1921, the British Government of the Federated Malay States (FMS) had appointed Charles Reade as the first Town Planner to advise on the town planning system within FMS [11], [12]. After two years reviewed and analyzed the planning system in FMS, Reade tabled his finding to the British Colonial Administration. As a result, Town Planning and Development Bill 1923 was enacted, which introduced the General Town Plans for FMS. In 1924, the first layout plan, which incorporated General Town Plans, was prepared for Kuala Kubu Bharu, Selangor, which replaces the old town of Ampang Pechah that suffered from the heavy flood [11], [13]. The town planning enactment has undergone a few further amendments until Malaya achieve independence.

Independence in 1957 has initiated the course of self-governance. Due to the rapid economic, social and urban development that began to grow, the government realized that there was a need to review the legal provisions in town planning so that it is in line with the current development. The government foresees that the National Land Code Act, 1965 (Act 56), is inadequate to govern development control[14]. Therefore, in the early 1970s, the government conducted a comprehensive study of the current town and country planning system and subsequently proposed a more complex and functional framework (legislation) for urban and rural planning [15], [16]. Thus, the Town and Country Planning Act 1976 (Act 172) was enacted by the Malaysian Parliament to have a standard planning system throughout Malaysia's Peninsular State. Among the critical elements of Act 172 were (1) introduction of two-tier Development Plan – Structure Plan and Local Plan, (2) Development Control System, (3) formation of State Planning Committee (SPC), and (4) establishment of Appeals Board [17]. One of the main highlights of the Development Plan's introduction is to appropriately plan and merge development within the local or state territory.

Act 172 has gone through a few amendments. One of the main amendments was made in 2001 (Act 1129). A key highlight in this amendment is on the statutory development plans system of the country: (1) Establish and emphasize planning system at the regional level through Regional Planning Committee, (2) involvement of federal government through National Physical Planning Council (NPPC), and (3) introduction of National Physical Plan (NPP) that will cover the spatial planning of the country [18]. The enactment, as mentioned, introduced a well-structured hierarchy of three-tier development plans in the country. The concept of plan-led through National Physical Plan, State Structure Plan, Local Plan and Special Area Plan is a way in implementing the development control through land use planning, planning control, planning permission and appeal board. The planning frameworks established by legislation were consistently used as instruments to plan, coordinate and manage land-use activities in Malaysia [19].

4.2 Spatial and development Plan in Malaysia

As Malaysia is practising a three-tier government system, the federal government is responsible for providing spatial planning for a balanced development throughout the country. The country's spatial and physical development has established a National Development Planning Framework consist of three primary planning documents: (1) National Physical Plan (NPP); (2) National Urbanisation Policy (NUP); and (3)
National Rural Physical Planning Policy (NRPPP) [20]. All the abovementioned policy is basically at the federal level, which will be cascaded down to the state and local level—given an example, identifying a need at one particular state to have new mixed-use development to boost up the economic growth of that specific area. Thus, this direction given by the federal government will be considered at the state level, which also needs to consider the development issues at the local authority level.

The State Structure Plan (SSP) outlines the general direction and recommendations for land use planning in each state. It provides the spatial planning framework in addressing the issues within the state context. The preparation of SSP falls under sub-section 6 (1) in Act 172. It interprets the national spatial policies and NPP framework, regional spatial policies, i.e., Northern Corridor Economic Region (NCER), and proposes development plan at the state level for urban, town, and rural areas within a particular state. Generally, SSP distributes the development plan for each state and proposed significant economic and infrastructure project for the state [18]. It also acts as the guide for investment, distribution and allocation of resources or budget, and decision coordination for the government and private agencies.

Local Plan (LP) is a component of the development plan in Act 172 Section 12, Town and Country Planning Act 1976. It provides a basis for greater development control of detailed and site-specific information at the local level. LP provided through the negotiation process a document of agreement between the local authorities, locals, and landowners against land use within the planning area [22]. Besides controlling the development, LP is also the basis for transparent governance and protecting the people’s rights. Thus, LP directly impacts daily life and value residential properties at the centre of the neighbourhood.

4.3 Land Use Planning Practice in Malaysia

Part IV of Act 172 specifically highlights the Planning Control. As highlighted in the previous section, planning control is an important mechanism to deter and foster development within the legal planning framework [23]. In the Malaysian context, it is prohibited on the use of land or building other than in conformity with the local plan as described in Part IV, subsection 18 (1) Act 172. Section 22(4)(a) further emphasizes the power of the development plan when it prescribed ‘The local planning authority shall not grant planning permission if the development in respect of which the permission is applied for would contravene any provision of the development plan’. This regulation is being applied to ensure that any development that takes place is in accordance with the formulated plan. This also ensures the proposed development follows the local authority's strategic plan and goal in the local plan. Apart from conforming with the local plan, any development shall require planning permission from the local authority. In other words, the development will only be considered as 'legal' when the planning permission has been granted simultaneously with the conformity with the local plan.

Application for planning permission is spelt out under section 21 (1) and section 25 (1) of Act 172. These sections give the local planning authority the power to grant, modify, or revoke planning permission granted to the applicant. While section 22(2) of Act 172 prescribes that in dealing with the application for planning permission, the local planning authority shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and, in particular – inter alia, the development plan, the directions of the State’s Planning Authority (SPA) and the development proposal report. On the other hand, section 21 (3) prescribes that a local
planning authority may give written directions to the applicant in granting the planning permission where the development involves the erection of the building. The PlanMalaysia has introduced more than thirty (30) physical planning guidelines, which include open space, housing, commercial, industry, solid waste disposal area, environment-sensitive area (ESA), and others to ensure sustainable development of the area [24].

5.0 FINDING AND DISCUSSION

5.1 Legal Cases Analysis

With the above discussion, it is proved that land use planning plays an essential role in shaping an area to be well planned. The use of planning law, to be the exact Town and Country Planning Act 1976 (Act 172) sets the legal framework in which the planning authority used to control the land uses; however, the policies adopted are the results of certain factors and pressures. Act 172 is the 'bible' used by the planning authorities to achieve what has been best-planned within their territories. Planning interference from various perspectives might obstruct the authority to accomplish its planning goal. Ngah pointed out that the local authority might encounter five significant challenges in executing their responsibility: i) urban poverty; ii) functional significance; iii) environment pollution; iv) development of information system; and v) and human capital development [25].

5.1.1 Legal Cases adherence to the development plan

From the enactment, it can be seen that the development plan shall be used as the tools and guidance for the local authority to control the development under their jurisdictions. The adherence of the development plan in planning permission can be seen in the case of Low Moh Sun v. Majlis Perbandaran Pulau Pinang LR/PP/15/92 [1992], where the Appeal Board held that "It was not improper for the local planning authority to consider and be guided by the provision of the draft local plan for Tanjong Tokong" [26]. In this case, the appellant has submitted planning permission to erect five storeys of 6 blocks apartment and penthouse on his land. However, the application was rejected because the area has been gazetted for housing zoning with a low-density development (bungalow and terrace). Further, the need for the planning permission to conform with the development plan was acknowledged by the court in Awang Ismail & Ors v. Kerajaan Negeri Kedah & Ors [2010] 3 CLJ case [27]. The High Court of Malaya at Alor Setar decided that any development plan binds the proposed development. In this case, the State Authority has declared a portion of the area at Gunung Jerai Forest Reserve, Kedah, for quarry project. However, according to the Structure Plan, the Gunung Jerai Forest Reserve should be preserved as a water catchment forest. Any activity that can destroy the natural environment and affect the supply of clean water is not allowed. Thus, in this case, the State Authority has committed an error by granting permission for a quarry operation by ignoring the Kedah State Structure Plan's content that they also endorsed.

Besides, the latest case concerning Taman Kiara Rimba, the case of Perbadanan Pengurusan Trellises & Ors v. Datuk Bandar Kuala Lumpur & Ors [2021] 2 CLJ 808 (Court of Appeal), is one of the landmark cases for planning law and judicial review in Malaysia [28]. In this case, Datuk Bandar Kuala Lumpur (first respondent) has granted a development order to the joint-venture companies, Yayasan Wilayah Persekutuan (second respondent) and Menang Perkasa Sdn Bhd (third respondent), to develop a mixed-use development which comprises affordable apartment and
luxurious condominium. The said development has to undergo the material change of use in which it has been demarcated as a public open space, recreational and sports area, green area and city in the Kuala Lumpur Local Plan. The proposed development is located just next to Taman Kiara Rimba, which has been demarcated as a city park and public open space with zero development intensity in the development plan. The proposed development also has requested an increase in the development density from 74 to 749 people per acre.

Thus, dissatisfied with the decision of the first respondent, the appellant (residents of Taman Tun Dr Ismail (TTDI)) applied for judicial review for (i) an order of certiorari to quash a Conditional Planning Approval dated 28.2.2017 and a Development Order dated 13.7.2017 issued by the first respondent (Datuk Bandar Kuala Lumpur) and (ii) an order of mandamus directing the first respondent to adopt the draft Kuala Lumpur Local Plan 2020 and to thereafter publish the adoption in the Gazette pursuant to section 16 of the Federal Territory (Planning) Act 1982. The Court of Appeal issued an order of certiorari quashing the first respondent's decision, which granted the development order for the said development on 13 July 2017. The court held that the decision in granting the development order is invalid when the statutory development plans were not taken into consideration. The judge on page 858 emphasizes the importance of the development plan to be considered by the local authority in granting the planning permission:

"If the Datuk Bandar, the 'authorized producer', so to speak of these plans, does not consider these plans material considerations, it is of great worry who then will."

The above cases show an apparent effect of the provision under Section 22(4)(a) of Act 172 in considering the application for planning permission. The local planning authority shall not grant planning permission if the proposed development contravenes the development plan. This section provides a high weightage of the development plan in development control. It also emphasises the need for plan-led development instead of ‘ad-hoc’ or short-term planning, neglecting the plan-led planning practice, which later may lead to an unorderly manner of urban development which can cause many unwarranted physical, environmental and social issues and problems, such as natural disaster, overpopulation, and congestion.

5.1.2 Power to Give Planning Condition in Planning Permission

Besides having the development plan as part of the planning control mechanism, Act 172 further provides a statutory discretion to the local planning authority under Section 22(2) in which they need to take into consideration such matters as are in its opinion expedient or necessary for proper planning of their area. Besides, the proposed development may contravene the development plan under Section 22(4)(a), the local planning authority can refuse the planning permission on two other grounds: that is of the application for the planning permission for the proposed development, which goes against any direction given by the committee and if the applicant has not paid the development charges.

The planning condition issue can be seen in the Bencon Development Sdn Bhd V Majlis Perbandaran Pulau Pinang & Ors [1999] 2 MLJ 385 (High Court of Malaya, Penang) [29]. In this case, the plaintiff applied for planning permission for the erection of five block 19-storeys medium cost flat and 24 units of two-storey shophouses and
one block 16-storey low-cost flats at South West District, Pulau Pinang. The total number of houses for the above-said development are more than one thousand units of houses. Due to the high density of the development, the local planning authority imposed for the plaintiff to widen the existing bridge on Jalan Relau based on the specification of the Public Work Department of Jabatan Kerja Raya (JKR). The plaintiff developer further appeal to the Appeal Board on the following justification:

1) The existing bridge is outside of the proposed development site and on the state’s land;
2) The proposed widening of the existing bridge will benefit the other surrounding development as well as ease the traffic on Jalan Relau; and
3) The plaintiff will bear the cost of widening.

However, the appeal was then dismissed by the appeal board. The aggrieved developer then appealed to the High Court. The issue highlighted by the plaintiff is either the condition that was imposed by the local planning authority to widen the said bridge is valid or not. The court held that the local planning authority’s condition is reasonable and lawful as the proposed development consists of a high-density project, which will indirectly cause massive traffic within the area. Quoted from the judge, Abdul Hamid Mohamed J:

"It is regrettable, speaking from the cases that come to this court, that developers want maximum density but minimum, or nil, contribution towards the upgrading of infrastructure. They, hopefully only some of them, seem only to think of maximizing their profits and are not at all concerned about the adverse effects caused by them, for which the local government is usually blamed."

It is undeniable that new development will impact the population, which indirectly increases a particular area’s density. In this situation, the developer will only look into maximizing their profit without considering the future impact of their development on its surrounding. A wise decision by the local planning authority in implementing systematic development control and land use planning is necessary to safeguard the community’s well-being. Md Dahlan elaborated that the views and directions from the planning authority and the relevant technical agencies in relation to any development proposed is crucial as they are the entities that provide the updated and detailed information that can facilitate the development to be carried out [30]. Therefore, there is a need for the local planning authority to impose certain conditions on the planning application, which may not be favourable to the applicant in certain circumstances. However, this condition is somehow part of their obligation to ensure that land-use planning can be fully exercised. The development control and planning conditions are essential to avoid any development spillover issue in SEZs development. In China, the spillover effect due to rapid urbanization in SEZ has also created urban and regional development disparities with another region if it is not fully integrated [31].

5.1.3 Legal cases not adherence to the development plan

Nonetheless, the judgments are not always favouring local authority in considering the development plan in granting the planning permission. In the Sunway City (Penang) Sdn Bhd v Lembaga Rayuan Negeri Pulau Pinang & Ors and other appeals [2017] MLJU 755, the court opined that the local planning authority is flexible in exercising their power and make the necessary decision on any planning application submitted by the applicant [32]. The local authority should not be too rigid in
interpreting the development plan's content, and in some instances, exemption on what has been gazetted in the development can be granted. In this case, the proposed development involves the hill land that is not allowable for the development to occur due to slope stability and restriction. However, the court held that the proposed development could be defined as a 'special project' in which the features are different from other ordinary development. Besides, the Court of Appeal in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 have the same opinion in this matter. The court elaborates the local planning authority's manner in deciding the planning permission, which does not conform to the development plan provision [33]. The court highlighted that the phrase 'shall take into consideration' the requirements of the Development Plan does not mean that the local planning authority will slavishly adhere. In other words, the power given to the local authority in treating the planning permission must be exercised with wisdom and flexible. Therefore, even if a particular requirement needs to be fulfilled by the applicant, there is still a room for consideration and negotiation on the said requirement [34].

Based on the above-discussed cases, the effectiveness of the implementation of the provision in the development plan as part of planning and development control can be argued and debated. The formulation of the development plan, specifically the local plan, addresses the current and future land use development issues at the local level. The non-adherence of the statutory plan would solve the current related local issues, which induces new issues and problems that may jeopardize city's development. As prescribed in Section 12(3)(a) and 7(3)(a) of Act 172, the formulation of a development plan must take into consideration environmental, social and economic impact. The inadequacy of the development plan's provision may indirectly cause landslide tragedies, deforestation, soil erosion and affect the development ecosystem [35], [36]. The abovementioned issues arose for several reasons, such as lack of monitoring system, human resource issues, and weak government agencies coordination [24], [37]–[39]. Therefore, there is a need to empower the development plan to ensure that the local planning authority can restrict and control the development based on the provision under Act 172 and other related by-laws.

6.0 RECOMMENDATION AND CONCLUSION

The establishment of the Town and Country Planning Act 1976 (Act 172) provides a planning system designed to regulate Malaysia's land development. It prescribes the important instrument for planning control through development plan in protecting and enhancing the built and natural environment. The development plan under Act 172 must be practical from the preparation stage until its implementation. However, looking into the abovementioned cases, there is a loophole in the statutory development system that needs to be further explored to ensure that the system aligns with the policymaker's objective.

Findings from the above discussion of legal cases show that local authority flexibility in treating planning permission is essential to spur the development in a particular area. Despite the local planning authority's non-compliance with the statutory plan, they are fully aware of the limit of flexibility allowed in implementing the development plan since they are the 'person in charge' for their jurisdiction. Maidin (2009) suggested that land use planning and development plans are the tools and mechanisms for the local planning authority in exercising their power [9]. Being the


'regulator and manager' of their geographical jurisdiction, the local planning authority should be given a high weightage in carrying out the planning control through development plan to avoid the 'ad-hoc' or short-term planning over the entire development of the area. Therefore to enhance the local planning authority power, there is a need to carefully revamp the vast discretionary power of local planning authority in ensuring that they are effectively governed in regulating the land use planning practice. This is necessary to facilitate the execution of the vast responsibility entrusted upon them.

Findings also emphasize the importance of 'plan-led development practice in avoiding 'ad-hoc' and chaotic land development. As 'development-led practice may lead to the disregard of potential social and environmental issues, it is recommended for local planning authority to be proactive in having a systematic and effective monitoring system of physical development. As part of the check and balance process, the monitoring system needs to assess the planning application's consistencies with the development plan provision. Although each of the development plan's timeframe may take five to ten years [18], the implementation and monitoring of the policies need to be carried out to ensure that all the provision inside the development are being executed and not just be a policy without being implemented. Even though PlanMalaysia has introduced the Malaysian Urban-Rural National Indicators Network on Sustainable Development (MURNInets) [41], there is still a need for the planning authorities to monitor the policies in accordance with the development plan.

Inefficient and improper planning can lead to haphazard development of emerging cities and loss of enormous resources. In the long run, any development that creates problems generated by them such as congestion, inefficiency resource depletion and environmental degradation. A holistic and comprehensive approach to the development policies has to be further relooked in promoting a balance socio-economic development without jeopardizing the environmental aspect just for economic growth [40]. As ‘Prevention is better than cure’, this writing helps identify and analyze the planning policy gaps and implementation challenges of previous and current Special Economic Zone worldwide. In this context, the statutory development plan is highly impacted by the SEZs development as it involves a large-scale development. The need for well-equipped infrastructure, financial support, and benefits with preferential terms for the SEZs development will also involve preparing development plans as long as it is within the local planning authority jurisdiction. Thus, the development of SEZs is not only focusing on boosting economic growth, but it will also shape the regulation of land use planning of the affected area. As it involves optimum land use planning management, SEZs' outstanding role and impact raise concerns on the land use planning system and regulation effectiveness.

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