

TOWN PLANNING BOARD

TPB Paper No. 8753

**for Consideration by the
Town Planning Board on 11.3.2011**

**Planning Enforcement
under the Town Planning Ordinance**

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PURPOSE

1. The purpose of this paper is to brief Members planning enforcement undertaken by the Planning Department (PlanD) under the Town Planning Ordinance (the Ordinance). The paper highlights the enforcement provisions of the Ordinance, a summary account of the enforcement actions undertaken by the Central Enforcement and Prosecution Section (CEPS) of PlanD, and the interface with the functions of the Town Planning Board (the Board).

BACKGROUND

2. Before 1990, there were no planning enforcement provisions in the Ordinance and statutory planning control was confined to the existing and potential urban areas. Development control was exercised through the Buildings Ordinance and the leases. Control over uses in the rural New Territories was mainly through the Block Crown Lease. The Melhado Case¹ in 1983 had led to extensive conversion of agricultural land into container yards and open storages. The uncontrolled proliferation of such uses has resulted in the general degradation of the rural environment, causing nuisances to the local communities and creating problems such as flooding, environmental pollution, visual intrusion, traffic congestion and even safety hazards to properties and life.
3. The Town Planning (Amendment) Ordinance 1991 was enacted in January 1991 to extend statutory planning control to cover the rural areas of Hong Kong. The Board was empowered to designate the rural areas of Hong Kong as Development Permission Areas (DPAs) for the preparation of statutory plans. Areas covered by a DPA Plan, or its replacement Outline Zoning Plan (OZP), are subject to planning enforcement under the Ordinance.

¹ The High Court's judgment on the case "AG v Melhado Investment Ltd [1983] HKLR 327" held that "use of land listed in the schedule of the lease was descriptive only and no implied covenant of the type contended for". Use of agricultural land (except when structures were involved) cannot be effectively controlled through the Block Crown Lease.

4. Since then, the Planning Authority (PA) has undertaken enforcement and prosecution against unauthorised developments (UDs) in the rural New Territories to tackle environmental black spots, to prevent proliferation of UD, and to reinstate the damaged land where necessary, with priority actions in ecologically sensitive areas and areas for conservation.
5. Proactive actions have also been pursued in subsequent years to strengthen the enforcement provisions of the Ordinance. The enforcement power of the PA had been strengthened in 1994 and 1995 through the provision for removal actions to ensure discontinuance of an UD as well as higher level of fines as a deterrent to the offenders.² The enactment of the Town Planning (Amendment) Ordinance 2004 has further strengthened the investigation power of the PA by giving power to the PA to enter or access through any land and premises for investigation, and to require the provision of relevant information which the PA may require for exercising its powers.³ The amended enforcement provisions have also enabled the PA to take prosecution actions without the need of waiting for exhaustion of planning application and the associated review and appeal procedures⁴.

ENFORCEMENT AGAINST UNAUTHORISED DEVELOPMENTS

6. Under s.1A of the Ordinance, “development” means “carrying out building, engineering, mining or other operations in, on, over or under land, or making a material change in the use of land or buildings”. Hence, operation and material change of use constitute a development. A development within a DPA covered by DPA Plan or its replacement OZP is regarded as unauthorised unless:

² The Town Planning (Amendment) Ordinance 1994 was enacted to empower the PA to take possession of, remove, detain and dispose of property remaining on land. On 28 June 1995, a resolution was passed by the Legislative Council to increase the maximum fines to \$500,000 (first conviction) and \$1,000,000 (subsequent conviction); and daily fines to \$50,000 (1st conviction) and \$100,000 (subsequent conviction).

³ The strengthened enforcement power, among others, include the power of the PA to enter or access through any land and premises without warrant at a reasonable time (except for domestic premises) for the purposes of carrying related enforcement duties; and the PA may issue a “Notice to Require Provision of Information” on that person by requiring the recipient to provide the relevant information by a specified period.

⁴ Before the implementation of the Town Planning (Amendment) Ordinance 2004, there was a requirement of obtaining planning permission in the Enforcement Notice. The Authority experienced difficulties in carrying out the enforcement duties since some enforcers of the planning enforcement action could easily take advantage of the planning application system in delaying the prosecution proceedings on enforcement cases. Application for planning permission was regarded as a reasonable step to comply with the notice and a defence according to a High Court judgment on an enforcement case in 1999.

- (a) the development is an existing use⁵;
 - (b) the development is permitted under the relevant statutory plan; or
 - (c) the development is covered by a valid planning permission.
7. The Director of Planning is the PA for undertaking planning enforcement under the Ordinance. The public officers in CEPS⁶ of PlanD have been authorised by the PA under the Ordinance to exercise any powers and to perform any duties in relation to planning enforcement on behalf of the PA. Currently, CEPS⁷ is responsible for undertaking enforcement action within 57 DPAs (45 covered by OZPs and 12 by DPA Plans) with a total land area of about 22,348 hectares within which enforcement against UD's can be taken (**Annex A**).

ENFORCEMENT AND PROSECUTION ACTIONS

8. The primary objectives of planning enforcement are to achieve discontinuance of the UD's, to regularise the UD's through the planning permission system, or to channel them to locations planned for the purposes. UD cases are mainly identified through public complaints, departmental referrals, regular patrol and revoked/lapsed planning approvals. Upon forming an opinion of an UD, on the basis of information/evidence collected, the concerned parties would be warned verbally or through warning letters.
9. The PA may serve an Enforcement Notice (EN) under s.23(1) of the Ordinance to one or more land owner(s), an occupier⁸ or a person responsible, requiring the concerned parties to discontinue an UD by the specified date where the PA can form an opinion that there is/was an UD. S.23 of the Ordinance also provides for a number of other enforcement actions which are undertaken to suit different circumstances of the cases,

⁵ Under s.1A of the Ordinance, an "existing use", in relation to a DPA means the use of any building or land that was in existence immediately before the first publication in the Gazette of notice of the draft DPA plan (or of the Interim Development Permission Area (IDPA) Plan in case the land was once covered by an IDPA).

⁶ Upon enactment of Town Planning (Amendment) Ordinance 1991, enforcement functions were discharged by the respective District Planning Officer. CEPS was formally set up in 1994 as a central unit to undertake enforcement and prosecution actions against unauthorised developments.

⁷ There are 63 staff under the current establishment of CEPS including 18 professional grade staff, 33 technical grade staff and 12 general grade staff.

⁸ Under s.1A of the Ordinance, occupier refers to (a) any tenant of a landowner whether or not he pays rents; (b) any person who resided in a building and (c) any person who carried on a full-time occupation in a building. Tenant under (a) means person who pays rent to a landlord for the use of a room, a building, land, etc.

including Stop Notice (SN), Reinstatement Notice (RN), Removal and Disposal Notices.

10. Where the PA considers that continuance of an UD would constitute a health or safety hazard, adversely affect the environment, or make it impracticable or uneconomical to reinstate the land within a reasonable period, a SN may be issued. The SN requires that the UD should be discontinued and the steps, if any, should be taken by a specified date to prevent anything related to the UD from causing any adverse effects.
11. Reinstatement of land occupied by an UD forms part of planning enforcement actions. Where an EN has been served in relation to the UD, the PA may issue a RN requiring the recipient concerned to reinstate the land to the condition it was in immediately before the first publication of the DPA plan (or the IDPA plan, if any); or to such other condition more favourable to the person concerned, as the PA considers satisfactory. The objectives and requirements of the different statutory notices are detailed in **Annex B**.
12. On prosecution, the PA may instigate direct prosecution against concerned parties who undertake/continue an UD without serving any prior notice when such concerned parties can be identified. Parties subject to direct prosecution are usually the occupiers/operators who are directly responsible for the UD.
13. Prosecution can also be instigated against the concerned parties, including the land owner, or occupier, or a person responsible, who fail to comply with the requirement of statutory notice to discontinue/stop UD or reinstate a site by a specified date since the non-compliance with statutory notice issued under s.23 of the Ordinance constitutes an offence under the Ordinance. The workflow of enforcement and prosecution actions is at **Annex C**.
14. The PA has pledged to take expeditious enforcement against UDs causing serious nuisances to the public or impacts on the rural environment. High priority will be given to:
 - (a) UDs located in or in the proximity of ecologically sensitive areas and conservation related zones;
 - (b) UDs involving filling of land/pond within "Agriculture" zone;
 - (c) UDs causing environmental nuisances to nearby residents;
 - (d) repeated UD cases;
 - (e) UDs arising from revoked and lapsed planning approval cases;
 - (f) UDs involving uses not conforming with the planning approvals;

- (g) UD's falling within Categories 3 and 4 areas under the Town Planning Board Guidelines for Application for Open Storage and Port Back-up Uses under s.16 of the Town Planning Ordinance (Town Planning Board Guidelines No.13E); and
 - (h) UD's in areas generally not proliferated by UD.
15. Other than enforcement actions, efforts have been made to increase public awareness. Pamphlets explaining the enforcement provisions are widely distributed and relevant information is available in PlanD's website for public browsing. Posters are prepared and Announcements for the Public Interest shown on television to highlight that proliferation of UD's would cause nuisance and environmental problems to the neighbourhood and UD's are subject to enforcement under the Ordinance. PlanD also maintains a regular dialogue with Heung Yee Kuk, open storage operators and Green Groups.

ENFORCEMENT AND PROSECUTION STATISTICS

16. There has been a steady increase of suspected UD cases investigated by PlanD over the years, from 692 in 1995 to 961 in 2000, and further to 1,301 cases in 2010 (**Annex D**). In recent years, the percentage of investigated cases confirmed to be UD is about 30% and there has been a significant increase of warning letters and statutory notices issued. The number of statutory notices issued has increased from 619 in 1995, to 2,409 in 2005, and further to 3,987 in 2010. The number of RN issued has increased significantly from 38 (13 cases) in 1995 to 161 (15 cases) in 2005, and further to 299 (46 cases) in 2010 (**Annex D**). The statistics indicate that the overall enforcement and reinstatement effort has been generally stepped up over recent years.
17. Regarding reinstatement, an average of 3 ha of land per year had been reinstated between 1995 and 1999. In the last three years, the extent of reinstated land has increased significantly to an average of 20 ha per year. The stepping up of reinstatement effort has brought about environmental improvement and mitigation of damages of the land by the UD's.
18. The conviction rate for prosecution of UD cases remains high at an average of 98%. Summons laid for prosecution have increased from 14 in 2000 to 166 in 2010, and the average fine per defendant/case increases from \$16,305/\$24,938 in 2000 to \$21,021/\$54,271 in 2010. The highest fine in a case has reached \$980,000.

19. Regarding the investigation on UD, nearly 51% and 73% of the investigated cases in 2005 and 2010 respectively were identified through public complaints, which is quite different from the situation in 1995 when a majority of the cases (58%) were identified from department referrals (**Annex E**), reflecting the increasing environmental awareness of the public.
20. Over the years, the most common types of UD handled remain to be storage, followed by workshop and container-related uses (**Annex E**). In recent years, there has been an increase in the diversity and complexity of UDs handled by PlanD. Apart from the common UDs such as container storage, workshops and parking of vehicles, there has been an increase of UDs of larger scale and more complex in nature such as land/pond filling and columbarium. These UD cases tend to be more resource-demanding and time-consuming in the investigation and collection of evidences.

INTERFACE WITH FUNCTIONS OF TOWN PLANNING BOARD

21. There is a close interface between the enforcement work of PlanD and the functions of the Board on statutory planning matters. CEPS's enforcement work is complementary to the work of the Board.

Extension of Coverage by DPAs

22. There has been growing community aspirations and pressure from Green Groups to enhance protection of areas of conservation value particularly those country park enclaves which are not covered by any control within the country park boundaries. In fact, all along PlanD has been progressively preparing DPA Plans/OZPs for rural areas not covered by statutory plans so as to step up statutory planning control in areas of high conservation value, subject to development pressure, susceptible to unauthorised uses, etc. Since early 2010, the Board has published 12 DPA Plans for public inspection. They cover the Frontier Closed Areas, some Country Park enclaves and other rural areas, amounting to about 2,550 ha of land. Arising from these new initiatives, there will be an increase of DPAs subject to planning enforcement action under the Ordinance.

Planning Permission

23. A number of planning application cases in the rural New Territories were triggered off by planning enforcement action. PlanD would follow up on the cases with planning permissions revoked/lapsed and proceed with

enforcement action when the developments become UD's upon the revocation or lapse of planning permissions. PlanD will also follow up to monitor the uses on site which are not conforming with the planning permission granted by the Board and to take enforcement action where appropriate.

24. In determining a planning application for regularising existing UD's, the use under application may be different from the use existing on the application site. The Board would consider the application on its merits while the PA would undertake enforcement action accordingly.
25. Sometimes, an application for planning permission to regularise an UD that has been in existence may claim that the UD in question is an "existing use". Regarding the claim of "existing use" status, it is for the court to deal with such claim based on evidence produced by the defendant. The Board does not have to decide on any claim of "existing use status" during deliberation of the application.

CONCLUSION

26. In view of the extension of DPAs subject to enforcement and increase in diversity and complexity of UD's, PlanD would continue its best effort to undertake enforcement action as provided under the Ordinance in response to rising public expectation and environmental awareness within the resources constraint.
27. Among the competing enforcement priorities, PlanD would endeavour to instigate effective and proactive enforcement and reinstatement actions against UD's, in particular those within environmentally sensitive and ecologically important areas.

ADVICE SOUGHT

28. Members are welcome to comment on the enforcement work undertaken by PlanD as briefly discussed in this paper.

ANNEXES

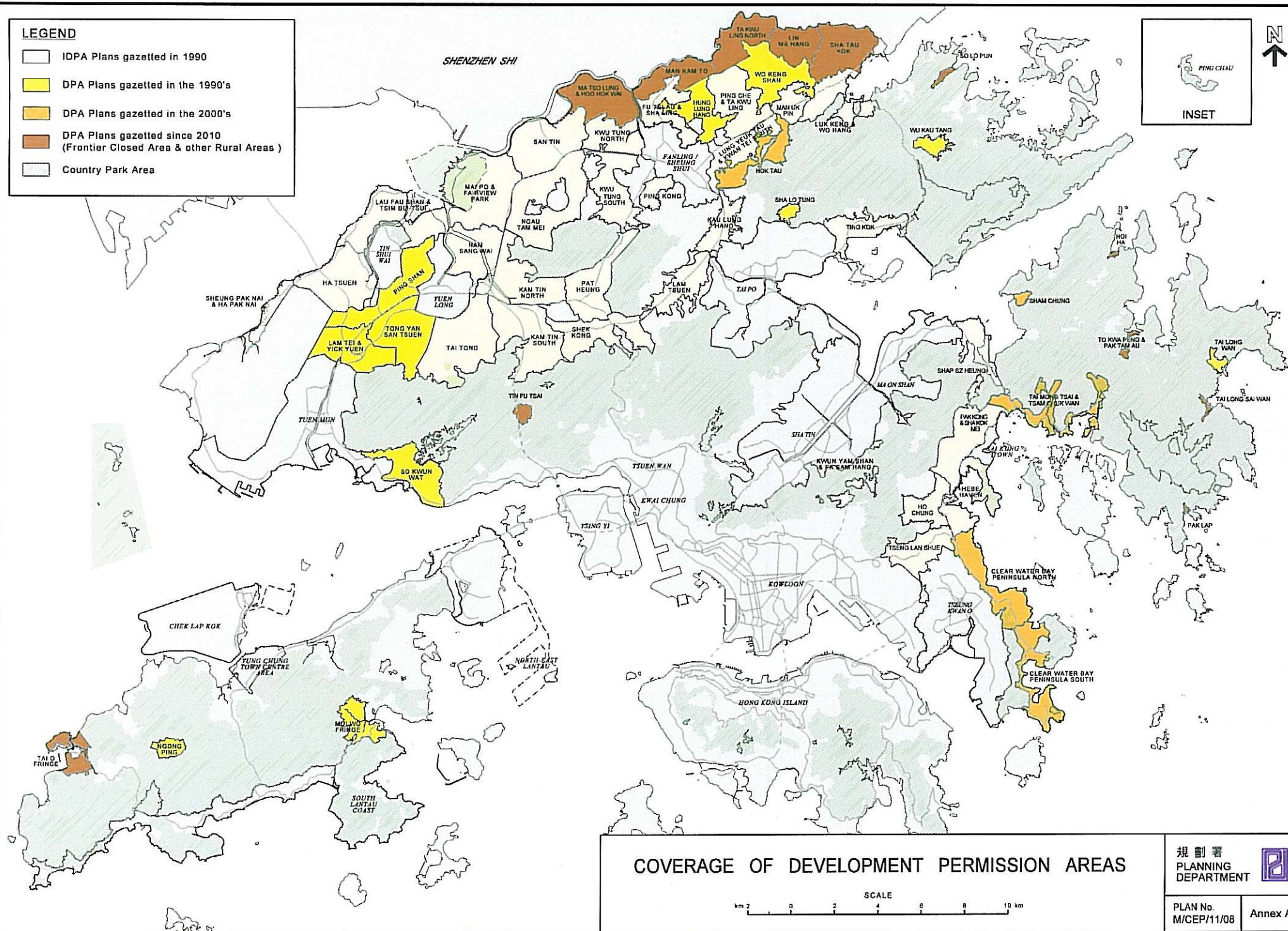
- Annex A Coverage of Development Permission Areas
- Annex B Objectives and Requirements of Statutory Notices
- Annex C Workflow of Enforcement and Prosecution Actions
- Annex D Number of Suspected UD Cases Investigated and
Number of Warning Letters/Statutory Notices Issued
- Annex E Source of Suspected UDs and Nature of UD cases

PLANNING DEPARTMENT

MARCH 2011

LEGEND

- IDPA Plans gazetted in 1990
- DPA Plans gazetted in the 1990's
- DPA Plans gazetted in the 2000's
- DPA Plans gazetted since 2010 (Frontier Closed Area & other Rural Areas)
- Country Park Area



COVERAGE OF DEVELOPMENT PERMISSION AREAS

SCALE
0 2 4 6 8 10 km

規劃署
PLANNING
DEPARTMENT



PLAN No.
M/CEP/11/08

Annex A

Date : 4/3/2011

Objectives and Requirements of Statutory Notices

(a) Enforcement Notice (EN)

- Where, in the opinion of the Planning Authority (the Authority), there is or was an unauthorised development, the Authority may issue an EN to the land owner, occupier or any other person responsible for the unauthorised development under s.23(1) of the Ordinance.
- An EN requires that the unauthorised development should be discontinued by the specified date.

(b) Stop Notice (SN)

- Where the Authority considers that continuance of the unauthorised development would constitute a health or safety hazard; adversely affect the environment; or make it impracticable or uneconomical to reinstate the land within a reasonable period, a SN under s.23(2) of the Ordinance may be issued.
- The SN requires that the unauthorised development should be discontinued and the steps, if any, should be taken by a specified date to prevent anything related to the unauthorised development from causing any adverse effects. There were examples that the notice recipient was only allowed one day to discontinue the unauthorised development.

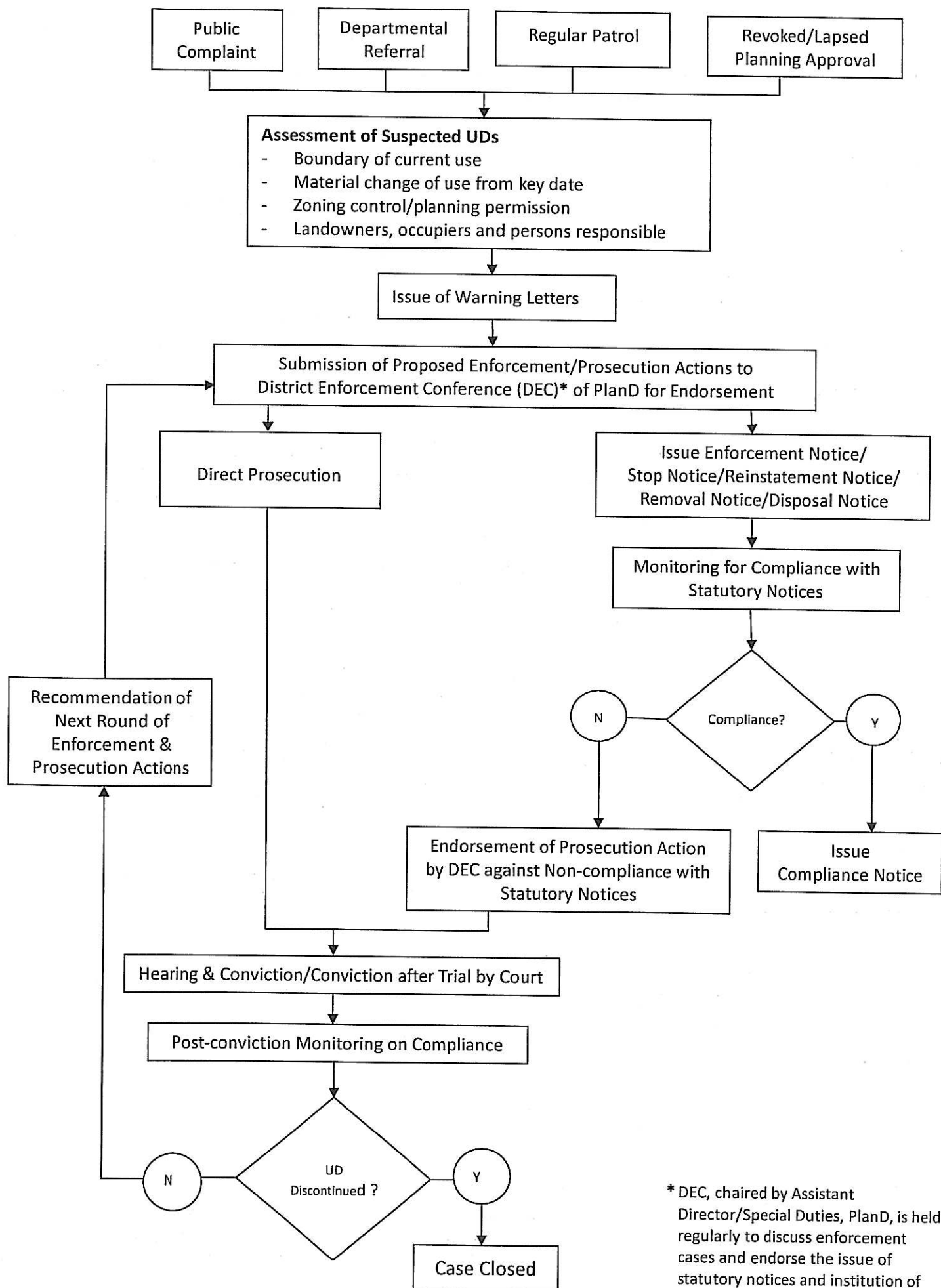
(c) Reinstatement Notice (RN)

- Where an EN has been served in relation to the unauthorised development, the Authority may issue a RN under s.23(3) or 23(4) of the Ordinance.
- A RN requires the person concerned to reinstate the land to the condition it was in immediately before the first publication of the DPA plan (under s.23(3)) or the IDPA plan (if any, under s.23(4)) or to such other condition, more favourable to the person concerned, as the Authority considers satisfactory.
- Any person aggrieved by a decision of the Authority in respect of a RN may, within 30 days after service of the notice, apply in writing to the Secretary for Housing, Planning and Lands for a review of the Authority's decision. If such an application is received, the decision under review is suspended until the review is settled.
- The compliance period for RN must be at least 30 days as required under s.23(3) of the Ordinance. It is our usual practice to allow three months for the carrying out of the reinstatement works. However, a compliance of shorter than the usual 3 months can be given for special considerations, such as to serve the purposes of ensuring public safety and protecting the environment from rapid deterioration.

(d) Removal (ReN) and Disposal Notice

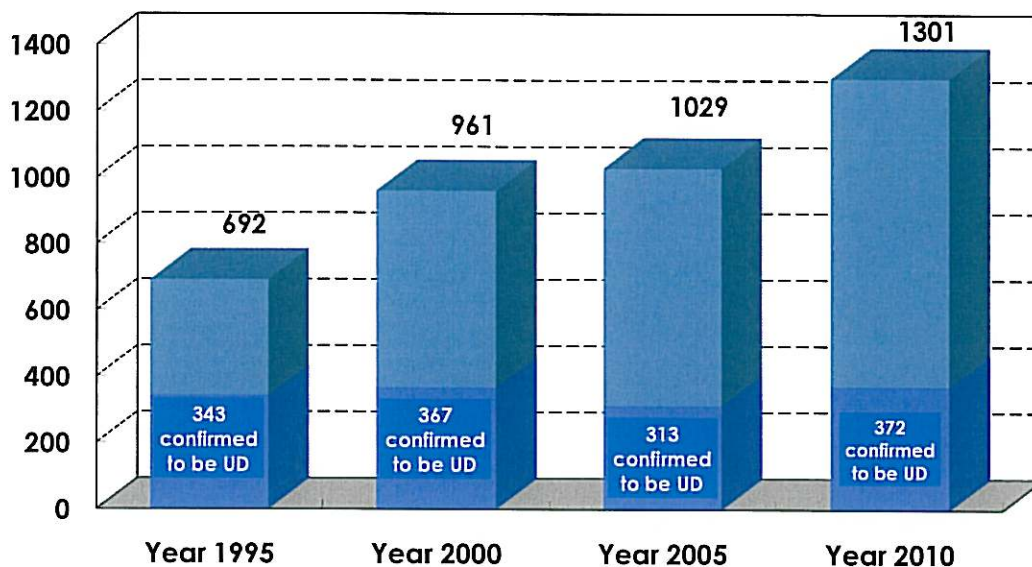
- In case the UD has not been discontinued, the steps have not been taken or the land has not been reinstated by the date specified in a/an EN/SN/RN, the Authority may, under s.23(7) of the Ordinance, enter the land and take whatever steps he considers necessary to ensure that the requirements in the above notices have been complied with.
- Under s.23(7A), the steps taken by the Authority under s.23(7) may involve taking possession, removal, detention, and disposal of the property on the concerned land.

- (e) Notice to Require Provision of Information (served under s.22(7) of the Ordinance)
- Where the Authority has reasonable grounds to believe that any person has any relevant information which the Authority may require for exercising its powers, the Authority may serve a notice under s.22(7) of the Ordinance on the person and require him to provide the information within the period specified in the notice.
- (f) Compliance with the Statutory Notices
- Compliance Notice would be issued under s.23(4A) (within specified date) or s.23(8A) (outside specified date) where the Authority is satisfied that : (a) the relevant matters have been discontinued; (b) steps have been taken; or (c) land has been reinstated, as required by the EN/SN/RN. Compliance Notice for ReN would be issued under s.2(4) and s.6A of the Town Planning (Taking Possession and Disposal of Property) Regulation.
- (g) Non-compliance with the Statutory Notices
- Under s.23(6) of the Ordinance, any person concerned who fails to comply with the requirements of either EN, SN or RN commits an offence and is liable, in the case of first conviction, to a fine of \$500,000, and in addition, to a fine of \$50,000 for each day after the date in the notice during which the person continues to fail to so comply; and in case of second or subsequent conviction, to a fine of \$1,000,000 and in addition, to a fine of \$100,000 for each day.
 - Any person who fails to comply with the notice served for the purpose of s.22(7) of the Ordinance to provide the required information is liable to \$100,000, i.e. a fine currently at level 6 under Schedule 8 of the Criminal Procedure Ordinance, Cap.221.
- (h) Except for the review against a RN, there is no statutory right of review under the Ordinance for other Statutory Notices served by the Authority.

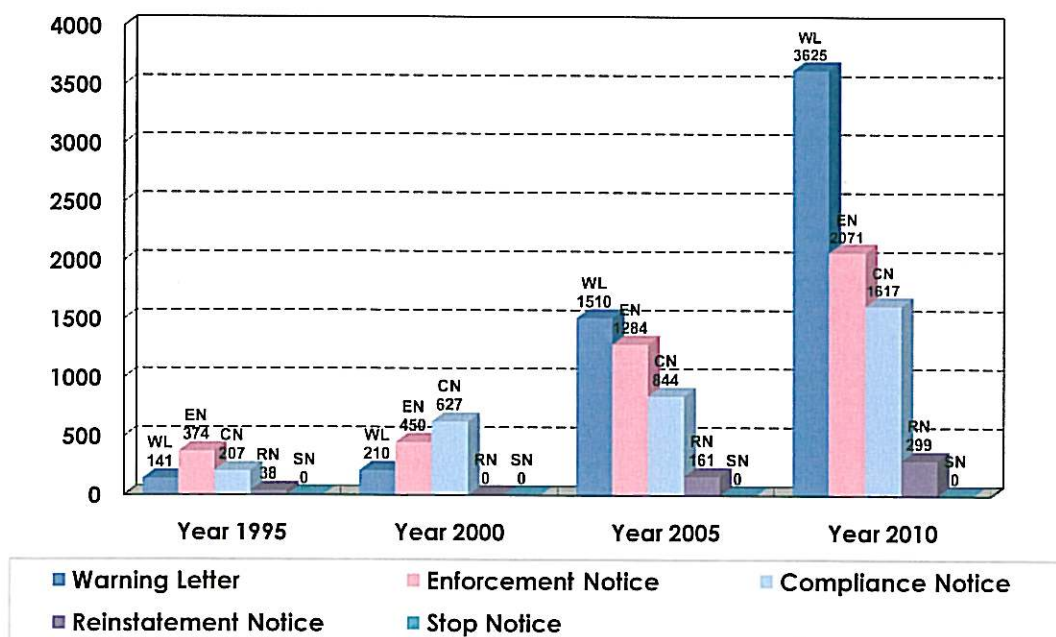


* DEC, chaired by Assistant Director/Special Duties, PlanD, is held regularly to discuss enforcement cases and endorse the issue of statutory notices and institution of prosecution action.

Number of Suspected UD Investigated

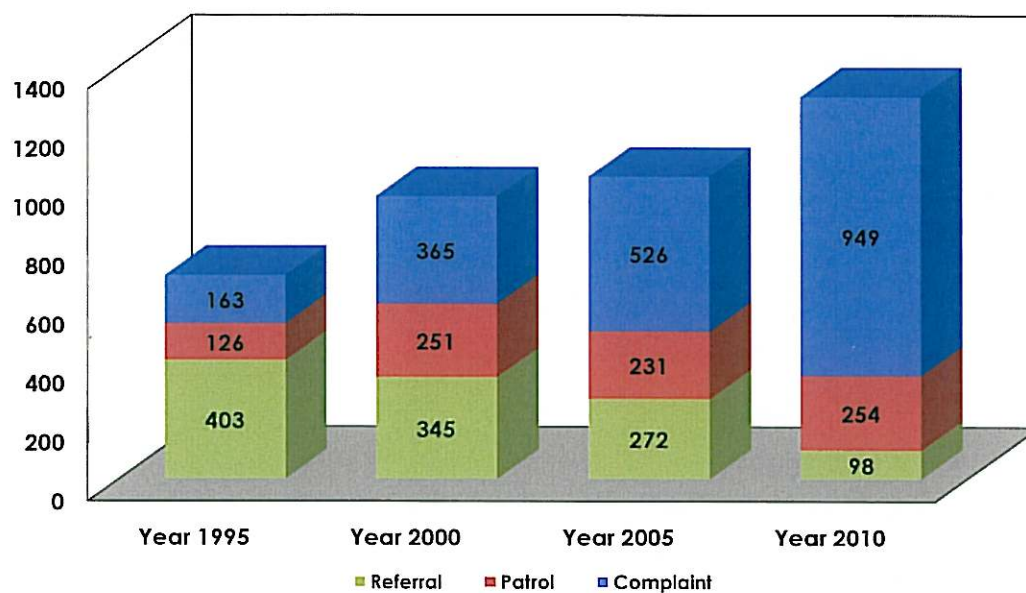


Number of Warning Letters & Enforcement/Reinstatement/Stop/Compliance Notices Issued



* Including Reminders

Sources of Suspected UD



Nature of UD Cases

