

Public Land Encroachment in Thailand: what does the law say? – a recent example in Phuket

For a law firm that includes real estate matters among its core specializations, it is fascinating to follow the executive branch of the Thai state in its effort to implement the law. We are referring to the latest investigations by the Department of National Parks, Wildlife and Plant Conservation (the “DNPWPC”) and particularly those you may have recently heard about in Phuket.

It should be noted that this firm is not directly involved in this matter that caused the recent headlines in Phuket. Therefore, we cannot provide any statement on the accuracy of the claims and actions of the DNPWPC. However, herein below we offer an overview of the general legal framework under which the investigations are currently taking place and some comments on how the owners of the suspect land plots could have avoided their current circumstances.

From our review of the latest news publications on this matter we understand that the DPNWPC is investigating several properties that the DPNWPC believes are located in a “**National Park**”. What legally constitutes a National Park is defined by the National Park Act (1961) (the “**National Park Act**”). According to Section 6 of the National Park Act: *“When it is deemed appropriate to determine any area of land, the natural feature of which is of interest, to be maintained with a view to preserving it for the benefit of public education and amenity, the Government shall have the power to do so by a Royal Decree with a map annexed thereto showing the boundary lines of the determined area. The determined area shall be called the “National Park.”*

The areas currently in question on Phuket are in an area which was made a National Park by the Royal Decree Determining the area of Sontalay Forest, Khaoruag Forest, Khaomuang Forest and Nai Yang Beach in Maikhao Sub-District, Sakoo Sub-District and Cherngtalay Sub-District, Thalang District, Phuket to be a National Park (1981)

(the “Royal Decree”).

In this context it is important to understand that the location of a property within such a National Park is not *per se* an indication of any illegality. According to Section 6 paragraph 2 of the National Park Act: *“The land to be determined as national park must not be owned or legally possessed by any person other than a public body”* or in other words: if land was privately owned prior to the establishment of a National Park through Royal Decree, such land is not considered a part of the National Park.

In this case, as we understand, it has been alleged that certain relevant areas within the boundaries of the relevant National Park might have been owned or possessed by the local population at the time of the Royal Decree. However, if such alleged prior ownership or possession is not proven, Section 16 of the National Park Act requires that: *“Within a national park no person shall: (1) hold or possess land, nor clear or burn the forest; (...)”*. Furthermore, in accordance with Section 21 National Park Act: *“The competent official shall have the power to order the person committing the offence under Section 16 to vacate the national park or to refrain from doing any act therein”*. And Section 22 of the National Park Act provides that: *“In the case where any violation of this Act has added to or changed the condition to anything in a national park, the competent official shall have the power to order the offender to demolish or remove such thing from the national park, or restore such thing to its former condition, as the case may be. If the offender fails to comply therewith or the offender is unknown, or for the purpose of prevention or alleviation of the national park from damage, the competent official himself may take any of the said actions as may be appropriate. The expenses incurred thereby shall be borne by the offender.”*

However, with regard to the land ownership or use itself, any revocation of an improperly issued land title or a land utilisation certificate in a National Park is not under the jurisdiction of the DNPWPC; such would fall to the Land Department. Section 61 of the Land Code confers the power to decide on and revoke a land title to the issuing administrative body: *“In a case where there appears an inaccuracy or illegality in connection with the issuance of the Title Deed or the Utilization Certificate, (...), the Director-General or either the Deputy Director-General or the Inspector of the Department of Land authorized thereby shall have power to order the annulment or amendment thereof.”* It should be noted, however, that the Land Code goes on to stipulate a detailed procedure involving a “Committee of Enquiry” before any revocation can be effected. But subjection to any such eviction or revocation as outlined above can be avoided if potential owners or lessees first perform a comprehensive due diligence into the

property prior to their 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 *"no such relevant law exists here"* or *"enforcement will never take place"*. However, as we see above and as we are now reminded of in the recent media reports, this is simply not true.

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.

An investigation of the title document itself will provide information regarding the land owner and, therefore, the potential seller or the lessor of the property. It further provides information about the type of title and encumbrances, if any. Mortgages, charges and other real rights must to be recorded on the title deed to be enforceable. Leases, exceeding a three year term, must also be recorded on the document to be enforceable. And the title document provides a small outline of the shape and size of the land plot itself.

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 that the target land can serve its anticipated purpose. Thus, other important issues that need to be investigated, but that do not necessarily involve the legality of the title itself are the legal status of physical and utilities access to the land and the relevant land use laws. Another common oversight of property buyers is the failure check that the property is not currently subject to pending court proceedings. If so it is possible that the sale could be revoked depending on the outcome of such proceedings.

Finally, since a purchaser of land is jointly liable with the seller of such land for unpaid local maintenance taxes for a maximum of five years, any professional title due diligence should include findings on this issue.

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 National Park land investigations in Phuket illustrate.

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