

Owning illegal real estate in Thailand when the military enforces the law and how to avoid being in that situation

The current news about some of the investigations and actions of the military government have resulted in a panic among certain real estate investors regarding the security of their investment. What has led to this situation and how could it been avoided?

The most common issues that are now seeing heightened enforcement under the current military regime are regarding the legality of:

- 1) land ownership (or land titles); and
- 2) land use (specifically, construction on such land).

In order to avoid any potential issues relating to the property the investor intends to invest in it should be mandatory to perform a comprehensive due diligence into the property prior to the investment. Many well advised investors actually do ask their competent legal counsel to perform such a due diligence and generally follow their counsel's advice. However, far too often, many other ill-advised investors follow incompetent and/or non-legal "counsel" (who often have a financial interest in the contemplated transaction). And then there are those who engage and hear the legal facts presented by the former but even then chose to follow the latter. These latter will tell the investor that "*the law in Thailand does not matter*" because either "*there is no law on that here*" or "*they will never enforce it*". However, as we see above and as we are all now reminded of in the recent media reports — this is simply not true.

LAND OWNERSHIP

In order to avoid being caught up in an official land title investigation certain issues

must be checked prior to any investment in real estate in Thailand. It should be noted that for such a comprehensive title investigation it is not sufficient to merely have a look at the title document itself. In fact, all of land plots at issue in Phuket purportedly have what appear to be legally issued title deeds. A proper examination of a title document is only the first step of a multi-step investigation process informed by skilled legal competency.

What cannot be found through merely reviewing the title document, however, is the title history or how the title was “upgraded” to its current title status. This investigation needs to be done at the respective land department by someone with particular competence and knowledge on what to look for and what to do if something unexpected is found. The investigation is conducted by reviewing the entire relevant title file(s) of the land plot.

Issues such as: an improper underlying document such as a “flying Sor. Kor. 1”; other flaws in the title issuance (besides any issue with regard to a National Park and to say that there are several such potential issues would be an understatement) such as the land owner did not possess the land early enough to be qualified for the title to the land; or that the area of the land in prior records does not accord with the area in later records, etc. can be (and unfortunately, all too often are) identified through such investigation.

Even if the land title is valid, an investor should also first confirm if the target land can serve its anticipated purpose. Thus, other important issues that do not necessarily involve the legality of the title itself that need to be investigated, such as the legal status of physical and utilities access to the land and the relevant land use laws.

LAND USE

As mentioned above, the second issue relates to the construction on such land itself. Buildings without any building permit are actually uncommon in Phuket. However, what about the legality of such building permit and why does it matter?

The relevant law for the issuance of a building permit administrative order is the Building Control Act (1979) (“BCA”). If a person wishes to construct, modify or move a structure, such person requires permission to do so. The administrative procedure is as follows. The applicant submits the application documents to the local

administrative office. The responsible officer schedules a site visit. He will also verify the application documents (e.g. construction drawings and specifications, etc.). Then he will review if the contemplated structure is legally permissible by law. In certain areas of Thailand, like Phuket the land use restrictions are basically under three laws: (1) BCA; (2) The City Planning Act (1975); and (3) The National Environmental Control and Maintenance Act (1992).

All of these laws need to be complied with; if not, a building permit can be revoked. Legally, a building permit is merely an administrative order and administrative orders can be revoked through an appeal or by action of the relevant government administration itself. If the relevant government office finds that there is a problem with regard to a point of law or factual suitability that order may be revoked or amended.

The conditions for revoking and administrative order without appeal are strict. The relevant regulations, treatment and outcome of a revocation of an administrative order depends on whether or not original order was a lawful or an unlawful one. In other words, the revocation of a lawful administrative order is subject to compensation for damages arising out of the revocation; whereas the revocation of an unlawful administrative order is only subject compensation if the recipient of the administrative order was not aware of the unlawfulness of the order.

CONCLUSION

Any investment in real estate is usually a long-term and generally significant investment. “Slow to enforce” does not mean “no enforcement”. What cannot be repeated often enough is that there is law in Thailand and it does, sooner or later, matter — as the current actions of the military government illustrate.

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