

OBTAINING USAGE RIGHT FOR FOREIGNER RELATED TO RESIDENTIAL HOMES IN INDONESIA

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Abstract: *In order to support the increasing development and increasing number of Foreigners who work and run their businesses in Indonesia, so it is necessary to make policies that provide legal certainty as well as ease in providing services and permits to obtain land rights for residential homes or residences for Foreigners. In this research, two problem formulations were formulated, namely: 1. How to obtaining the usage of rights of foreigners related residential homes in Indonesia? 2. What are the procedures for the transfer of foreigners' usage of rights to residential homes in Indonesia? The theory used in this research is the theory of legal certainty and the theory of authority. The method used in this thesis is the Normative Juridical approach method, the source of the data are primary, secondary and tertiary legal material. The research results obtained are that regarding the procedure for obtaining foreign usufructuary rights there is a difference between the previous rules and the current rules, namely the acquisition of usufructuary rights for a resident, previously the acquisition of usufructuary rights can only be obtained if the apartment is built on use rights, but now after the enactment of ATR Minister Regulation Number 29 Year 2016, making flats above building use rights can be purchased and owned by foreigners by making changes directly to the Certificate of Ownership to become the Right to Use Flats in the Land Office. the procedure for the transfer of foreign usufructuary rights has not been popular with foreigners and the community and needs to be improved by the government, because the transfer of usufructuary rights can only be done to Indonesians, and foreigners cannot transfer it to foreigners, then due to the law which is caused by the acquisition of foreigners' usufructuary rights over land in Indonesia is a legal consequence of the concept of land with flats, where foreigners can indirectly enjoy the Right to Build, even though those who are allowed to enjoy the Right to Build are only Indonesian citizens, because flats have the concept of shared land, if the shared land is a building use right, then foreigners can also enjoy the joint use right into joint ownership, considering that the apartment purchased by a foreigner is on the Right to Building.*

Key Words: *Right of Use, Foreigners, Residential Houses.*

1. INTRODUCTION:

The Importance of Legal Certainty Regarding Residential House for Foreigners

The Unitary State of the Republic of Indonesia based on the 1945 Constitution of the Republic of Indonesia is a legal state that guarantees and protects the rights of citizens, including the right of citizens to obtain, possess and enjoy Property Rights. Ownership of land as a type of ownership, which is very important for the state, nation and people of Indonesia as an agrarian society that is developing towards industrial development and others. Residents who occupy Indonesian territory are not only Indonesian citizens, hereinafter referred to as Indonesian citizens, but also Foreigners residing in Indonesia. In its development, there are increasingly more and more foreigners in Indonesia. One reason is because of the progress in science and technology, as well as openness between countries in international relations. For example, for foreigners who work in Indonesia, whether through shares they have invested in a company in Indonesia, or their company in Indonesia. The legal relationship between people both Indonesian citizens and foreigners as well as legal actions regarding land in Indonesia is regulated in Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, hereinafter referred to as UUPA. In relation to subjects that can be granted and have rights to land, according to the principle of nationality which is the basis of the LoGA, it is determined that in accordance with Article 9 of the LoGA it states that "only Indonesian citizens can have a full relationship with the earth, water and space".

In his explanation it was said, only Indonesian citizens can have ownership rights over land. According to Article 26 paragraph 2 of the LoGA, ownership rights to foreigners are prohibited and violations of this article contain null and void sanctions. However, the LoGA does not close down the opportunity for Foreigners to own land rights in Indonesia. Foreigners can have land rights in Indonesia. But it is only limited to the use of the right of use, not other types of rights so that from the principle of nationality the interests of Indonesian citizens are increasingly clear in terms of economic, social and political aspects (1)The subject of legal rights to land, namely people and legal entities. The legal subject is given the authority to use the land in question. Whereas the objects of land rights include the surface and body of the earth, water and the space above it within certain limits. Although the holders of land rights are given the authority to use the rights to land, but the holders of rights are also restricted by the legislation including:

- Must pay attention to social functions;
- Ownership of land rights must not exceed the maximum and minimum;
- Only Indonesian citizens and Indonesian legal entities can have ownership rights based on government regulations (2)

In order to support the increasing development in cooperation with Indonesia with friendly countries, and the increasing number of Foreigners who work and run their businesses in Indonesia, the demand for housing or shelter for Foreigners is increasing, so that policies need to be made that provide legal certainty as well as ease in providing services and permits to obtain land rights for residential homes or residences for foreigners (3). In connection with this, dwellings that can be used by foreigners, namely land with the right to use land, dwellings can be in the form of houses or flats, with the case that strangers can own houses for residence or dwelling in Indonesia with usufructuary rights for their purposes which will support the relationship cooperation between Indonesian citizens and foreigners. The definition of the Right to Use is contained in Article 41 paragraph 1 of the BAL which reads:

“Right of Use is the right to use and / or collect the results of land that is directly controlled by the State or land owned by someone else, which gives the authority and obligations specified in the decision to grant it by the official authorized to give it or in an agreement with the land owner, which is not a lease agreement. rent or land management agreement, everything as long as it does not conflict with the soul and the provisions of this Law ”

Regarding the granting of the Right to Use to foreigners, it is regulated in Government Regulation Number 103 Year 2015 Regarding Foreign Ownership of Residential Homes or Occupancy by Foreigners domiciled in Indonesia, hereinafter referred to as PP No. 103 of 2015 jo. Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency of the Republic of Indonesia Number 29 of 2016 concerning Procedures for Granting, Relinquishing, or Transferring the Right to Owning Residential Houses or Occupancy by Foreigners Based in Indonesia, hereinafter referred to as Permen ATR / KBPN RI Number 29 In 2016. With the addition of residential houses or dwellings that can be owned by foreigners, the researcher is interested in conducting research according to Indonesian legal system,

2. LITERATURE REVIEW:

2.1. Review of Criteria for Foreigners Who can Have a Place to Live In Indonesia:

Foreigners can indeed have a place to live. However, there are certain criteria that must be met. Based on PP 103/2015, only foreigners who hold a residence permit can own a house with usufructuary rights. Residence permit is a permit for foreigners to settle in the territory of Indonesia within a certain period according to the type of residence permit owned. Regarding the foreigner residence permit is regulated further in the Migration Act, PP 31/2013, and Permenkumham 16/2018 (4).

2.2. Review of Land Rights That Can Be Owned by Foreigners:

In Article 41 paragraph 1 of the BAL, the Right to Use is the right to use and / or collect results from land that is directly controlled by the State or land owned by someone else, which gives the authority and obligations specified in the decision to grant it by the authorized authority to give it or in the agreement. with the owner of the land, which is not a lease or land management agreement, everything as long as it does not conflict with the soul and the provisions of this law (5). From the formulation contained in Article 41 of the Loga it can be seen that the granting of the Right to Use can be sourced from:

- Land that is directly controlled by the state, in the form of a decision to grant rights by an authorized official.
- Land that has been owned with ownership rights by certain individuals, based on an agreement with the land owner. In connection with agreements with holders of land rights

In the LoGA it is determined that the agreement must not be a lease agreement or a land management agreement. Furthermore, Article 42 of the BAL states that those who can have the Right to Use are:

- Indonesian Citizen;
- Foreigners domiciled in Indonesia;
- Legal Entity established under Indonesian law and domiciled in Indonesia;
- Foreign legal entity that has a representative in Indonesia.

Also in the provisions of Article Government Regulation Number, the subject of the holder of the Right to Use is emphasized by giving a more complete description, namely: Land that can be granted with the Right to Use is explained in Article 41 PP Number 40 of 1996 concerning Land Use Rights, Building Use Rights and Land Use Rights, namely:

- State Land;
- Land Management Rights;
- Freehold Land;

The subsequent occurrence of the Right to Use in the provisions of Article 42 PP Number 40 of 1996 concerning Land Use Rights, Building Use Rights and Land Use Rights are:

- 1 The Right to Use on State Land is granted with a decision on the granting of rights by the Minister or an appointed Officer;
- 2 The Right to Use over Management Rights is granted with a decision to grant rights by the Minister or appointed official based on the proposal of the holder of Management Right;

- 3 Provisions regarding the procedure and requirements for application and granting of the Right to Use on State land and land on Management Right are further regulated by Presidential Decree.

3. OBJECT OF RESEARCH

Based on what has been described in the background of the problem above, the writer formulates several issues that will be discussed in this scientific work, namely:

- How to obtaining the usage of rights of foreigners related residential homes in Indonesia?
- What are the procedures for the transfer of foreigners' usage of rights to residential homes in Indonesia?

4. ANALYSIS:

4.1. Obtaining The Usage Right for Foreigner Related Residential Home in Indonesia:

4.1.1. Regulation for Residential Homes in Indonesia:

In Article 3 of the Regulation of the Minister of Agrarian Affairs / Head of the National Land Agency Number 9 of 1999 concerning Procedures for Granting and Canceling State Land Rights and Management Rights, granting and cancellation of Property Rights, Business Rights, Building Rights, Building Rights, Use Rights and Management Rights are carried out by the Minister. In this case the Minister can delegate his authority to the Head of the Regional Office, Head of the Land Office and the appointed Officer. Furthermore, the granting of Foreign Use Rights is carried out at the local Land Office based on Article 11 of ATR / KBPN RI Regulation No. 29 of 2016, the application for registration of changes in Ownership Rights and Building Use Rights to Use Rights or Changes in Ownership Rights on Flats in Houses into Use Rights on Units Flats are submitted by the person concerned or their attorney to the local Land Office. Where the Land Office has the authority to grant Use Rights to Foreigners, if it has been done based on the requirements set by the Land Office, so that the acquisition of land rights for Foreigners in accordance with statutory regulations.

Foreigners domiciled in Indonesia are people who are not Indonesian citizens whose existence provides benefits, does business, works or invests in Indonesia. Foreigners can own a house for shelter or residential use rights. Foreigners who can own residential homes or dwellings referred to are Foreigners holding a residence permit in Indonesia. In addition to the convenience provided in the process of granting Foreigner Use Rights and the relatively long period of time granted, the Government through PMNA / KBPN Number 29 of 2016 also provides convenience in terms of inheritance. It is explained in Article 3 that in the event that a Foreigner dies, the house of residence or residence can be inherited. In case the heir is a Foreigner, the heir must have a residence permit in Indonesia in accordance with statutory regulations. Indonesian citizens who carry out marriages with foreigners can have the same land rights with other Indonesian citizens. The land rights are not shared assets as evidenced by the agreement on the separation of assets between husband and wife, which is made by a notarial deed (6). Based on PP Number 103 Year 2015 concerning Ownership of Residential Houses or Occupancy by Foreigners domiciled in Indonesia, residential houses or dwellings that can be owned by foreigners are (7).

- Above ground house:
 1. Right of Use; or
 2. Right of Use over Ownership Right which is controlled based on the agreement to give Right of Use over Ownership Right with the Act of the Land Deed Maker.
- Sarusun which was built on a plot of land.

Furthermore, in the Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency of the Republic of Indonesia Number 29 of 2016 as the executor of PP 103 of 2015 there are additional contents in Article 4 namely:

- Single house, above the ground:
 1. Right of Use;
 2. Right of Use over Ownership Right which is controlled based on the agreement to give Right of Use over Ownership Right with the Act of the Land Deed Maker; or
 3. Use Rights arising from changes in Ownership Rights or Building Use Rights.
- Sarusun who:
 1. built on a plot of land for the Right to Use;
 2. derived from changes in ownership rights to the Flats.

4.2. Measure to Obtain The Usage Right for Foreigner Related Residential Home in Indonesia:

People who want to have a house to live in Indonesia, one way to get it is by buying and selling. However, whether the land rights which are the object of the sale and purchase have fulfilled the requirements for the sale and purchase transaction. For example, A is an Indonesian citizen selling a residential house with the status of a Right to Build land to a Foreign Citizen. This sale and purchase transaction cannot be carried out because Foreigners are not subject to Building Rights. So Foreigners must not own land or property with land status for Building Use Rights. First, the sale

and purchase object with the status of the Right to Use for the Building is reduced. From Building Rights to Use Rights. The process based on the Indonesian legal system follows (8)

1. Photocopy of the applicant's identity and power of attorney if authorized, then a Residence Permit / Resident Permit Card (KIM) issued by the Immigration Office that has been matched with the original by the ticket window clerk, then the two foreign nationals also enclose:
 - a) Power of Attorney familiarized to the Developer
 - b) Original certificate of Building Use Rights
 - c) Deed of PPAT in the form of buying and selling
 - d) Declaration of Worthy Function if it is an apartment
 - e) The above documents are submitted to the Head of the South Jakarta Administrative City Land Office
 - f) Then the head of the land office orders the subsidy of land rights to conduct an examination of the physical and juridical data of the apartment, after being declared sufficient by the land rights subsidy, asks the Head of the South Jakarta Land Office to ask for advice from the field inspection team, and the land rights subsidy, then the transition can be continued.
2. Then the process is then carried out wherein 1 (one) unit with the Right to Own Property Certificates (SHRSM) on behalf of the developer is reversed by changing the SHRSM to the Right to Use Housing Rights (SHPSRS) Certificate, as for the way of granting Right of Use, namely by crossing out the words and numbers of the Ownership Rights of the Flats from the developer, along with all the lists and maps of related land rights, and replace them with the words and numbers of the Right to Use of the Flats.
3. In connection with the completion of the granting of Alien Right to land in Indonesia, then based on an interview at the South Jakarta City Land Office, which is for 38 (thirty eight) days for agricultural land whose area does not exceed 2 Ha, and 38 (thirty eight) days non-agricultural land whose area does not exceed 2,000 m. However, this time period does not become a benchmark that will be completed as stated, because there are more possibilities than that, given the completion of the granting of the Right to Use depends on the process undertaken by the Land Office.

4.3. Procedures for the transfer of foreigner's usage of rights to residential homes in Indonesia:

4.3.1. Transfer of Foreigners' Use Rights to Residential Houses No Longer Residing in Indonesia:

Regulations covering foreign property are based on Government Regulation Number 103 Year 2015 and Ministerial Regulation Number 29 Year 2016, and the rule is a legal basis that has sufficient legal power to regulate residential ownership for Foreigners. Acquisition of Foreign Use Rights can be done through buying and selling, grants, exchanging, and inheritance as well as transferring rights made to fellow Indonesian citizens, buying and selling and through inheritance. Usufructuary Rights may be transferred by the Alien holders using the sale and purchase. Buying and selling rights of foreigners can be done both to Indonesian citizens and foreigners. Whereas if the sale and purchase is carried out with foreigners as buyers, then the buyer must fulfill the requirements stipulated in the Law, one of which is to have a residence permit in Indonesia issued by the immigration office and work and be beneficial for investment progress in Indonesia. Buying and selling of Foreigners' Right to Use cannot be done with buyers who are foreigners. In the event that a Foreigner dies, the house of residence or residence can be inherited. In case the heir is a Foreigner, the heir must have a residence permit in Indonesia in accordance with statutory regulations.

- In Government Regulation Number Government Regulation Number 103 Year 2015 Regarding Ownership of Residential Houses or Occupancy by Foreigners domiciled in Indonesia and ATR / KBPN RI Ministerial Regulation Number 29 of 2016 concerning Procedures for Granting, Releasing or Transferring the Right to Owning Residential Houses Or Dwelling By Foreigners Based In Indonesia.
- Foreigners who no longer live or are domiciled in Indonesia, then within a period of 1 (one) year, the Foreigner is obliged to transfer said Use Rights to the state if the land is state land, or to the land owner if the land was originally a Right Belongs to.
- In the event that the land is not transferred after the expiry of 1 (one) year and Foreigners who are no longer domiciled in Indonesia, the land will be auctioned by the state if it is built on state land, or returned to the land owner if it is land previous property rights.

Transition and acquisition of land for foreigners can be done by taking into account the requirements that apply in the legislation. In Article 41 paragraph (1) of the BAL, the Right to Use is the right to use and / or collect results from land that is directly controlled by the State or land owned by someone else, which gives the authority and obligations specified in the decision to grant it by the authorized authority to give it or in the agreement. with the owner of the land, which is not a lease or land management agreement, everything as long as it does not conflict with the soul and provisions of this law. From the formulation contained in Article 41 it can be seen that the granting of the Right to Use can be sourced from:

- Land that is directly controlled by the state, in the form of a decision to grant rights by an authorized official.

- Land that has been owned with ownership rights by certain individuals, based on an agreement with the land owner. In connection with the agreement with the holders of ownership rights over the land, stipulates that the agreement must not be a lease agreement or a land management agreement.

4.3.2. Legal Effects That Can Be Caused By Acquisition of Foreigners' Use Rights to Residential Houses in Indonesia

Previous Foreign Residential Arrangements are regulated in Government Regulation Number 41 of 1996 concerning Ownership of Residential Houses or Residential Residents domiciled in Indonesia (hereinafter referred to as PP Number 41 of 1996), PP Number 41 of 1996 is intended to guarantee legal certainty of the Law Number 16 of 1985 Concerning Flats (hereinafter referred to as Law Number 16 of 1985), where in the Law on Flats at that time did not regulate apartments for foreigners, so PP No. 41 of 1996 was issued.

1. Foreigners can automatically enjoy a shared piece of land

In the concept of a flat there is the term shared land, this is regulated in Law Number 20 of 2011 concerning Flats, as stipulated in the provisions of Article 1 number 4 which explains that: "Shared land is a piece of land or lease rights for buildings on the basis of an inseparable joint right on which flats are built and the boundaries of the building permit requirements are determined. It needs to be underlined the word "on which flats are built" means that the shared land is the land on which flats are built, and the land can be in the form of Building Use Rights, if related to Article 6 paragraph (2) Permen ATR / KBPN RI Number 29 Year 2016, which explains that the sale and purchase of flats built on land for building rights can be done by foreigners by replacing SHMRS to SHPRS, here only the certificates of apartment units are replaced, but the shared land has become a single unit of rights for foreigners, because the apartment which he has bought on the land of Building Rights.

2. The occurrence of violations of the principle of legislation

That it is explained in Article 42 of the Basic Agrarian Law, which explains that Foreigners can only obtain the Right to Use, then in the implementing regulations related to the house of residence of Foreigners, as stipulated in Article 4 PP Number 103 Year 2015 explains that:

Houses or dwellings that can be owned by foreigners as referred to in Article 2 paragraph (1) are:

a. Single house above:

1. Right of Use or

2. Usufructuary rights over ownership right based on the agreement to give us usufruct rights over ownership rights

b. Sarusun which was built on a plot of land for Use Rights.

Whereas in the provisions of Article 6 paragraph (2) Article 6 paragraph (1) paragraph (2) and (3) Permen ATR / KBPN RI Number 29 of 2016, namely: Sarusun which is built on the Right to Build or Management Rights that are owned by foreigners due to the sale and purchase, grants, exchanges, and auctions, as well as other means intended to transfer rights, then the Right to Own Flats in the Flats are immediately granted with the change to Rights Use the Flat Unit to the Foreigner concerned.

Based on the above provisions, the ATR / KBPN RI Candy Number 29 of 2016 has exceeded PP Number 103 of 2015, so that in this case it is necessary to look at the principle of legislation namely the Lex Superior Derogat Lex Inferiori principle, where the statutory regulations below may not contrary to higher laws. therefore, it should be consistent in ATR / KBPN RI Regulation No. 29/2016 that flats that can be owned by foreigners are only flats that are actually built on use rights, open the right to use buildings, because in the concept of flats as regulated in Act Number 20 of 2011 concerning Flats, there are provisions on shared land.

Based on the explanation above, related to the legal process and consequences, the writer needs to discuss from the standpoint of legal certainty theory related to ownership of Foreigners' occupancy. Whereas in principle legally the rules relating to Foreigners are intended to provide legality to Foreigners who wish to live in Indonesia to avoid legal smuggling such as agreements using the names of Indonesian citizens, so that the foreigner can obtain shelter, it is clear contrary to existing rules.

The challenge faced after the issuance of Agrarian Regulation Number 29 Year 2016 is where the regulation is not going well, this is based on information from the Land Office that the author has conducted his research, that there is still a large tendency for foreigners to use methods that are not justified by the rules that apply in Indonesia, namely the name loan agreement, whereas the Agrarian Regulation Number 29 of 2016 as a legal basis for the implementation of the granting of usufructuary rights for foreigners' dwelling, and the authority in granting such usufructuary rights is the government in this case the Land Offices in each administrative region each as a form of application of the theory of authority sourced from the state / government.

5. CONCLUSION:

There are some conclusion in this is research as follows :

- Regarding the process of obtaining Foreign Use Rights there are differences between the previous rules with the current rules. Where the different rules referred to are the acquisition of the Right to Use of Foreigners for a place of residence, where previously the acquisition of the Right to Use of Foreign People may only be obtained if the flat is built on the Right to Use, but now in the acquisition of Right to Use Foreigners after the entry into force of the ATR Candy / KBPN RI Number 29 of 2016, makes flats above the Right to Build can be purchased and owned by Foreigners by making changes directly to the Certificate of Ownership to a Right to Use Flats in a Land Office with certain conditions that must be met by Foreigners.
- Legal consequences arising from the acquisition of Alien Right to land in Indonesia are the legal consequences of the concept of land with flats. Foreigners can indirectly enjoy the Right to Build, even though those who are allowed to enjoy the Right to Build are only Indonesian citizens. Because flats have the concept of shared land, if the shared land is a building use right, then Foreigners can also enjoy the Joint Right to be jointly owned, bearing in mind the flats purchased by Foreigners are on land for Building Rights.

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