

THE BALANCING OF SCALES: LEGALITY VERSUS LEGITIMATE EXPECTATIONS

ARADA VANAPRUK*

The Ashton Asoke Condominium case illustrates the long-standing conflict of whether the administrative courts should promote the facilitation of public administration or uphold the interests of affected individuals. In resolving the conflict, the courts balance the principles of legality and legitimate expectation when faced with disputes involving unlawful administrative orders. The appropriate standard to apply to in such cases, however, remains highly contested among legal scholars and practitioners. This article thus contributes to this ongoing debate by exploring the relevant legal principles and the different balancing mechanisms that Thai administrative courts apply in rendering judgments by analysing the Thai administrative legal framework, the Central Administrative Court and the Supreme Administrative Court's decisions on the Ashton Asoke Condominium case, as well as other similar administrative court cases. The topic is of significant importance as administrative law regulates the actions of public authorities and ensures accountability for their decisions. The balancing of legality and legitimate expectations is a core aspect of administrative law and is essential for protecting the rights and interests of individuals affected by administrative orders.

I. INTRODUCTION

The judgement rendered by the Central Administrative Court of Thailand with regards to the Ashton Asoke Condominium case has sent shockwaves throughout the real estate industry. Often, in administrative court cases relating to the (un)lawfulness of the issuance of construction permits, the court will revoke such unlawful permits so as to reinforce and uphold the principle of legality, ensuring that all administrative acts are done in compliance with the rule of law. By doing so, the court tends to aim to facilitate the implementation of rules and regulations that prioritise public safety as mandated by the Building Control Act, B.E. 2522 (1979) (“BCA”).¹ However, due to the nature and circumstances of this case, with the overwhelming pressure from the individuals involved, including related third parties, the Court had to consider the damages and impact that

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¹ Thailand, *Building Control Act*, B.E. 2522 (1979).

would be inflicted upon such parties for their reliance on the unlawful decision. In navigating this intricate legal terrain, the administrative courts shall meticulously weigh the relevant interests at stake and determine which carries greater weight and whether the priority lies in facilitating public administration or safeguarding the interests of affected individuals. This process reflects the foundational tenets and principles of administrative law in Thailand, specifically the contrasting principles of legality and legitimate expectation. Hence, the principles of legality and legitimate expectation shall be placed upon a balancing scale to determine the best course of action for administrative courts when faced with a difficult decision similar to this.

II. PRINCIPLE OF LEGALITY

In order to understand the issue at hand more clearly, it is important to first understand what the relevant principles are and how they come into play in the determination of the case. The principle of legality,² arguably, is the very basis and foundation of administrative law. In Thailand, that principle stems from section 3 of the Thai Constitution of 2017 (the “Constitution”), which states that the “performance of duties of the National Assembly, the Council of Ministers, the Courts, Constitutional Organizations and State Agencies shall be in accordance with the rules of law”.³ In the pursuit of manifesting and facilitating a democratic society, the rule of law must be abided by and all governmental bodies must perform their functions in accordance with the law.⁴ This constitutional directive stems from a broader concept of a legal state, where a system of checks

² วรณาริ สิงห์โต [Woranari Singto], “การคุ้มครองความเชื่อโดยสุจริตกรณียกเลิกถอนคำสั่งทางปกครองในระบบกฎหมายเยอรมัน [Protection of honest belief in the case of cancellation and revocation of an administrative order in the German legal system] (Der Vertrauensschutz bei der Aufhebung eines Verwaltungsaktes [The protection of legitimate expectations when an administrative act is repealed] (2010) 27:2 at 5 [Singto].

³ Constitution of the Kingdom of Thailand [รัฐธรรมนูญแห่งราชอาณาจักรไทย], s 3.

⁴ นกสนันทชนศรีปัญญาประดิษฐ์ [Napasanant Sripanyapadit], “ปัญหาทางกฎหมายในการพิจารณาวินิจฉัยและการเพิกถอนคำสั่งทางปกครองซึ่งเป็นการให้ประโยชน์แก่ผู้รับคำสั่ง” [Legal Problems of Considering and Revoking Administrative Orders Beneficial for Order Recipients] (2019)] 7:1 มหาวิทยาลัยศรีปทุม 71, online: <<http://dspace.spu.ac.th/bitstream/123456789/6388/7/7.บทที่%202.pdf>> at 28 [Sripanyapadit]. See also *Ahmed Ali Al-Kateb v Godwin* [2004] HCA 37, 219 CLR 562 at [19]; Felix Uhlmann, “Administrative law” in Marc Thommen, *Introduction to Swiss Law* (Berlin: Carl Grossmann Verlag, 2018) 161 at 190-191 [Uhlmann].

and balances prevails among governmental bodies. As such, administrative acts performed by administrative bodies must be in accordance with the law, and the law itself must be enacted by elected legislators or, in certain circumstances, the executive branch which must be in line with the constitution. This is designed to uphold the rule of law and ensure that all branches of the government operate within the confines of legal parameters.⁵ Furthermore, the principle of legality fosters a system where administrative acts are predictable and just. If the state acts in violation of the law, such act will be deemed as unlawful and may be subjected to challenges, potentially leading to its revocation. Thus, the principle of legality not only safeguards individual rights but also reinforces democracy by necessitating compliance to the law in the exercise of administrative power.

An administrative act, pursuant to Section 5 of the Thai Administrative Procedure Act B.E. 2539 (1996) (as amended) (“APA”), is an act done by a public authority or any persons, or entity, that perform tasks in the exercise of administrative power in the material sense which has regulatory characteristics, addresses concrete individual cases, and has direct external legal effects.⁶ Due to the elements of an administrative act that affects the rights of identifiable individuals, administrative acts, therefore, are acts that may restrict or create rights and liberties of such individuals. The protection of rights and liberties of a person in Thailand is evidently protected in Chapter 3 of the Constitution; however, it must be noted that to properly facilitate public administration and to impose regulations for the purposes of effectively managing the country and maintaining control over its citizens, certain restrictions and limitations must be put in place. This is illustrated by section 26 of the Constitution, which establishes that if a restriction on the constitutionally protected rights and liberties of a person are to be imposed upon, it can only be done to the extent that is specifically allowed by the law and to the extent which is deemed necessary to impose such restrictions.⁷

⁵ Gomes Kwanmuang & Phrakruvinaidhornsuriya Suriyo, “Administrative Law on the Rule of Law in Thai Society” (2022) 9:4 *Journal of MCU Nakhondhat* 374 at 383 [Kwanmuang & Suriyo].

⁶ Thailand, *Administrative Procedure Act* B.E. 2539 (1996), s 5 [APA].

⁷ Sripanyapadit, *supra* note 4 at 29.

In this context, considering the inherent nature of administrative acts to impose restrictions and constraints on the rights and liberties of individuals, the legitimacy of such acts is therefore dependent upon the legal framework that grants administrators the authority to do so. As such, legality is the basis for all administrative acts; should these acts fail to reflect or are done in violation of the law, then such law ceases to be effective, rendering it unlawful,⁸ and the people will inevitably lose trust in the law. The public administration must facilitate the law to achieve its objectives and to ensure the effectiveness of the law.⁹

Additionally, the principle of legal certainty, born from the fundamental principle of legality, ensures the lawfulness and consistency of administrative acts. Its primary objective is to allow individuals to confidently recognise and exercise their lawfully entitled rights while providing them the opportunity to plan or construct their lives upon the presumed lawfulness of these acts.¹⁰ By facilitating the right to self-determination, the principle of legal certainty contributes to the stability and predictability of legal systems; in other words, the recipient of the administrative act should be able to anticipate the legal consequences arising from the act in the assumption of its lawfulness.

Although legal certainty is derived from the principle of legality, it is important to acknowledge that it can also extend to acts that are in violation of the law. It can be argued that to maintain legal certainty, there is a presumption that acts performed by administrators are in line with the law. Thus, even if an administrative act meets the formal requirements of what constitutes an administrative act pursuant to section 5 of the APA but is substantively or materially unlawful, it will still be considered a valid administrative act.¹¹ This approach aims to uphold the trust individuals place in the public administration and the law, despite any shortcomings in the act's compliance with the substance in the law.¹²

⁸ Vorapot Visrutpich, *ข้อความคิดและหลักการพื้นฐานบางประการของกฎหมายปกครอง* [Some Basic Ideas and Principles of Administrative Law], 6th ed (Thailand: Winyuchon Publication House, 2023) at 37.

⁹ Singto, *supra* note 2 at 6.

¹⁰ *Ibid* at 7.

¹¹ *Ibid* at 10.

¹² C. F. Forsyth, "The Provenance and Protection of Legitimate Expectations" (1988) 47:2 Cambridge LJ 238 at 243.

In such cases, legal certainty illustrates the contradiction between the so claimed legality of the administrative act and the actual compliance with the existing legal framework insofar as it protects individuals from the uncertainty of unlawful administrative acts. As such, legal certainty intersects with the concept of legitimate expectations which refers to the reasonable expectations individuals have in relation to how administrative authorities will act based on past practices, decisions or promises.¹³ When administrative acts deviate from these expectations and violate the legality of the rules governing the issue at hand, legal certainty and legitimate expectations assume the role of protecting the rights and interests of the affected individuals which stands in contrast to how the principle of legality and legal certainty protects the rights and liberties of the public in general.

III. LEGITIMATE EXPECTATIONS

Suppose that an individual has applied for a construction permit to construct a building. It would be odd to assume that the individual is aware of all relevant laws and regulations governing the issuance of a construction permit; a layman is not expected to know all things pertaining to the law. The official in charge of determining and issuing the permit, however, is expected to be aware of and well educated on all relevant governing laws and regulations as they represent that public administration and shall have the expertise to create and grant rights to individuals.¹⁴ However, what happens when the official errs in his decision to grant such permit to the individual? In all cases, if the administrative act is unlawful, a revocation of such unlawful act can be expected to follow suit. Though, the unlawfulness of an act does not automatically result in it being null and void as it would in the realm of civil and commercial law or private law. It has been stated that “decisions touched by unlawfulness may be valid unless quashed, and some kinds of unlawfulness will not normally lead to their quashing”,¹⁵ as well as that their legal effects are not dependent on

¹³ Farrah Ahmed & Adam Perry, “The Coherence of the Doctrine of Legitimate Expectations” (2014) 73:1 Cambridge LJ 61 at 64-66.

¹⁴ Manit Wongseri, “หลักการคุ้มครองความเชื่อถือหรือความไว้วางใจโดยสุจริตของประชาชน [Principle of Trust and Good Faith Reliance of the Public] (Vertrauensschutzprinzip)” (2007) 7:1 Journal of the Administrative Court at 3

¹⁵ David Feldman, “Error of Law and Flawed Administrative Acts” (2014) 73:2 Cambridge LJ 275 at 282.

legality.¹⁶

The concept of legitimate expectations as it exists in the APA derived from the influences of German administrative law (*Verwaltungsrecht*), i.e., the principle of *vertrauensschutz*¹⁷ Section 48 of the German Administrative Procedure Act (*Verwaltungsverfahrensgesetz*, “VwVfG”) provides that “an unlawful administrative act may, even after it has become non-appealable, be withdrawn wholly or in part either retrospectively or with effect for the future”, however, “an administrative act which gives rise to a right or an advantage (beneficial administrative act (*begünstigender Verwaltungsakt*)¹⁸) may only be withdrawn subject to the restrictions...” to which paragraph 2 of the same section further entails that “an unlawful administrative act [...] may not be withdrawn so far as the beneficiary has relied upon the continued existence of the administrative act and his reliance deserves protection relative to the public interest in a withdrawal”.¹⁹

To determine whether the beneficiary or recipient of the unlawful administrative act has relied on the persisting existence of the administrative act or not, the VwVfG further defines such reliance as circumstances where the beneficiary or recipient of the unlawful administrative act has already made use of such order, whether by making financial transactions which can no longer be cancelled or by being placed in a disadvantaged position if the transactions were to be reversed – a disadvantage that cannot reasonably be expected to be imposed upon them²⁰. Hence, it is apparent that the VwVfG serves to safeguard the interests of individuals who have reasonably placed their trust in the judgement of the administrator. In cases where the administrator intends to revoke a decision that has been relied upon, the VwVfG requires the administrator to carefully balance the

¹⁶ Sripanyapadit, *supra* note 4 at 13. See also Worachet Pakeerut, *ความรู้เบื้องต้นเกี่ยวกับกฎหมายปกครอง: หลักการพื้นฐานของกฎหมายปกครอง และการกระทำทางปกครอง [Basic Principles of Administrative Law and Administrative Action]*, 3rd ed (Thailand: Winyuchon Publication House, 2006) at 91-99.

¹⁷ Aree Singto, *The Principle of the Protection of Legitimate Expectation: Case Study of the Remuneration according to the Royal Decree of the Chairperson of the Board, Member of the Board and Qualified Members of Thai Public Broadcasting Service as Prescribed of Public Broadcasting Service Act BE 2551 (2008)* (LLM Thesis, Dhurakij Pundit University, 2017) (unpublished) at 10-11.

¹⁸ Sripanyapadit, *supra* note 4 at 14.

¹⁹ Germany, Administrative Procedures Act (VwVfG), s 48. See also Singto, *supra* note 2 at 16-17.

²⁰ *Ibid*, s 48(2).

interests of the affected beneficiary against the public interest, which relies on compliance with the law.

The same idea is reflected in the APA in sections 49 to 52 which stipulates similar rules, conditions and restrictions to those as seen in the VwVfg. Section 51 of the APA stipulates that:

In revoking an unlawful beneficial administrative act giving rise to the payment of money or the transfer of property or an advantage which is severable, the bona fide reliance of the beneficiary on the continued existence of the administrative act and the public interest shall be taken into account.

The bona fide reliance under paragraph one cannot be claimed unless the beneficiary has taken the benefit given by the administrative act or proceeded with the property which can no longer be cancelled or can be cancelled only by suffering an unreasonable disadvantage.²¹

This provision refers to the concept of *bona fide* or good faith reliance on the persisting existence of the administrative act which derives from the principle of *treu und glauben*²². According to the reliance theory, if an individual incurred damages from placing their trust in the actions or representations of another party, who created the impression of legitimacy, the party instilling the trust upon another shall be bound to such act so as to not act in a way that would betray that trust²³. In this regard, administrators who have created the impression of legitimacy in the administrative act shall be bound by their actions for the purpose of maintaining predictability and certainty in the decisions.

²¹ APA, *supra* note 6, s 49.

²² Sripanyapadit, *supra* note 4 at 68.

²³ Keitkrai Kraikaew, *The Protection of Legitimate Expectation in Administrative Decisions* (LLM Thesis, Chulalongkorn University, 2008) (unpublished) at 9-10 [Kraikaew]. See also Neil Maccormick & Joseph Raz, "Voluntary Obligations and Normative Powers" (1972) 46 Proceedings of the Aristotelian Society, Supplementary Volumes 59 at 68.

However, as can be seen in sections 51 and 52 of the APA, there is a recourse in the form of compensation if a beneficial unlawful administrative act is to be revoked by the administrator. This measure aims to mitigate the potential harm caused by the revocation and to restore, to a certain extent, the affected individuals to the positions they were in had the unlawful act not occurred. Although recourse from the public administration may not be the best course of action in all cases as it ultimately leads to the revocation of the act; there may be instances where the continued existence of the unlawful act is far more important to the individual rather than seeking compensation as would be in cases of construction permits. As such, for the administrator to not simply revoke the act and provide compensation, the legitimate expectation of the affected individual must be more important than the public interest.

Section 49 of the APA grants discretionary power to the administrator in determining whether to revoke an administrative act, irrespective of its legality, on a situation-based basis depending on the circumstances at hand. Given the multitude of complex matters that the public administration has to care for, it is extremely difficult to legislate for every aspect of such administration in one single codified law²⁴. As a result, discretionary power is delegated to authorised individuals and entities, allowing them to make diverse decisions based on their specialisation or expertise on a wider range of issues. Discretionary power, however, introduces an element of uncertainty as individuals are much more unlikely to be certain or able to predict how administrators will exercise their discretion due to the ambiguity within the law conferring such authority. Such ambiguous law naturally leads individuals to place trust in the decisions made by the administrators as individuals themselves are often unlikely to have the ability to comprehend or understand the complex legal framework. Therefore, individuals place their trust in the expertise and knowledge of the administrators that their decisions will align with the law and thus form legitimate expectations²⁵. Moreover, individuals tend to believe in the enforceability of the administrative act even if it is unlawful. Thus, to ensure the effectiveness of public administration, the administrator must uphold their decision to retain the trust placed upon them²⁶.

²⁴ Kwanmuang & Suriyo, *supra* note 5 at 376-377.

²⁵ Kraikaew, *supra* note 23 at 16.

²⁶ Sripanyapadit, *supra* note 4 at 39.

The issue arises when administrators exercise their discretionary power in a manner that is beneficial but unlawful (for the purpose of this article, unlawful administrative acts refer to materially unlawful administrative acts only). When a beneficial unlawful administrative act is revoked, it can have repercussions on the recipient's acquired rights (*droits acquis*²⁷) and their legitimate expectations. The revocation may lead to damages or losses as it cannot be presumed that they were aware of the unlawfulness of the act²⁸. The recipient, provided that they have *bona fide* reliance and that their expectations are legitimate, may have relied on the validity and legality of the administrative act, and may have made decisions or taken actions based on that belief. Consequently, the revocation disrupts their established rights and expectations. Thus, to safeguard the interests of the recipient, the weighing of interests between public interest and legitimate expectations must be done before revoking a beneficial unlawful administrative act.

In considering whether to revoke a beneficial unlawful administrative act or not, there is a two-step test that courts or administrators must consider: (1) does a legitimate expectation exist on the part of the affected parties, and (2) does the legitimate expectation outweigh the public interests²⁹. In determining which is the weightier consideration, there are many factors that must be considered. Key factors include the impact on the affected parties, taking into account any potential damage or loss they may suffer if the act they legitimately placed their trust upon is revoked. Additionally, the ramifications on the public and on the effectiveness of the law must also be considered if the court or administrators decide to allow the unlawful act to remain in effect. Furthermore, the interests of relevant third parties, who may be directly or indirectly affected by the revocation of the unlawful act, should also be considered.

IV. CASE STUDY: ASHTON ASOKE CONDOMINIUM

On 30 July 2021, the Central Administrative Court deliberated and rendered a decision on the case

²⁷ Kraikaew, *supra* note 23 at 69.

²⁸ *Ibid* at 36.

²⁹ Sripanyapadit, *supra* note 4 at 26.

filed by the Stop Global Warming Association and 15 other affected individuals with regards to the dispute arising from the unlawful administrative acts of the public administrators and state officers, namely the District Office Director of Wattana District, the Director of Public Works Department, the Governor of the Bangkok Metropolitan Administration, the Governor of the Mass Rapid Transit Authority of Thailand, and the EIA Expert Committee. Ananda MF Asia Asoke Co., Ltd., and Ananda Development Two Co., Ltd., were interpleaders to the suit.

The main issue of this case revolves around whether the developer, Ananda Development Two Co., Ltd., had complied with section 2 paragraph 2 of the Ministerial Regulation No. 33, B.E. 2535 (1992) issued pursuant to the Building Control Act, B.E. 2522 (1979) (“Ministerial Regulation No. 33”)³⁰ or not. This rule requires that, for High Buildings or Edifices (as defined in the BCA) with a total floor area of more than 30,000 square metres, at least one side of the land where the building is situated must have a length of at least 12 metres which must be adjacent to a public road with a field width of at least 18 metres, and such public road must be connected to another public road with a field width of at least 18 metres.³¹

In this case, the disputed area is the only connection between Ashton Condominium Asoke and Asoke Montri Road, a public road with a field width of at least 18 metres, which belongs to the Mass Rapid Transit Authority of Thailand (“MRTA”). Prior to the beginning of the construction of the condominium project (“Project”), Ananda Development Two Co., Ltd., (hereinafter “Ananda Development”) had purchased land under the Land Title Deed No. 2345 in 2013 which had an access or egress passing through the land of the MRTA, connecting such land to Asoke Montri Road, with a width of 6.40 metres.³² However, despite the purchased plot of land having such an access or egress, it was not possible to utilise it as it was a part of the parking space of the Sukhumvit MRT Station. Consequently, in order to adhere to section 2 paragraph 2 of the

³⁰ Thailand, Ministerial Regulation No. 33, B.E. 2535 (1992) (issued pursuant to the Building Control Act, B.E. 2522) (1979), online: <<https://download.asa.or.th/03media/04law/cba/mr/mr35-33-upd69.pdf>> [Ministerial Regulation No. 33].

³¹ *Ibid* at [2].

³² Central Administrative Court Decision No. 19/2564 at 113 [Central Administrative Court Decision No. 19/2564].

Ministerial Regulation No. 33, in 2014, Ananda Development requested the MRTA to permit the utilisation of the disputed land owned by the MRTA as an access or egress for the condominium, requested the MRTA to relocate the position of the access or egress, and additionally requested to expand the width of such access or egress with an additional 6.60 metres despite such plot of land being an expropriated land for the purpose of operating MRTA business. Thus, once put together, the access or egress would have a total width of 13 metres, which would be in accordance with the rules stipulated in the Ministerial Regulation No. 33.³³

Later in July of the same year, the MRTA issued a permit to utilise the land of the MRTA as an access or egress to Ananda Development from 2 July 2014 onwards following which Ananda Development submitted such permit to the competent authorities in order to receive the Certificate of Construction, Modification or Relocation to commence construction of the Project in February 2015. In exchange for the utilisation, Ananda Development had entered into an agreement to pay compensation to the MRTA in the amount of THB 97,671,707.45.³⁴

The Stop Global Warming Association and 15 other individuals from the community filed a case in the Central Administrative Court presenting five grounds, of which, this article will only focus on the discussion of the first ground, as the court dismissed the other four grounds. The plaintiffs had claimed that defendants 1 to 5 had neglected their duties and that defendants 1 to 3 unlawfully issued the permit, allowing Ananda Development and Ananda MF Asia Co., Ltd., to construct the Project, a large high rise building, which violated the rights of the community, rights of individuals and surrounding neighbours, causing the plaintiffs to suffer damages.³⁵

Upon deliberation of the facts, the Court determined that the second defendant, the Director of Public Works Department, acting on behalf of the third defendant, the Governor of the Bangkok Metropolitan Administration, to allow Ashton Development to construct and modify the building acted unlawfully. In this regard, the Court looked at whether the Project land has at least 1 side with a length of at least 12 metres adjacent to a public road with a field width of at least

³³ *Ibid* at 114.

³⁴ *Ibid*.

³⁵ *Ibid* at 2-3.

18 metres, connected to another public road with a field width of at least 18 metres pursuant to section 2 paragraph 2 of the Ministerial Regulation No. 33. As the Project fell under the definition of an edifice, as defined in section 1 of the Ministerial Regulation No. 33 in conjunction with Section 4 of the BCA,³⁶ it was mandatory for the Project to adhere to the stipulated requirements outlined in section 2 paragraph 2 of the Ministerial Regulation No. 33. Such requirements were in place for the purpose of supporting the utilisation of the Project by a large number of people and to ensure accessibility for emergency vehicles, such as fire trucks, in times of disasters.

On the facts, one of the plots of land that Ananda Development had purchased was originally situated adjacent to the Asoke Montri Road. However, certain sections of this plot of land were expropriated for the construction of an expressway as part of the initial phase of the Mass Rapid Transit (“MRT”) project. Consequently, due to the expropriation, none of the sides of the land directly bordered a public road. Even though the MRTA had issued a permit to utilise the land of the MRTA as an access or egress and had agreed to relocate the position of the access or egress along with expanding the width to 13 metres, such permission was not in line with the purpose of expropriation as the expropriated land must only be used for operating a mass rapid transit business as defined in section 4 of the Mass Rapid Transit Authority of Thailand Act B.E. 2543 (2000).³⁷

Consequently, the Court rendered that the permit issued by the MRTA was unlawful. The disputed land was not a part of the Project, which meant that the construction of the condominium did not comply with the Ministerial Regulation No. 33 as no side of the condominium was adjacent to a public road; *ergo*, the act of the second defendant, acting on behalf of the third defendant, to allow Ashton Development to construct and modify the building was unlawful. As a result, since the condominium was not done according to the relevant rules and regulations, the Court revoked the Certificate of Building Construction, Modification or Relocation issued to Ananda

³⁶ Ministerial Regulation No. 33, *supra* note 30, s 1: “edifice” means the building constructed for use of the whole or any part of floor areas for residing, or operating one or more categories of activities, having the whole space area of every ground floor of the same building of more than ten thousand square metres.

³⁷ Central Administrative Court Decision No. 19/2564, *supra* note 32 at 131-133. See Mass Rapid Transit Authority of Thailand Act B.E. 2543 (2000), s 4.

Development. This revocation applies retroactively from the date of issuance, implying that the building should not have been allowed to exist in the first place.³⁸

The ensuing issue, therefore, was whether it was possible for such building to not exist given that there were individuals already residing in it. Currently, approximately 668 out of 783 condominium units have been sold to the buyers.³⁹ If the construction permits were to be revoked with retroactive effects, the ownership rights of the buyers over the condominium units would also be affected, ceasing to exist as a result of the revocation of the permits. As such, the developers and its stakeholders have subsequently lodged an appeal to the Supreme Administrative Court. If the Supreme Administrative Court affirms the decision of the Central Administrative Court, the relevant authorities and Ananda Development would be subjected to pay compensation and refund the price of all condominium units back to the individuals who have purchased the units.

Moreover, no evidence suggests that the condominium unit buyers were aware of the illegality surrounding the construction of the building at the time of entering into the sale and purchase agreement of the units. As such, they must be deemed to be *bona fide* third parties who genuinely relied on the legitimacy of the construction of the building; it is also important to note that such external individuals had no means of knowing that the construction was done unlawfully. Their decision to transact with Ananda Development was based on the assumption that all necessary permits and approvals were in place, making them *bona fide* third parties who had no knowledge of the underlying legal issues whose rights and expectations must be protected.

Consequently, the legitimate expectations of the *bona fide* third parties, in addition to those of Ananda Development, should have been taken into consideration by the Supreme Administrative C in deliberating the final decision regarding the revocation of the construction permits. In this case, the condominium unit owners and Ananda Development claimed that they had relied on the expertise of the administrative authorities who granted the permits which they, then, formed the

38 Ibid at 142-143.

39 “16 เดือน แอชตัน อโศก 668 ห้องชุดถูกระงับคดี “ศาลปกครอง” Prachachat (16 December 2022) online: <https://www.prachachat.net/property/news-1147163#google_vignette>.

legitimate expectations that the Project could be constructed and sold in a lawful manner.⁴⁰ For the Court to revoke the construction permit would, therefore, result a “contradictory behaviour”, which Felix Uhlmann describes as:

The prohibition of contradictory behaviour highlights the closeness of good faith to the protection of legitimate expectations: for example, an authority which requests the demolition of a property revoking an otherwise falsely issued building permit may violate the individual's legitimate expectations while also acting in a manifestly contradictory manner.⁴¹

As such, to maintain legal certainty for the purpose of facilitating consistency and predictability of the application of law, legitimate expectations that the public administration had manifested upon individuals must be upheld.

In contrast, the plaintiffs claimed that the unlawful administrative act caused adverse impacts on their rights as members living in the community. Their position is based on the importance of upholding the principle of legality and the proper application of the law. They rely on the presumption that administrative acts must be done in accordance with the law to prevent them from suffering damages. Additionally, the plaintiffs place trust in the availability of legal remedies to address any violations or breaches of the law. In essence, their arguments emphasise the need for compliance with the legal framework to protect their rights and interests.

The claims of the plaintiffs become even more relevant when recognising that the permit of the MRTA to allow Ananda Development to utilise the access or egress will eventually expire, rendering the access or egress non-compliant with the law as it will have a width of less than 12

⁴⁰ Supreme Administrative Court Decision No. 188/2566, at 93 [Supreme Administrative Court Decision No. 188/2566].

Online: <<https://www.admincourt.go.th/admincourt/Casefile/admcase/document/signed/pdf/2564/02012-640067-1f-6607-27-0000752930.pdf>>

⁴¹ Uhlmann, *supra* note 4 at 200.

metres. This reinforces the need to address and rectify any violations of non-compliance with the law to maintain the legality of the Project. The expiration of the permit, which would result in the Project having only a 6.40 metres wide access or egress, raises concerns regarding the accessibility of emergency vehicles during times of disasters; it would be challenging for emergency vehicles to reach the building efficiently, potentially hindering their ability to provide assistance and support. Pertaining to this issue, the Supreme Administrative Court has concurred with this concern, noting it is uncertain whether the access egress would remain in place as it can be changed at any time. Consequently, it rejected the claim that the access or egress can ensure the entry and exit of emergency vehicles as long as the Project exists, even if the permit was approved by the Council of Ministers.⁴² This, therefore, highlights the unlawfulness of the permit. As such, this issue must not be taken lightly by the Court when weighing the interests of the public in terms of public safety against the interests of the affected individuals and *bona fide* third parties.

Despite the unlawfulness of the administrative act in issuing the construction permits without a proper legal basis, which resulted in the construction of the building not being in compliance with the rules and regulations as stipulated in the Ministerial Regulation No. 33, the defendants and Ananda Development claimed in the appeal that the interests of the plaintiffs do not outweigh the interests of the individuals affected by the revocation of the beneficial unlawful administrative act who have legitimately relied on such act for the following reasons: (i) the plaintiffs are not directly affected by the construction of the building and have not suffered any damages as a result of the administrative act,⁴³ (ii) even if they had incurred some damages, such damages have been remedied or compensated,⁴⁴ and (iii) the plaintiffs failed to file the case within ninety days as from the date the cause of action is known or should have been known pursuant to Section 49 of the Act on Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999).⁴⁵

⁴² Supreme Administrative Court Decision No. 188/2566, *supra* note 40 at 125-126.

⁴³ *Ibid* at 107-108, 112-117.

⁴⁴ Central Administrative Court Decision No. 2413/2565 at 29, online: <https://www.admincourt.go.th/admincourt/upload/webcms/News/News_251122_080920.pdf>

⁴⁵ Supreme Administrative Court Decision No. 188/2566, *supra* note 40 at 109.

However, in the decision rendered by the Supreme Administrative Court, even though the lawsuit was filed beyond the stipulated time outlined in section 49, the Supreme Administrative Court deemed this case as one pertaining to the protection of public interest under section 52 paragraph 1 of the aforementioned Act which adds an intriguing layer to the legal considerations at play. The Court justifies this classification based on the Project's structure as a large high-rise building, thereby asserting that the permit to construct or modify the building impacts the neighbouring residents and people passing through the public road. Given its association with the protection of public interest, the plaintiffs may, consequently, file the lawsuit at any time pursuant to section 52 paragraph 1.⁴⁶

The ability to file such cases at any time, even after the prescribed ninety-day deadline, introduces an element of uncertainty for real estate developers as it exposes them to potential lawsuits due to the broad interpretation of what qualifies as a case relating to the protection of public interest, subjecting developers to legal challenges without a clear time limit. The question that then arises is: to what extent does this procedural approach prejudice the legitimate expectations of developers? The possibility of legal challenges casts doubt on the developers' ability to confidently rely on the persisting legitimacy and the lawfulness of the permits granted to them.

Despite the desire and hope within the legal community for a shift in Thai administrative court jurisprudence towards favouring legitimate expectations, the decision reached by the Supreme Administrative Court was not in line with such expectation. Instead, the Supreme Administrative Court affirmed and endorsed the prior decision of the Central Administrative Court by a majority, concurring with its deliberation to revoke the permit to construct and modify the building. In its ruling, the Supreme Administrative Court deemed the claims provided by Ananda Development in the appeal were insufficient to overrule the decision of the Central Administrative Court and opted for upholding the principle of legality. Furthermore, it is noteworthy that the Supreme Administrative Court's deliberation lacked additional reasoning and a comprehensive balancing of

⁴⁶ *Ibid* at 117-120.

the conflicting interests. Instead, the Court predominantly applied the law to the facts of the case, which had already been laid out in detail by the Central Administrative Court.

The dissenting judge argued that the MRTA, in permitting Ananda Development to utilise the land as an access or egress, is certain about the ability of the area to serve as an access or egress for a large high rise building in compliance with the legislative intent of Ministerial Regulation No.33 and the BCA. This certainty is further emphasised by the approval of the Council of Ministers, the highest governing body, endorsing the use of the disputed area, demanding strict adherence to such approval. Additionally, the dissenting judge contended that the revocation of the permits without affording the relevant parties an opportunity to rectify the violations inflicts damages on the condominium unit owners who purchased their units in good faith and had legitimately relied on the presumed lawfulness of the permits when considering that the violations are rectifiable, depriving the developers of such opportunity.⁴⁷

As such, the Supreme Administrative Court, by adhering to the established jurisprudence of upholding the principle of legality, seemed to prioritise the principle of legality over a nuanced consideration of conflicting interests. This decision, lacking the weighing of interests, has potential repercussions for parties who had legitimate expectations in the administrative acts of the relevant authorities, resulting in damages to such affected parties. The strict adherence to such principle, in some cases, overshadow the need for a more balanced approach that considers all relevant interests of the parties involved.

V. CONCLUSION

The Ashton Asoke Condominium administrative court case serves as a significant example highlighting the legal landscape in Thailand regarding the revocation of beneficial unlawful administrative acts. While the protection of legitimate expectations and interests of affected individuals and *bona fide* third parties remains an important aspect that administrative courts should consider, the prevailing dominance of the principle of legality embedded in the jurisprudence of Thai administrative courts illustrates a need for a shift in the legal landscape to promote a more

⁴⁷ *Ibid* at 162.

equitable approach that seeks to strike a balance between upholding the principle of legality and considering the rights and expectations of those who relied on the administrative act in good faith. In the event where the Supreme Administrative Court revokes the revocation of the construction permits, it will set a precedent in Thailand that subsequent administrative courts ensuing this case can refer to when considering similar situations. It will encourage administrative courts to consider and properly weigh the different interests and expectations in rendering the order to revoke a beneficial unlawful administrative act. While each case will differ in terms of the facts and surrounding circumstances and that each case will be determined on its own merits, the principles remain significant and will allow the administrative courts to further develop and evolve the balancing mechanism in order to promote a fair administrative law framework.