

**The Revocation of the Notification of the Ministry of Natural
Resources and Environment***

The Supreme Administrative Court Judgment No. D. 33/2553, 21 April B.E. 2553 (2010)

Chalong Concrete 1999 Co.Ltd. et al. (P)

v.

Ministry of Natural Resources and Environment (D)

The Notification of Ministry of Natural Resources and Environment providing measure to prohibit the expansion or the relocation of the factories severely affecting environment restricted the freedom of industrial occupation of twenty two plaintiffs. However, the measure was issued by virtue of the specific law consistent with the Constitution of the Kingdom of Thailand and was necessary to accomplish the restoration of natural resources and environment. The Plaintiffs' freedom of industrial occupation were limited only five years, and the Defendant did not terminate the Plaintiffs' rights in renewing or filing the industrial license in the previous permitted area. Additionally, at the time of the issuance of this measure, there are no specific provisions allowing people to have participation in the public hearing for the governmental project impacting on environment, culture, occupation, and natural resource according to Constitution of the Kingdom of Thailand B.E. 2540 (1997). Therefore, this case must be enforced by Clause 5 paragraph one of Regulations of the Office of the Prime Minister on Public Hearing Process B.E. 2548 (2005). This Ministerial Notification is lawful since the Defendant had already conducted public hearing process with the people in the surrounding areas.

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Legal Principles: *Public Hearing, Freedom of Occupation*

Administrative Court Procedure: *Unlawful Act in a Manner Inconsistent with the Form, Process, or Procedure which is the Material Requirement for Such Act*

Legal Provisions: *Constitution of the Kingdom of Thailand, B.E. 2540 (1997) (Section 46, Section 56, and Section 59)*

Act on Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 (1999) (Section 9 paragraph 1 (1))

Enhancement and Conservation of National Environment Quality Act, B.E. 2535 (NEQA 1992) (Section 44 (1) (2) and Section 45)

Notification of the Ministry of Natural Resources and Environment Re: Location and Environmental Protection Measures in Amphoe Khura Buri, Amphoe Takua Pa, Amphoe Thai Mueang, Amphoe Thap Put, Amphoe Mueang Phangnga, Amphoe Takua Thung and Amphoe Ko Yao, Phangnga Province, dated 15 March B.E. 2550 (2007) (Clause 4 (1) and Clause 11)

Regulations of the Office of the Prime Minister on Public Hearing Process B.E. 2548 (2005) (Clause 5 paragraph one)

Judgment (Summary)

Ministry of Natural Resources and Environment, the Defendant, had duties to preserve and restore natural resources and environment, and maintain the sustainable use of natural resources and environment. The Defendant delegated Office of Natural Resources and Environment Policy and Planning (ONEP) to study environmental problems on Phangnga coastal areas. ONEP found that natural resources in these areas were in crisis and faced severe environmental problems from the expansion of community. Additionally, there was no restriction on industrial zones as well as any specific provisions preventing adverse effects on natural resources and environment. As a result, in order to protect

environment, ONEP had proposed the Defendant to impose measures to restrict industrial zones. Subsequent to the ONEP's proposal, the Defendant issued the Notification of the Ministry of Natural Resources and Environment Re: Location and Environmental Protection Measure in Amphoe Khura Buri, Amphoe Takua Pa, Amphoe Thai Mueang, Amphoe Thap Put, Amphoe Mueang Phangnga, Amphoe Takua Thung and Amphoe Ko Yao, Phangnga Province, dated 15 March B.E. 2550 (2007). According to Clause 4 (1) of the Ministerial Notification, there was prohibition on some conservative and restricted areas against constructing, modifying or changing any constructions into factories according to the factory law except some identified factories, and Clause 11 provides that certain permitted activities or businesses according to Clause 3 and Clause 4 must not increase or beyond the scope of the permit. The Plaintiffs No. 2 – No. 12 and the Plaintiffs No. 14 – No. 22, who hold industrial licenses in that permitted areas prior to the Ministerial Notification was in effect, viewed that Clause 4 (1) and Clause 11 of the Ministerial Notification were unlawful because the clauses deprived the twenty two plaintiffs' freedom of industrial occupation. Furthermore, the public hearing process was not conducted before the issuance of the Ministerial Notification. For all of these reasons, the Plaintiffs raised the case to the Administrative Court and requested the Court to order the Defendant to amend the Ministerial Notification to allow the Plaintiffs, holding industrial licenses before the Ministerial Notification was in effect, to continue conducting their businesses as previous granted.

The Supreme Administrative Court held that Phangnga coastal areas had adverse impacts from the expansion of community and other developments due to the lack of the restriction on industrial zones. In addition, factory laws and building control laws are not sufficiently aware of the suitability and adverse effects on environment and natural resources, and the efforts to restore and prevent environmental disasters are not in accordance with academic rules. To protect environment, the Defendant is entitled to promulgate Clause 4 (1) and Clause 11 of the Ministerial Notification by virtue of Section 45 and Section 44 (1) and (2) of Enhancement and Conservation of National Environment Quality Act, B.E. 2535 (1992), which is the specific law according to Constitution of the Kingdom of Thailand.

According to research study on Phangnga coastal areas, it was found that environmental quality was in crisis. The Notification of the Ministry of Natural Resources and Environment was issued to designate conservative areas, to restrict industrial zones, and to prohibit constructing, modifying or changing any buildings to factories except certain identified factories. The measure to prohibit the expansion or relocation of factories shall be a solution to environmental quality problems and the deterioration of natural resources in Phangnga coastal areas. Even though the measure affected the Plaintiffs' freedom of industrial occupation, the measure was necessary to accomplish the restoration of natural resources. Moreover, the measure had limitation for merely five years, and the Defendant did not terminate the Plaintiffs' rights in renewing or filing a new license in the previous permitted areas. The Plaintiffs also did not have plans to expand factories or increase manufacturing productivity within these five years. The Plaintiffs' claim was merely the speculation that they would be affected by the measure. The Plaintiffs had lesser damage when weighed against loss to the public interest. Besides, the Notification of the Ministry of Natural Resources and Environment did not prohibit the Plaintiffs and others, holding industrial license prior to the Ministerial Notification was in effect, from conducting their industrial businesses. In other words, the Plaintiffs and others were still eligible to renew or file a new license, but unable to expand factories or increase manufacturing productivity within these five years. The Notification, therefore, did not fully and completely deprive the Plaintiffs' freedom of industrial occupation. The disputed Ministerial Notification, consequently, did not affect the essential substances of the Plaintiffs' freedom of industrial occupation, and then was not against the law.

Another issue was whether the Ministerial notification was unlawful since the Defendant did not conduct public hearing process with the Plaintiffs and other involving persons before its issuance. The Supreme Administrative Court held that at the time of the issuance of the Ministerial Notification, there was no specific provision subject to Sections 46, 56, and 59 of Constitution of the Kingdom of Thailand B.E. 2540 (1997), regulating that any persons shall have participation in the public hearing for governmental projects impacting on environment, culture, occupation, and natural resource. Therefore,

this case must be enforced Clause 5 paragraph one of Regulations of the Office of the Prime Minister on Public Hearing Process B.E. 2548 (2005), the law in force at that time, providing that the public hearing process must be conducted prior to the operation of public services affecting public interest. The Defendant had held a meeting regarding survey on industrial location and had conducted public hearing process with the people in the surrounding areas. Furthermore, the Defendant had submitted the draft of the Ministerial Notification to total 49 State agencies and local authorities to consider the draft. Consequently, the Ministerial Notification is lawful.
