



Legal certainty of land ownership for public facilities in residential areas: A case study from tangerang reGENCY, Indonesia

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Abstract

The increasing demand for residential housing has created opportunities for unscrupulous individuals to exploit regulatory weaknesses and the lack of social control, leading to the improper transfer of land designated for social and public facilities in residential areas. Population growth and the expansion of residential zones bring with them the logical consequence of increased societal needs. This research aims to explore the status of land ownership for social and public facilities in residential areas and the legal implications of transferring such land rights. The study employs an empirical sociological method to assess the effectiveness of legal instruments according to current regulations, observing the research objects and the extent of their practical implementation. The findings indicate that the private ownership of land designated for social and public facilities within residential areas is deemed illegitimate, as such land is inherently owned by the state, under the collective control of the community. In cases where such land has been transferred, the transfer can be challenged and potentially annulled through the courts, which would provide a final decision as the basis for the deletion of any recorded land data.

Keywords: Legal certainty, ownership of public facilities land, in residential areas

Introduction

In the context of a legal state, G. Radbruch broadly identifies three fundamental legal concepts that scholars consider the objectives of law: achieving legal certainty, legal justice, and legal utility. The recognition of property rights by the state is governed by various binding legal regulations that apply to all citizens, including the government as the state authority, to ensure legal certainty regarding citizens' ownership rights.

Property rights over land reflect a specific legal relationship between the subject and object of the rights for every Indonesian citizen. This relationship fulfils the basic human need for land ownership, ensuring legal certainty. Other regulations concerning land are specifically outlined in the Basic Agrarian Law (UUPA), which governs various land rights, including ownership rights, cultivation rights, building rights, usage rights, rights to clear land, and rights to collect forest products, among others as determined by regulations. However, despite the legal guarantees provided by the government, the prevalence of land disputes in Indonesia indicates that existing laws have not fully resolved all issues in the land sector. The enactment of Law No. 5 of 1960 on Basic Agrarian Principles marked the beginning of a transition from a communal land ownership system to an individual ownership system.

The discussion surrounding land affairs has become increasingly complex due to rapid population growth, the advancement of construction, and the ease of acquiring land for both immediate use and long-term investment. This situation has inevitably led to conflicts. The harmonisation of land ownership under the Basic Agrarian Law, as articulated in Article 20(1) of Law No. 5 of 1960, clarifies that ownership is a generational inheritance, representing the strongest and most complete rights an individual can have over land. The phrase "strongest and most complete" distinguishes individual ownership rights from other types of rights under this law. Furthermore, the provisions of this

Article are linked to Article 6, which explains that land rights carry a social function. According to the General Explanation, Point II, No. 4 of this Law, the social function implies that the use of land must be aligned with the conditions and nature of the rights attached to it.

Ownership rights to land for citizens should be free from discrimination and limitations imposed by either national or local governments, as constitutional recognition represents the state's acknowledgment of the natural rights of citizens, which are passed down from one generation to the next and must be recognised by both the broader society and the state. However, in principle, certain limitations are still recognised, particularly concerning the control, use, and size of land for public development purposes ^[1].

Tenurial Ownership, understood as the right to possess, manage, sell, and derive benefit from property, encompasses three urgent types of ownership: individual (private) ownership, state ownership, and collective ownership ^[2]. Today, the recognition of ownership rights, particularly over land, is a critical issue, as it has become a source of conflict and competing claims in various regions, often escalating into disputes, and even violence, between individuals. The existence of a stronger legal guarantee of land ownership rights can help mitigate the emergence of ownership disputes and land conflicts ^[3].

With the rapid expansion of residential areas and population growth, the availability of land is not keeping pace, leading to limited open space for housing development. This creates challenges in the legal relationship between people and land, particularly in the ownership of landed houses.

On the other hand, the demand for housing continues to rise, yet the availability of land for housing is limited. This situation creates opportunities for individuals to exploit the lack of social control and public awareness, resulting in the improper transfer of land designated for social and public facilities (Fasos-Fasum) in residential areas, which should be under the collective control of the community. This issue

is particularly significant regarding the legal status of land ownership for Fasos-Fasum, which is intended for the development of infrastructure and facilities within residential complexes, as a responsibility of developers in accordance with Article 3 in conjunction with Article 54(3)(h) of Law No. 1 of 2011 on Housing and Residential Areas. This research describes two issues: First, it examines the legal status of ownership of land designated for social and public facilities (Fasos-Fasum) in residential and settlement areas. Second, it investigates the legal consequences of transferring rights to Fasos-Fasum land within these areas.

Research method

The study addresses the topic by analysing it through an empirical social approach, meaning that law is seen as a dynamic aspect of society based on experience ^[4]. Secondary data is obtained through document studies of the following regulations: "Law No. 5 of 1960 (UUPA), Government Regulation No. 24 of 1997, Law No. 1 of 2011; Minister of Home Affairs Regulation No. 9 of 2009; Minister of Public Housing Regulation No. 11 of 2008; Regional Regulation of Tangerang Regency No. 8 of 2022." Primary data is gathered from interviews and supporting documents from the "Housing, Settlement, and Cemetery Department (DPPP) of Tangerang Regency, located at Jalan M. Atik Soearia Blok AN 33 No. 24, Kadu Agung, Tigaraksa District, Tangerang Regency, Banten 15720, Tel (021) 5550912, dated 02-07-2024." The study aims to identify underlying issues related to the implementation and enforcement of the law. Additionally, this study is descriptive in nature, with the objective of collecting data on the condition of a variable or theme, phenomenon, or situation as it exists at the time of the research ^[5].

Result and discussion

Current Issues with the Legal Status of Ownership of Land Designated for Social and Public Facilities (Fasos-Fasum) in Residential and Settlement Areas

The recognition of property rights, especially over land, has become increasingly critical and is a frequent source of conflict and competing claims, often leading to disputes and even violence. Land ownership conflicts can arise from various situations, including inheritance disputes among family members, and issues related to property division between spouses who are no longer married.

Legal certainty regarding land ownership can help reduce disputes and conflicts over land rights. Often, land ownership is based on physical occupation and use, leading individuals who physically control and use the land to consider themselves as rightful owners. This phenomenon is common in newly developing areas where land prices are relatively low, and the buying and selling practices are flexible.

With rapid residential development and population growth, the available land is insufficient to meet demand, resulting in limited open space for housing. This creates problems in the legal relationship between people and land, particularly for landed housing. The increasing demand for housing, coupled with limited land availability, creates opportunities for exploitation due to inadequate social control and public awareness. This includes the improper transfer of residual land (land left over after development) that should be under communal control.

The legal status of residual Fasos-Fasum land is crucial to address these issues, as it pertains to land used for public facilities and infrastructure as mandated by the "Article 3 in conjunction with Article 54(3) (h) of Law No. 1 of 2011 on Housing and Residential Areas."

Understanding the status of residual Fasos-Fasum land is urgent due to the growing population and development of residential areas, which increase the demand for land. Clarity on the ownership status of such land is essential to prevent future individual and social conflicts over land rights. The government has established principles and regulations regarding land use, ownership, and resource management, as outlined in Law No. 5 of 1960 on Basic Agrarian Principles, which covers the foundation and main regulations on land rights, water, air, land registration, sanctions for violations, and land transfer provisions.

Natural resources, as found on Earth, are subject to individual rights but remain under state authority, with their management regulated by Article 8 of the UUPA. Land is a crucial and vital element for a country as it serves multiple functions, including habitation, cultivation of both productive and non-productive plants, housing development, irrigation, educational facilities, public transportation, administrative needs, and more. This situation is referred to as the complexity of fulfilling needs. The implementation of physical infrastructure, such as comfortable and safe facilities, is often overseen by policymakers but can sometimes conflict with regulations.

Historically, the relationship between humans and land has been inseparable due to its fundamental necessity for life, livelihood, and other needs ^[6]. Land is considered the highest layer of Earth with the legal term for land rights as outlined in Article 4(1) of the UUPA: "Based on the state's control as referred to in Article 2, various types of land rights are defined, which can be granted to and owned by individuals, either individually or jointly with others, and legal entities". In Tangerang Regency, the process of fulfilling land needs for development to achieve public interest goals is managed by the local government through a designated team responsible for investigating land and building ownership, including valuable items. They also assess appropriate compensation for land ownership losses to reach an agreement.

According to Law No. 1 of 2011 on Housing and Settlement, Article 1(2) mandates that for housing purposes, necessary infrastructure and social facilities must be provided. Additionally, Government Regulation No. 6 of 2006 on the Management of State/Regional Assets states that regional property includes all assets sourced from the Regional Revenue and Expenditure Budget (APBD) and other legal sources. Local government authorities have established regulations and standards for the creation of public and social facilities, as detailed in Minister of Home Affairs Regulation No. 9 of 2009 on the Transfer of Environmental Infrastructure, Public Utilities, and Social Facilities to Local Governments.

Furthermore, Tangerang Regency has issued Regent Regulation No. 8 of 2022 concerning the management and utilisation of regional assets in residential and settlement areas, providing a legal framework for both developers and the community. However, despite the numerous regulations, there are still instances where individuals intentionally create private ownership certificates for public facility land, which is intended for communal use. From a legal

perspective, the Tangerang Regency Government has the opportunity to reclaim and restore the land to its original status, provided that the BPN (National Land Agency) cancels the certificate unilaterally without involving a lawsuit to the Administrative Court (PTUN).

Based on national development goals, Indonesia's pattern tends to be that of a welfare state. Consequently, policies are designed to allocate land for development, aiming to enhance the welfare and prosperity of the nation and its citizens without disregarding the legal rights of individuals or institutions. Therefore, to achieve this welfare, it is essential to prioritise the provision of public facilities (Fasos) as shared resources. In practice, developers often do not promptly transfer the management or ownership of these facilities to the local government after a year of completing housing projects. This delay contravenes the regulations set out in Article 12 of Minister of Home Affairs Regulation No. 9 of 2009, which stipulates that developers have up to one year to manage public facilities before transferring them to the local government^[7].

The provision of public and social facilities is intended to support housing development. The lack of certainty from developers in fulfilling these provisions can lead to losses for consumers and may create opportunities for either developers or others to misuse the facilities upon their transfer to the local government^[8].

Essentially, the status of Fasos-Fasum land in residential and settlement areas should be communal, especially concerning the legal ownership status of residual Fasos-Fasum land used for infrastructure and facilities as part of the developer's responsibilities, as stipulated in Article 3 in conjunction with Article 54(3)(h) of Law No. 1 of 2011 on Housing and Settlement, and Regent Regulation No. 8 of 2022 on the management and utilisation of regional assets in residential and settlement areas. The local government, through the Regional Regulation on the Management and Utilisation of Regional Assets in Residential and Settlement Areas, undertakes preventive measures via the Housing, Settlement, and Cemetery Office (DPPP) of Tangerang Regency. Specifically, the duties of the Sub-Division for Monitoring and Data Collection involve monitoring and data collection for all housing developers operating in Tangerang Regency. This ensures that developers are still active in construction and area expansion or whether they have ceased activities, and to verify the status of Public Social Facilities (PSU) in the residential areas—whether they have been handed over to the local government or not. If many PSU facilities in housing complexes within Tangerang Regency are still not handed over or if development activities have ceased with developers moving to other areas within the jurisdiction of the local government, the DPPP will facilitate this through an invitation letter. Developers will be required to attend a general meeting and briefing on the process and procedures for handing over PSUs, and to provide technical guidance on whether the transfer should be partial, incremental, or complete. Developers are expected to proceed with the PSU transfer to the local government according to their chosen method^[9].

If issues arise concerning PSU land that has not yet been cleared by developers, an alternative solution offered by the DPPP is to remove the PSU object from the list of items to be transferred. The developer is then required to resolve the land status issues first. This approach aims to clarify the

legal status of the land and ensure that the PSU transfer process is carried out partially, pending resolution of land status, to prevent future disputes over land ownership when the PSU object is handed over to the local government^[10].

Legal consequences of the transfer of rights over fasos-fasum land in residential and settlement areas

Ministerial Regulation No. 9 of 2009 underlines the crucial importance of public and social facilities within a residential community. Subsequently, developers are required to hand over these facilities to the local government within one year after completing and maintaining the development. The government regulation clearly stipulates that the transfer from the developer to the local government ends upon this handover. In a different provision, Article 22, paragraph (1), specifies that post-handover, the responsibility for the facilities shifts from the developer to the local government. This transfer involves both the land and any buildings constructed on it, or just the land itself, along with the associated management responsibilities.

The general prerequisites for this transfer include the agreed-upon residential area, based on the licensing approvals granted by the local government. In practice, the construction site must comply with established regulations. Documentation requirements typically include initial site plans, building permits (IMB), approvals for building use (IPB), and records of the transfer from the developer to the local government. The transfer must be preceded by a validity check of the documents conducted by a verifier, and the findings should be recorded in a Field Inspection Report. There are two scenarios for the transfer process: First, a general transfer occurs when the physical state of the public and social facilities is deemed satisfactory. Second, a specific transfer occurs when the facilities require physical repairs or renovations before they can be handed over.

The scope of responsibility for managing public and social facilities includes: (a) Transfer of management through a valid BAP after verification; (b) The transfer must include land with a government certification; (c) If certification is pending, proof of application should be attached with a receipt from the National Land Agency, with management eventually falling under the local government. During the development phase, the local government may partner with other entities involved in housing development. In such partnerships, financing obligations are the responsibility of the partner, who does not have the authority to alter the intended use of the facilities.

Before the transfer of development responsibilities to the local government (Pemda), the land in the form of Building Use Rights (HGB) must be converted to State Land. During the transition process, documentation such as a Record of Handover and a Deed of Release of Rights must be completed. After the transfer of infrastructure (sarpras) is executed, the local government assigns management responsibilities to the Regional Government Work Unit (SKPD). The deadline for the transfer of infrastructure according to regulations is a maximum of 90 days, or approximately three months, following the issuance of land rights documents by the Land Office for SKPD. Due to frequent negligence by developers in fulfilling their obligations to provide infrastructure and misuse of land, there is a need for stricter oversight by the local government. This oversight should not only limit

opportunities for developers to neglect their commitments but also enforce clear penalties for proven negligence.^[11]

The earth, being a living entity, supports various activities, including human needs for land, which are fundamental. Therefore, regulatory rules concerning ownership, use, and control of land are essential. These regulations are outlined in Law No. 5 of 1960 on Basic Agrarian Principles, which includes fundamental provisions on land ownership, water, non-land spaces, and the registration process, as well as penalties for legal violations and procedures for land transfers. Thus, the need for valid land ownership evidence, such as certificates, is crucial for proving legal claims to land.

According to applicable regulations and the local government regulations in Tangerang Regency, public and social facilities are required to be provided by developers as part of residential development. The conversion of these facilities for different uses in Tangerang Regency, especially when not aligned with the intended land use plans and lacking proper permits, constitutes a regulatory violation. If discrepancies occur between initial design plans and actual field practices concerning facility land, the local government has the authority to instruct developers to revert to the original design, ensuring that the land is used for its intended supportive role. If there is a transfer of public and social facilities land by individuals for personal or others' benefit, such transfers are legally invalid and can be contested in court. Legal action can be taken to annul the registration through a lawsuit in the district court and to request the cancellation of the National Land Agency's (BPN) documents related to unauthorized registrations. To effectively prevent misuse by developers or individuals, the Tangerang Regency Department of Housing, Settlement, and Cemetery (DPPP) often conducts public meetings to educate developers on complying with existing legal regulations^[12].

Conclusion

Ownership of public and social facilities (fasos-fasum) in residential and settlement areas is deemed unlawful if held privately, as such land rightfully belongs to the state and is under communal control. If there has been a transfer of rights over fasos-fasum land by individuals exploiting loopholes for personal gain or that of others, such transfers are legally invalid. The transfer of fasos-fasum rights can be contested through legal action in the district court to annul the ownership claim, and a request for annulment can also be submitted to the Administrative Court (PTUN) to cancel the National Land Agency's (BPN) records of such unauthorized registrations. This ensures that the land is restored to its intended public use and that any unauthorized claims are rectified according to applicable regulations.

Suggestion

To the residents of residential complexes, especially to the heads of neighborhood associations (RT), community associations (RW), as well as community leaders, religious leaders, and youth leaders: It is essential to cultivate a collective sense of responsibility, enhance supervision, and build social control mechanisms over all regional and state assets within residential and settlement areas. This is crucial to prevent unlawful actions by individuals who might attempt to transfer residual fasos-fasum land illegally, which could harm the community. To the local government: It is

important to impose strict and measured sanctions on housing developers or parties who fail to fulfill their obligations in providing adequate infrastructure, facilities, and utilities in residential areas. Additionally, pressure should be applied to developers to promptly complete and transfer the facilities, infrastructure, and utilities that have been constructed and have completed their maintenance period, in accordance with applicable legal regulations. This approach is vital to prevent the misuse of residual fasos-fasum land and to protect both the community and the local government from potential losses.

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