

## The Legal Position of Attorney's Power Imposing Mortgage Rights in Providing Subsidized Home Ownership Credit Facilities

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**Abstract.** *This study aims to determine and analyze the legal position of the power of attorney imposing mortgage rights in the provision of subsidized housing credit facilities related to Article 15 paragraph (5) of Act No. 6 of 1994 concerning Mortgage Rights provides an exception for the period of time for the Power of Attorney to impose Mortgage Rights (SKMHT) granted to guarantee certain loans and the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of Act No. 22 of 2017 concerning Determination of the Deadline for the Use of Power of Attorney Imposing Mortgage to Guarantee the Repayment of Certain Loans. This study uses an empirical juridical approach that relies on primary field research data and the research specifications applied in this study are descriptive analytical with population and the sampling technique used is non-random sampling with purposive sampling. The results of this study indicate that the Power of Attorney to impose Mortgage has a function as a power of attorney addressed to the mortgage holder or other party to represent the mortgage giver himself present before the PPAT to carry out the encumbrance of the Mortgage, as well as a form of binding guarantees to creditors. In the event that the debtor is in arrears/defaults, the creditor can exercise his rights based on Article 1276 of the Civil Code, namely suing for matters to fulfill/implement the agreement.*

**Keywords :** Attorney; Credit; Home; Mortgage; Subsidized.

## **1. Introduction**

Banking institutions as creditors in providing credit are not without risk, so the risks that will harm the creditors need to be taken more seriously by the Bank. In addition to the process of providing credit, the banking sector will always pay attention to the principles of healthy lending, the bank should ask for adequate guarantees to provide legal protection and certainty both for creditors themselves and for debtors or other interested parties.

For legal certainty and in order to obtain legal protection, the application for credit is stated in the form of a credit agreement which is the main agreement, while the existence of a guarantee in the main agreement arises an additional agreement regarding guarantees. Additional agreements or better known as Accessoir Agreements cannot stand alone but exist and are deleted depending on the main agreement.

The agreement according to Article 1867 of the Civil Code (KUH-Perdata) can be carried out authentically or privately. In general, what is used in the banking world to bind credit agreements is in the form of an authentic deed. An authentic deed according to Article 1868 of the Civil Code explains: "An authentic deed is such, which is made in the form determined by law by or before a public official authorized for it, at the place where it was made."

The relationship between Article 1868 of the Civil Code is Article 1 point 1 of Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of a Notary (UUJN) explaining that: "Notaries are public officials authorized to make authentic deeds and has other powers as referred to in this Law or based on other laws."

Based on Article 1 number 1 of Government Regulation Number 37 of 1998 concerning the Regulation of the Position of Land Deed Making Officials, "Land Deed Maker Officials, hereinafter referred to as PPAT are public officials who are authorized to make authentic deeds regarding certain legal actions regarding land rights or rights. Owned by Flat Units." PPAT is a position established based on the provisions of Article 19 of Government Regulation Number 10 of 1961 concerning Land Registration, because in the Government Regulation it is ordered that all legal actions that intend to transfer land rights or encumber land rights as collateral for debt must be proven by a deed made by or before an

official appointed by the Minister.<sup>1</sup> This provision is further regulated in the Regulation of the Minister of Agrarian Affairs Number 10 of 1961 which states firmly that land deeds are the authority of the Land Deed Maker Official.

In general, the Land Deed Maker serves concurrently as a Notary. The concurrent position is made possible by the provisions of Article 7 paragraph (1) of Government Regulation Number 37 of 1998 concerning the Regulation of the Position of the Land Deed Maker Officer which explains "PPAT can hold concurrent positions as a Notary, Consultant, or Legal Advisor". This dual position is possible because both of them have the same position as public officials, even though the Notary is a public official with more general and broader authority than PPAT.<sup>2</sup>

In the banking world, especially in the provision of credit, the existence of a Power of Attorney for Imposing Mortgage and Deed of Granting Mortgage has a very important function. One of the elements in the provision of credit and as a means of protection for creditor security for the certainty of debtor debt repayment is a guarantee institution. One of the guarantee institutions used by creditors/banks in granting credit is Mortgage Rights.

Mortgage rights according to the provisions of Article 1 paragraph (1) of Act No. 4 of 1996 concerning Mortgage on Land and Objects related to land are "Guaranteed rights imposed on land rights as referred to in Act No. 5 years 1960 concerning Basic Regulations on Agrarian Principles, including or not including other objects which are an integral part of the land for the settlement of certain debts, which give priority to certain creditors over other creditors."

In the installation and registration of Mortgage under certain conditions, it is necessary first to make a Power of Attorney to impose Mortgage related to the condition of the object of the Mortgage. A very diverse routine of legal subjects has implications for the possibility of being unable to attend when the Deed of Granting Mortgage should be signed, meaning that it is impossible to sign the deed directly at that time. In this condition, the law provides a solution by granting the power of attorney to impose mortgage rights in the form of a power of attorney to impose mortgages whose form has been determined.

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<sup>1</sup>Samsaimun, 2018, *PPAT Position Regulations Introduction to the Position Regulations of Land Deed Making Officials (PPAT) in the Transfer of Land Rights in Indonesia*, Bandung : Reka Cipta Library, p. 3.

<sup>2</sup>*Ibid*, p. 4

The Power of Attorney for Imposing Mortgage is a tool to overcome if the Mortgage Giver cannot be present before the Land Deed Making Officer and the power of attorney must be given directly by the Mortgage Provider. In relation to the Power of Attorney to impose Mortgage, Article 15 paragraph (3) of the Mortgage Law explains that "The Power of Attorney to Impress Mortgage regarding registered land rights must be followed by making a Deed of Granting Mortgage no later than 1 (one) months after it was given. Article 15 paragraph (4) explains that "A Power of Attorney to impose Mortgage on land rights that have not been registered must be followed by making a Deed of Granting Mortgage no later than 3 (three) months after it is granted".

The fact is that the provisions of Article 15 paragraph (3) and Article 15 paragraph (4) of the Mortgage Law are not sufficient, namely land that has not been registered for the transfer of rights, its split, or its merger. This is often found in home ownership loans (KPR). The house certificate is still in the name of the developer or seller, so it is necessary to process the name transfer first based on the deed of sale to the debtor/buyer of the house. This is in accordance with the provisions of Article 4 paragraph (5) of the Mortgage Law which explains that: "If the building, plant, and work as referred to in paragraph (4) are not owned by the holder of the land right.

The authentic deed referred to in this article based on the explanation of Article 4 paragraph (5) of the Mortgage Law is a Power of Attorney to impose Mortgage. With the increasing number of mortgage enthusiasts today, it is only natural that the Power of Attorney to impose Mortgage becomes one of the facilities that are often used in banking credit.

Problems that can occur in the legal position of the power of attorney to impose mortgages in the provision of subsidized housing loan facilities are when the debtor defaults in payment of the installments, the creditor holding the power of attorney to impose mortgages must immediately follow up with the making of a Deed of Granting Mortgage with the installation of Mortgage so that the position of the creditor become the preferred creditor.

Thus, based on the things that have been conveyed in this background, it becomes an attraction for the author to conduct further research to find out and analyze the legal position of the power of attorney to impose mortgage rights in the provision of subsidized housing loan facilities.

## 2. Research Methods

This research method used an empirical juridical approach that relies on primary data (field research) where the data was used to find out the problems that arise related to the legal position of the power of attorney imposing mortgage rights (SKMHT) in the provision of subsidized home ownership credit (KPR) facilities. The specification of this research was analytical descriptive, that is research that only describes the overall state of the research object by grouping, categorizing according to the research objectives to answer the problems in the research. Sources of data and methods of data collection using primary data obtained by means of direct interviews with resource persons who are considered to understand the research topic and secondary data obtained by reviewing the literature related to the research topic.

## 3. Results and Discussion

### 3.1. Legal Position of Power of Attorney for Imposing Mortgage Rights in Providing Subsidized Home Ownership Credit Facilities

The provision of credit is generally carried out by the bank (creditor) because the income or profit of a bank is mostly sourced from providing credit to debtors. This is in accordance with the provisions of Article 3 of Act No. 7 of 1992 concerning Banking that the main function of Indonesian banks is to collect funds and distribute public funds.

In the Subsidized Mortgage Agreement, the debtor only makes a Power of Attorney to impose Mortgage on the grounds that the secured land rights are not in the name of the mortgage giver, because the land rights certificates have not been split individually and are still in the process of transferring names on behalf of the attorney<sup>3</sup>.

The validity period of the Power of Attorney to impose Mortgage used to guarantee the Subsidized Mortgage Agreement according to the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency no. 4 of 1996 is valid until the expiration of the main agreement. So as long as the main agreement lasts, the Power of Attorney to impose Mortgage is still valid without

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<sup>3</sup> Kamelia, Mariah., & Masdhdurohatun, Anis. 2017, "Peran Notaris Dalam Pembuatan Akta Perjanjian Kredit Dalam Perspektif Hukum Positif dan Hukum Islam". in Jurnal Akta, Vol. 4, No. 4.

a Deed of Granting Mortgage being made. The purpose of granting power of attorney to impose mortgage rights considering the steps to install collateral with Mortgage Rights is not easy, must go through certain formalities, takes a long time and costs a lot, and land rights have not become the property of the guarantor so sometimes for credit provided by The creditor has been sufficiently secured by simply getting the power of attorney from the debtor to put up the collateral.

The granting of power or *lastgeving*, in Dutch, is an agreement by which a person gives power or power (*macht*) to another person, who accepts it for and on behalf of the giver (*lasgever*). The method of granting and receiving power of attorney can be done with an authentic deed, in writing under the hand, by ordinary letters and or orally. As for the recipient, apart from expressly, it can also be done secretly and its implementation can be concluded. The granting of power is not promised to occur free of charge<sup>4</sup>.

Based on Article 10 paragraph (2) of the Mortgage Law, after the main agreement is held, the granting of the Mortgage must be carried out by the Mortgage Provider himself by making the Deed of Granting Mortgage (APHT) made by the Land Deed Making Official in accordance with the laws and regulations. valid invitation. However, if the grantor cannot be present at the time of making the Deed of Granting Mortgage, it can be done with a power of attorney (Power of Attorney for Imposing Mortgage) which has been regulated in the Mortgage Law, this is because the giver of the power of attorney is not in the area of the law where the object of the mortgage is located.

The Deed of Power of Attorney to impose Mortgage has a function, apart from being a special power of attorney addressed to the mortgage holder or other party to represent the mortgagee being present before the Land Deed Making Officer to carry out the encumbrance of the mortgage, as well as a form of binding credit guarantees to provide guarantees. to the bank as the creditor. Indeed, this method is very practical and does not require expensive costs. Moreover, if the debtor in the implementation of the agreement fulfills the agreement as specified, it will be very easy for the debtor.

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<sup>4</sup> Velentini, Ni Putu Erna., & Yogantara, Pande, 2021, "Pencoretan Hak Tanggungan dengan Akta Konsen Roya". Dalam *Jurnal Hukum Kenotariatan*, Vol. 6, No. 1.

The Power of Attorney to impose Mortgage is indeed not a guarantee institution like existing guarantee institutions such as Mortgage or Fiduciary. However, if the Power of Attorney to impose Mortgage is followed up into a Deed of Granting Mortgage and the Deed of Granting Mortgage is registered with the local National Land Agency Office by issuing a Mortgage Certificate, then a Mortgage guarantee institution will arise.

In connection with the description of the position of the power of attorney to impose mortgage rights, the power of attorney to impose mortgage rights, namely as follows:

- Does not have a (strong) collateral value because the holder of the Power of Attorney to impose Mortgage does not have a position as a preferred creditor of the land that is planned to be burdened with the Mortgage. This creditor is only an ordinary creditor.
- Has a risk of loss for the bank if the debtor suddenly goes bankrupt or is in breach of contract (default).
- Does not have the principle of specialization in order to provide legal certainty and certainty of rights.
- Does not fulfill the principle of publicity of Mortgage granted with the PPAT deed, which must be registered with the National Land Agency for Land Registration so that the assignment of land can be known by the wider community. Then it is recorded in the Land Book, and as proof a certificate of Mortgage is issued.

Based on the principle of encumbrance, the mortgage must be carried out by the mortgagee as the person entitled to the object of the mortgage. Only if it is absolutely necessary and cannot be present alone, it must be authorized to another party. In the event that the mortgagee cannot be present before a Notary/PPAT, Article 15 of the Mortgage Law also provides the opportunity for the mortgagee to use a Power of Attorney to impose Mortgage<sup>5</sup>.

The absence of the mortgage giver before the PPAT at the time of making the Mortgage Deed is a reason that allows the mortgage provider to make and use a Power of Attorney to impose Mortgage, therefore Article 15 paragraph (1) of the Mortgage Law confirms that the said power of attorney must be special and authentic which must be made before a Notary/PPAT. Thus, the substance of the

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<sup>5</sup> Malik, Djatmika., Limbong, Mangirim., & Wahyuningsih, Sri Endah. 2018, "Legal Protection for Debtors in Selling Of Immovable Guaranteed Objects Below The Market Price In Indonesian Positive Law". Dalam Jurnal Akta. Vo. 5. No. 2.

Power of Attorney for Imposing Mortgage is the granting of power of attorney from one legal object (person/legal entity) to another legal subject (person/legal entity) (recipient of power of attorney) to carry out one particular business.

In this regard, it is also necessary to pay attention to the arrangement of the granting of power according to the Civil Code which provides the legal basis for all forms of power of attorney. The granting of power of attorney is regulated in the Civil Code Article 1792 to Article 1819. Furthermore, the granting of power as referred to in Article 1972 of the Civil Code, reads: "The granting of power of attorney is an agreement whereby a person gives power or authority to another person, who accept it, to carry out a business on his behalf."<sup>6</sup>

The substance of the Power of Attorney for Imposing Mortgage is the granting of power in accordance with the understanding of the power of attorney, namely to carry out or carry out one particular interest, namely to impose mortgage rights only in the form of a Deed of Granting Mortgage.

### **3.2. Legal Consequences of Power of Attorney Imposing Mortgage on Debtors of Defaulting Subsidized Home Ownership Credit**

In practice, the credit agreement accompanied by the creation of a Power of Attorney for Imposing Mortgage is not in accordance with Article 15 paragraph (3) of the Mortgage Law which reads: "The Power of Attorney for Imposing Mortgage Rights concerning registered land rights must be followed by making a Deed of Granting Mortgage. no later than 1 (one) month after it is given. And Article 15 paragraph (4) of the Mortgage Law, the Power of Attorney for Imposing Mortgage regarding land rights that have not been registered must be followed by the making of a Deed of Granting Mortgage no later than 3 (three) months after being granted. Delays regarding the follow-up to the Power of Attorney for Imposing Mortgage due to the length of time required in the practice of making the Power of Attorney to Imposing Mortgage sometimes exceeds 1 (one) month.

Making a Power of Attorney for Imposing Mortgage is used as a bridge for making a Deed of Granting Mortgage in the future because at that time the Deed of Granting Mortgage could not be made. Thus, it can be concluded that the validity period of the Power of Attorney to impose Mortgage cannot be

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<sup>6</sup> Article 1972 of the Civil Code



extended, therefore the Notary/PPAT must really pay attention to and take into account the validity period of the SKMHT so that there will be no problem when the Deed of Granting Mortgage will be made due to the expiration of the SKMHT period. the.

In the agreement there is a possibility that one of the parties does not fulfill the achievement which is said to be a default. The form of default can be in the form of:

- Not doing what he is promised to do;
- Carry out what was promised, but not as promised;
- Doing what was agreed but late;
- Doing something according to the agreement may not be done.

In the event that the debtor defaults, based on Article 1276 of the Civil Code, the creditor may sue for the following matters:

- Fulfill/implement the agreement;
- Fulfilling the agreement accompanied by the obligation to pay compensation;
- Paying compensation;
- Cancel the agreement; and
- Canceling the agreement is accompanied by compensation.

If the debtor is in default and the creditor has the right to guarantee material, one of which is Mortgage, the creditor can exercise his rights under Article 20 of the Mortgage Law, namely:

- Based on the right of the first Mortgage holder to sell the object of the Mortgage as referred to in Article 6, or
- Based on the executorial title contained in the Mortgage certificate as referred to in Article 14 paragraph (2), the object of the Mortgage is sold through a public auction according to the procedure specified in the laws and regulations to settle the debt of the Mortgage holder with the right to precede the creditor - other creditors.
- Upon the agreement of the grantor and the holder of the Mortgage, the sale of the object of the Mortgage can be carried out under the hands if in this way the highest price will be obtained that benefits all parties.

In the provision of subsidized housing credit facilities, a Power of Attorney to impose Mortgage is only made with a period of validity according to the

Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 4 of 1996 valid until the expiration of the validity period of the principal agreement. So as long as the subsidy mortgage agreement lasts, the SKMHT is still valid, without a Deed of Granting Mortgage being made.

For defaulting debtors who are only installed with a Power of Attorney to impose Mortgage, the Mortgage has not yet occurred. Therefore, the creditor does not have the right as the recipient of the mortgage and thus cannot carry out the execution as is the way to execute the object of the mortgage as regulated in Article 20 of the Mortgage Law. The creditor is also not located as a preferred creditor, in this case the creditor can only file a lawsuit to the court if the debtor defaults because there is no special guarantee in the form of a security guarantee and only a general guarantee as stipulated in Article 1131 of the Civil Code that all assets belonging to the debtor are guaranteed for debtor engagement to creditors.

The process of settlement of defaulting debtors for subsidized housing loans in the category of non-performing where only a Power of Attorney to impose Mortgage is attached, then proceeds with the making of the Deed of Granting Mortgage. The APHT process according to Article 13 paragraph (1) of the Mortgage Law must be registered at the Land Office. In Article 13 paragraph (2) and paragraph (3) of the Mortgage Law, it is explained how to register Mortgage, as follows:

- After the parties have signed the APHT made by the PPAT, the PPAT shall send the APHT concerned and other documents required by the Land Office. The delivery must be made by the PPAT concerned no later than 7 (seven) working days after the signing of the APHT.
- Registration of Mortgage is carried out by the Land Office by making a Land Book of Mortgage and recording it in the Land Book of Land Rights which is the object of Mortgage and copying the notes on the certificate of Land Rights in question.
- The date of the Mortgage Land book is the seventh day after the complete receipt of the documents required for registration and if the seventh day falls on a holiday, the relevant land book is dated on the next working day.

After the process is complete, the creditor has the right to guarantee material, namely Mortgage and can request his rights based on Article 20 of the Mortgage Law, namely:

- Based on the right of the first Mortgage holder to sell the object of the Mortgage as referred to in Article 6, or
- Based on the executorial title contained in the certificate of Mortgage as referred to in Article 14 paragraph (2), the object of Mortgage is sold through a public auction according to the procedure specified in the laws and regulations for the settlement of the debt of the Mortgage holder with the right to precede the creditor other.
- Upon the agreement of the grantor and the holder of the Mortgage, the sale of the object of the Mortgage can be carried out under the hand if in this way the highest price can be obtained that benefits all parties.

Furthermore, after the debts are settled, according to Article 22 paragraph (1) of the Mortgage Law, "after the Mortgage Rights are deleted as referred to in Article 18 of the Mortgage Law, the Land Office crosses out the Mortgage records in the land book of land rights and the certificate."

The request for deletion as referred to in Article 22 paragraph (1) of UUHT, by Article 22 paragraph (4) of UUHT is determined to be submitted by an interested party by attaching a certificate of Mortgage which has been given a note by the Creditor that the Mortgage is nullified because the receivables are guaranteed to be paid off with the Mortgage it's paid off.

#### **4. Conclusion**

The Power of Attorney for Imposing Mortgage has a function as a power of attorney addressed to the Mortgage holder or other party to represent the mortgagee being present before the Land Deed Making Officer to carry out the encumbrance of Mortgage, as well as a form of binding collateral to the creditor. SKMHT is not a guarantee institution so that the position of SKMHT does not have a strong guarantee value because the SKMHT holder does not have a position as a preferred creditor on land that is burdened with mortgage rights so that the creditor's position is only as an ordinary creditor, having a risk of loss to the creditor if the debtor suddenly goes bankrupt. or breach of contract (default), does not have the principle of speciality in order to provide legal certainty and certainty of rights, does not have the principle of publicity of Mortgage.

## 5. References

### Journals:

- [1] Kamelia, Mariah., & Masdhdurohatun, Anis. 2017, "*Peran Notaris Dalam Pembuatan Akta Perjanjian Kredit Dalam Perspektif Hukum Positif dan Hukum Islam*". in Jurnal Akta, Vol. 4, No. 4.
- [2] Malik, Djatmika., Limbong, Mangirim., & Wahyuningsih, Sri Endah. 2018, "Legal Protection for Debtors in Selling Of Immovable Guaranteed Objects Below The Market Price In Indonesian Positive Law". Dalam Jurnal Akta. Vo. 5. No. 2.
- [3] Velentini, Ni Putu Erna., & Yogantara, Pande, 2021, "Pencoretan Hak Tanggungan dengan Akta Konsen Roya". Dalam Jurnal Hukum Kenotariatan, Vol. 6, No. 1.

### Regulation:

- [1] Act No. 10 of 1998 concerning Banking
- [2] Act No. 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land (UUHT).
- [3] Act No. 5 of 1960 concerning Basic Regulations on Agrarian Principles.
- [4] Book of Civil Law
- [5] Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 22 of 2017 concerning Stipulation of Deadline for Use of Power of Attorney to Imposition Mortgage Rights to Guarantee the Repayment of Certain Loans.