

PAPER 4

LEGAL AND ADMINISTRATIVE CONSIDERATION IN UNDERGROUND LAND DEVELOPMENT

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ABSTRACT

The rapid growth of urban development has resulted in the use of underground land as alternative choice to maximize the utilization of the land in Malaysia, the National Land Code 1965 was amended to insert a new Part Five (A) to enable State Authority to dispose underground land and gives State Authorities a clear power to dispose underground land of new cases of land disposal. Together with that, Federal Land and Mines Office (JKPTG) has also issued a guideline for the same purpose which to provide a basis for the legal framework of underground land development. Recently, many arguments are showing up especially in term of ownership. For underground land, the depth is considered as boundaries of surface and underground ownership. Since the legislations provided is still ambiguous, there is an urgent need to define the rights also the boundaries of the surface and underground land ownership. Hence, this research aims to identify the issue in the legal and administrative issues in term of ownership and the right to develop underground land, to examine the legal implementation of surface land use regulations for underground land development and also to determine the restrictions associated with the development. In order to achieve the aim and objectives of the study, the pure qualitative study is applied. However, the use of comparative study will focus on the two countries in their experience in handling the underground land development in term of its legal and administrative point of view. The strategy for underground land development is proposed at the end of the research to assist the administration in term of its legal and the administration of the underground land development.

EXECUTIVE SUMMARY

1.0 RESEARCH PROBLEM

Today, more than half of the world population lives in urban areas, and it is expected that this figure will grow rapidly to reach 85.9% in 2050. People will keep on migrating from inland to village, city, and metropolis and the number is increasing year by year. Obviously, cities are facing limits to growth and calling for innovative development strategies and sustainable renewal by favoring compact city patterns. Malaysia is also not excluded from urbanization issues. The explosive growth of cities in developing countries and, thus, the demand for improved livability and environmental protection has created a high demand for new underground development.

Underground development will create more space above ground for many purposes especially for recreation and social activities also the development of new green fields and residential area. Looking back, the underground space has been exploited for thousands of years, for strategic and military purposes, for religious building, for water and sanitation conveyance and military purposes (Maire et al., 2006). It is only later than that the underground has been deeply used for transportation, commercial building and other infrastructures, such as tunneling and integrated railway transport. The establishment of shop lots below the Merdeka Square about fifteen years ago, the recently completed Petronas Twin Towers, and Light Rail Transit are the comprehensive developments of underground land in Malaysia. All of the national contributions stated that use of underground space is becoming more and more attractive for development. For Malaysia, being a new form of land development several problems have been encountered, which includes the legal implications to the landowners above the developments and technical issues pertaining to building structures and the safety of the occupants. This several problem will have a negative influence on the future development of underground works.

Basically, under Section 44 (1) (a), NLC 1965, every landowner have the right to use the land include the airspace and the underground. In simple words, “the owner of the surface also owns to the sky and the depths”. However, the recent Guidelines for the Disposal of Underground Land, 2008, by JKPTG, do specifying the minimum depth based on the land use, are the limits of minimum depth that can be enjoyed by the surface land owner of their underground land. Furthermore, any development of the underground land will be developed under the land held for agriculture, building or industrial, and surely will involve either the state land or alienated land.

Development of underground space will not be much of a problem if it involves the state land because it only involves two parties; developers and state governments. Moreover, usually if a project that will benefit the general public does not creates many problems to be approved. However, the situation will be different and complicated if the development to be carried out will involve the private land. Although sometimes the use of underground space will not require the surface, however for the safety of the user, the developer will usually ask for both the surface and underground land to be use. If this happen, it will often cause dissatisfaction among landowners in giving up their title.

This can be seen in the case of 51-km of MRT rail project development, with tracks running both underground and above ground, starts from the city’s north-west in Sungai Buloh and connects with other rail networks at various points in the city before ending in Kajang in the south-east. The project has caused some anger among residents whose land has to be acquired for the project, as seen in Petaling Street, where several heritage buildings are being bought over. Lok Ann Hotel for example, a landmark on the street in the middle of Chinatown, has become a symbol of resistance, with the family that owns the 75- year-old establishment having rejected a deal with MRT Corp to co-own the land. The MRT tunnel is to run beneath the building. In acquiring the land for underground development, at present there are only two solutions that can be taken, one is for the developer to buy the land directly from the land owners, or, secondly to use of state authority power to acquire the land to the public project to be constructed allowed under Malaysian land laws for public project. Then, compensation will be paid based on the land

value. However, in this case, talks between the residents and the MRT Corp have broken down and RM680,000 that MRT Corp offered to the hotel owners were rejected. They are especially upset that the deal requires them to seek consent from MRT Corp if they ever want to redevelop the property. Now, the government is forcibly acquiring the property.

Difficulty in getting good cooperation from landowners is a significant challenge constraining the success of the underground land development. This is because, for landowners, the land is not just an asset to be kept, but it is more than that. So, without a good consultation with the landowners, the proposed development could not be completed in the given period or, and it became worse, it had to be canceled. If this continues to happen, the development of underground land in Malaysia will be affected and would cause severe traffic congestion in the future.

In Malaysia, one special part has been created entitled Disposal of Underground Land under "Part Five (A)" in the NLC 1965 regarding disposal of underground land and other things related to it. The circulation of JKPTG No.1/2008 has clarified the minimum depth for underground land disposal which is, the depth of the ownership shall not be less than 6 meters in the case of agricultural lands and in case of building category or industrial it shall not be less than 10 and 15 meters. This specified depth is very minimal compared with the prescribed depth in other countries such as Japan that sets the depth up to 40 meters to any types of land. The depth given to the land owners are shallow and it will limit the development that can be carried out. Besides, maybe there will be a waste of space underground for different land categories. As an example, the land held under industrial and the buildings category that is adjacent to which each will has different levels of depth. The result from the different levels of depth can cause uneven spaciousness looking from horizontal and also that vertical that caused some difficult space developed as inappropriate. So space will be left without development and makes development planning is not sustainable.

The JKPTG Circulation No 1/2008 have provided, the standards are applicable only to the disposal of stratum development but not directly and clearly specified for underground land development, while both have different approaches and definitions. However, the minimum depth is valid only for the fresh alienation of surface land, while for the alienation of surface land without the minimum depth; the underground land still can be alienated but only by the surface landowner. These restrictions may prevent the development of underground land because usually much development done by private companies. Besides that, the landowners usually use the underground land for the purpose of dependent surface use only, such as car park or storage. If this continues, the development of underground land will only be on the development that gives importance to the individual and will not be developed extensively. For private companies, they will be facing with a biggest problem in developing the underground land that the depth is not specified, because they are not eligible to apply for a title, and, what is more complicated is when they need to get approvals from landowners. Whereas if we look at the current scenario, has shown that landowners are reluctant to cooperate in the release of their title.

The terms stratum and underground development are different as stated in the NLC 1965. Section 92A of the National Land Code 1965, stated that the underground land is the land that lies below the surface of the earth; meanwhile stratum is the cubic layer of underground land. For practice in Malaysia, disposal or development of underground land is known as Stratum but in others countries, a various term used to represent the underground land such as; subsurface, underground space and subterranean. Differences in the definition also lead to a different way of disposal in other countries. Because of Malaysia is a new country that has just started moving towards the underground land development, so the terms should be better explained with clear diagrams that are not available to some confusion. This is because; most of the references are usually made in other countries who was first developed the underground land, that we do know that the term are different to our country.

Based on the above issue, this study will directly focus on the legal and administrative issue in term of ownership and the right to develop the underground land. The underground land development involves a vertical development that consists of different layer of underground

(Dongjun, G., Nelson, P. P., Zinrong, X., & Zhilong, C., 2012), the fundamental principle regarding the depth of underground land and its boundary will be examined in this study to identify the extension of ownership of the landowners. For underground land development in Malaysia is still considered at the infant stage, there is many elements need to be considered and to be taken especially in formulating the legal and administrative framework in giving the ownership. Consequently, due to the lack of expertise and experience in developing such underground land in Malaysia, there seemed to be a barrier in that such development. Several problems have been encountered which includes the legal implications to the above landowners, the procedures of developments and the most important is the technical issues pertaining to building structure and the safety of the occupants (Megat Mohd Ghazali, et. Al., 2000).

It looks like if we are to develop our underground land several factors must be taken into account; the many aspects of legal, economy, social, technical and not to forget also the environment. However, the contributions taken from some develop countries has stated that state governments and their local authorities should institute in the effort of planning in the underground land especially in urban areas (ITA, W.G.N., 2000). It has become a must now for us Malaysia to put a great concern in underground land development to maximize the land usage and to save nature for the future undertaken.

2.0 OBJECTIVES OF RESEARCH

The research aim is to define the land rights also the boundaries of surface and underground land concerning the legal and administrative aspect. The objectives of this research are divided into three progressive steps:

1. To study the legal and administrative issues in term of ownership and the right to develop underground land
2. To examine the legal implementation for the application of surface land use regulations into the underground land development
3. To determine the restrictions associated with the underground land development

3.0 METHODOLOGY

This study proposed a methodology based on three main stages; firstly is based on theoretical stage, secondly on the empirical stage and thirdly on the evaluation stage. On theoretical stage, it begins with the identification of research issues, aims and objectives based on the problem statement. Next, it moves on to elaborate the literature review that touches more on the fundamental knowledge on underground land development.

The empirical stage starts with the data collection stage that involves the primary and secondary data. To obtain data for this research, research instruments used are the structured and semi-structured interview questions and examining other related legal documents. To generate the findings, the views from experts in land development and legal aspects will be obtained through in-depth interviews. Besides, the comparison with another country will also be made with regard to legal and administrative consideration. This is done to find the differences or the similarity in it. The findings will be then analyzed through qualitative analysis to get the output of research. Finally, the proposed mechanism will be evaluated and validate by expertise in the respected area through technology transfer. The diagram for research process is shown in Figure 1.

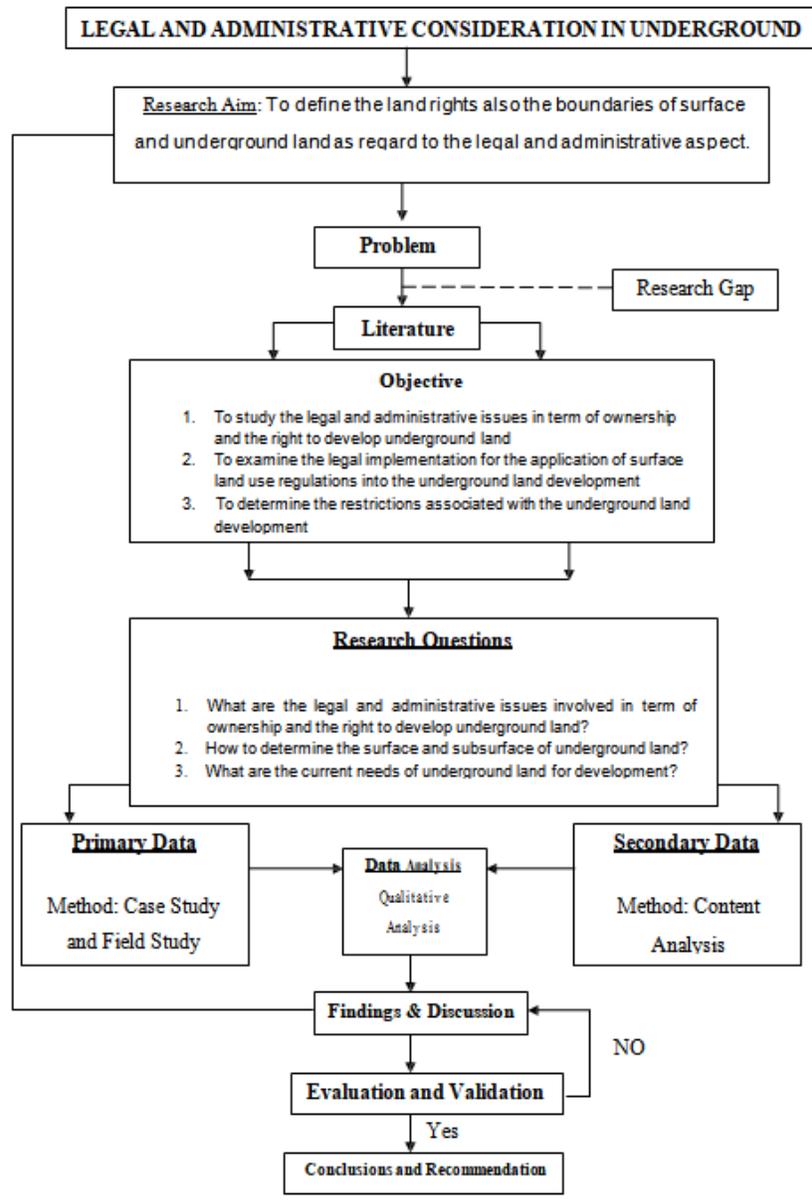


Figure 1: The Research Methodology Framework

3.1 Data Collection Techniques

This study will be applied qualitative data collection techniques. Since it involves qualitative method, Case Study is chosen as a strategy in this study and interview method will be used for obtaining the data. The obtain data will be analyzed through qualitative analysis (comparison analysis and descriptive analysis).

For objective one, the data will be collected through literature review and in depth interview. This is because reviewing the accumulated knowledge about a question is an essential early step in the research process. Through in-depth interviews, it is hoped that the concept of underground land ownership can be clearly defined. Data collection for objective two will be done through in-depth interview and content analysis. Therefore, the implementation for the application of surface land use regulations to the underground land will be reviewed and analyzed to look out on its application. Hence, the content analysis will be applied to review the document relating to it.

To strengthen the data, in-depth interview with related respondent will be done to strengthen the data from a content analysis. After the data have been analyzed, the comparison analysis will be applied by comparing Malaysia experience with three best countries that well developed underground land which are Japan, Finland and China. Next, the third objective is to determine the restrictions associated with the underground land development will also be achieved by an in-depth interview with selected government agencies that involve directly in underground land development.

3.2 Type of Data

The research was collected two types of data which are primary data and secondary data. The data is as follows:

3.2.1 Primary Data

The collected primary data is based on the interview and discussion with the selected respondents. The voice recording was made to save the data especially the main opinions from respondents to ensure the main point is collected.

3.2.2 Secondary Data

Secondary data is collected from the references resources such as the circulation (JKPTG Circulation No 1/2008), National Land Code 1965 and Land Acquisition Act 1960. Apart from that, the information for the countries that chosen as a case study is gather through the legal document, interview with the country representative who's attending the ACUUS Conference.

Among the important data that collected is the history of underground land development, the successful project for underground land and also the needs of underground land utilization.

3.3 Format Interview Question

The set of interview question is prepared based on its format to collect the data to achieve the objectives. In the set of interview questions, the purpose of the study is stated to ensure the respondents give the opinion based on the need for this research.

The questions are divided into four (4) Parts:

Part A: Respondent's Background

Part B: Legislation in Underground Land Development

Part C: The Depth of Underground Land Development

Part D: The Suggestion to Enhance the Mechanism of Underground Land Legislation

3.4 Data Analysis Technique

The process of data analysis for this research depends on the primary and secondary data. Primary data is gathered through the interview session from the respondents while secondary data is on the information of legal and land administration (Act and guideline) also the previous study (literature review).

Since the research also applies the comparative study, three countries are chosen for this which is Japan, Finland and China. The country is chose based on their vast experience in developing underground land. After the analysis, the outcome of the study is based on the integration data of qualitative analysis and comparative analysis.

3.5 Qualitative Data Analysis

The data will be analyzed after the data collection stage is done. The analysis is very important to determine whether the objectives are achieved or not. The qualitative data analyses involve few stages that are:

- i. Prepare the data;
- ii. Developing codes/categories;
- iii. Revise the system of categories based on the data; and
- iv. Report the result of data analysis.

This study applies the descriptive technique because this study is the qualitative study. The data will be explained and discuss in the form of statement to unlock the issues and answering research questions.

3.6 Interview Data Analysis

Each data from the respondents is going through the voice recording and transfer to writing a transcript. The analysis is done based on the transcript by develop a coding from the answer and translate it in the form of a statement. Then, the statement will once again be filtered based on the suitability of analysis. After all the data have been analyzed and filtered, then the report writing is starting to explain and discuss the subject matter.

4.0 MAJOR FINDINGS

1. The legal and administrative issues derived from the study are divided into two sections which are the legal issues and administrative issues. The information is shown in Figure 2.

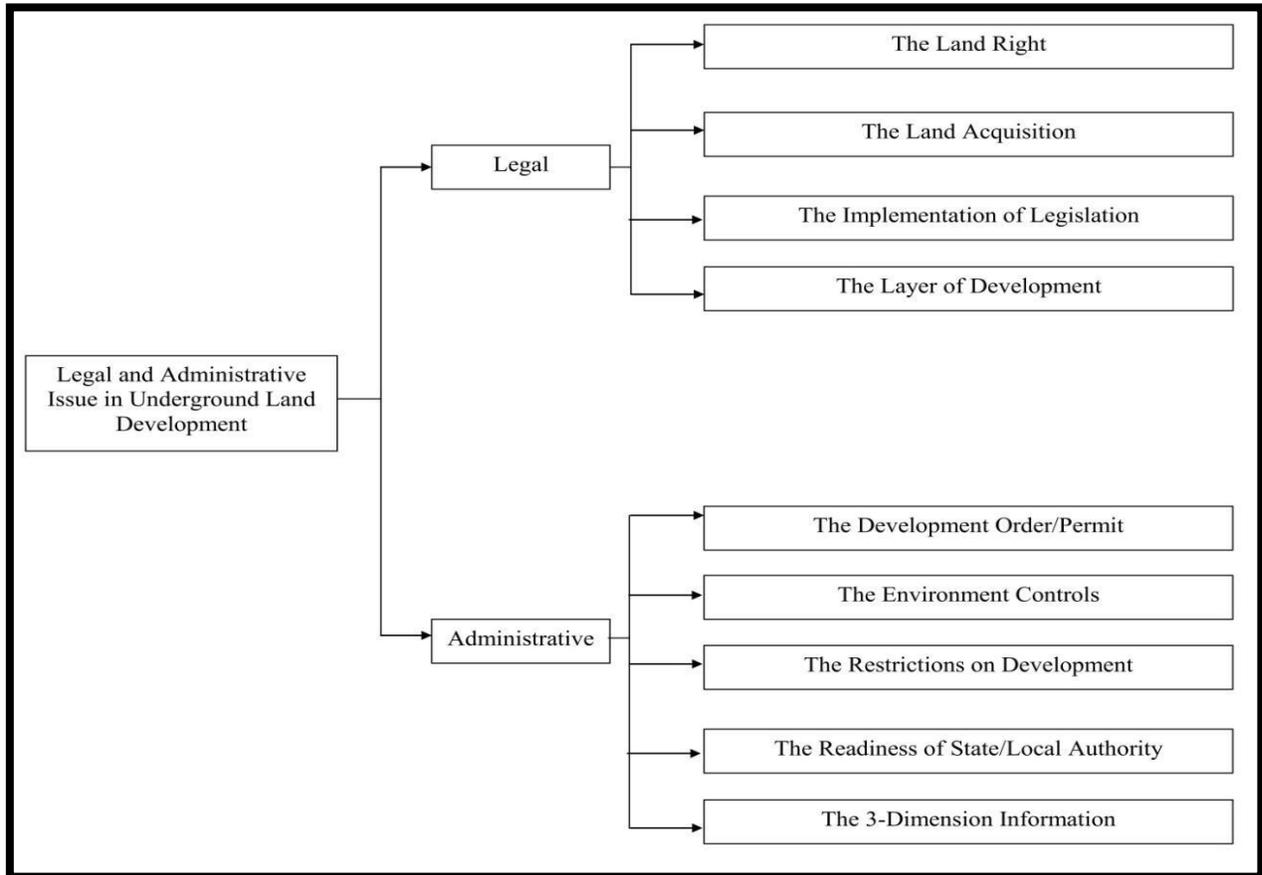


Figure 2: The Legal and Administrative Issues in Underground Land Development

2. The restrictions that occur in the term of legal and administrative considerations which associated with the underground land development. Table 1 shows the details of the result.

Factors of Restriction	Causes become Restriction
Right of land owner	To develop the underground land development under the alienated land must involve and get the permission from the land owner
Express condition	It became restriction to protect the ownership and to avoid deviation based on original purpose of development
Restriction in interest	
Depth of development	Limitation of depth for surface land owner to develop the underground land development
Category of use of the land	There are 3 categories of the use of surface land; agriculture, building, and industry (commercial). It became restriction when to ensure that the development therein is worth to develop especially in commercial development

3. The mechanism of legal and administrative aspects in underground land development is improved by proposed the strategy of underground land development. The proposed strategy of underground land development is shown in Figure 3.

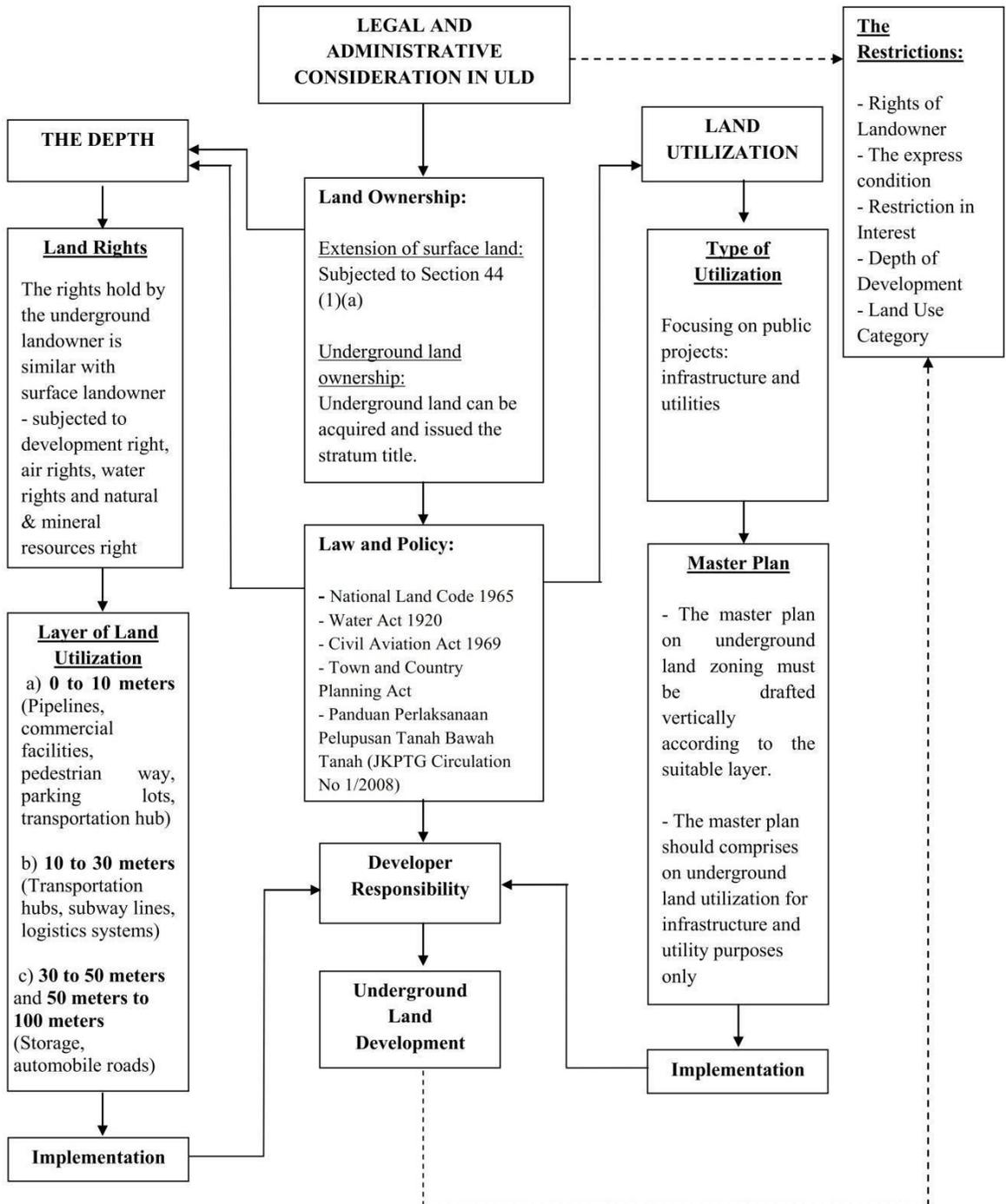


Figure 3: The Strategy of Underground Land Development in Malaysia

5.0 SIGNIFICANCE OF THE PROJECT

1. The outcome of the project will contribute to the landowners, authority and industrial agencies which involved directly or indirectly with the underground land development. It will give the clear information and knowledge in underground land development especially in term of legal and administrative aspects.
2. The elements in the legal and administrative consideration which derived from the study will assist in proposing the guideline for developing the underground land to meet the urban needs.