

Implications of The SKMHT Validity Period According to The Term of Subsidized Home Finance in Connection With The Principle of Lex Superior Derogat Legi Inferiori

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Abstract. *Regulation of the Minister of Agrarian Affairs of the Head of BPN No. 22/2017 Concerning the Determination of the Time Limit for the Use of a Power of Attorney to Encumber Mortgage Rights to Guarantee the Settlement of Certain Credits, if the regulation of the ATR/BPN ministry is enforced, there will be a conflict of norms between Law No. 4 of 1996 concerning Mortgage Rights and the regulation of the ATR/BPN ministry. Regulation of the ATR/BPN ministry number 22 of 2017 overrides the Mortgage Rights Law in terms of the limitation of the SKMHT period. The principle of Lex Superior Derogat Legi Inferiori states that lower regulations must not conflict with higher regulations. Regulations with lower authority should not exceed higher regulations. The purpose of this study is to analyze the effect of changes in SKMHT regulations in subsidized housing financing based on the principle of lex superior derogate legi inferiori. This research method is a normative legal research method. The approach in this study uses a case approach and a legislative approach. The data required includes secondary data consisting of the 1945 Constitution; Law No. 10 of 1998; Law No. 21 of 2008; Law No. 12 of 2011, Law No. 4 of 1996; Regulation of the Minister of Agrarian Affairs of the Head of BPN No.22/2017; Regulation of the Minister of Public Works and Public Housing of the Republic of Indonesia Number 35 of 2021, as well as books and other supporting documents. Taken with the method of data collection using library techniques. The data analysis method is prescriptive. Based on the research, it was concluded that the conflict of legal norms occurred due to differences in the regulations regarding the period of use of SKMHT between the Mortgage Rights Law and Regulation of the Minister of ATR/BPN No. 22 of 2017. The Mortgage Rights Law regulates the maximum period of SKMHT for 3 months, while Regulation of the Minister of ATR/BPN No. 22 of 2017 regulates that the period of SKMHT can be valid during the credit period or until the end of the principal agreement. The Mortgage Rights Law as a law has a higher degree compared to the Regulation of the*

*Minister of ATR/BPN which is an implementing regulation. Therefore, based on the principle of *lex superior derogate legi inferiori*, the regulations in the Mortgage Rights Law should apply.*

Keywords: *Period; Principle; Time.*

1. Introduction

The need for housing is one of the basic human needs, so that house buying and selling transactions have increased in number from time to time. Based on data from the Central Statistics Agency (BPS) in 2020, households that do not have access to decent housing in Indonesia reached 59.54%.¹ Responding to this, the Ministry of Public Works and Public Housing (PUPR) has various programs to encourage Low-Income Communities (MBR) to have decent housing, by providing subsidies for purchasing decent housing for low-income communities, where to support the smooth running of this program, for 2023 PUPR has collaborated with 40 existing banks, which is implemented with a financing mechanism by the Banking Party.

The program is known as the Housing Financing Liquidity Facility (hereinafter referred to as FLPP) which has been started since 2020 and is managed by the Ministry of Public Works and Public Housing based on the Regulation of the Minister of Public Works and Public Housing of the Republic of Indonesia Number 35 of 2021 concerning the convenience and Assistance of Public Housing Financing for Low-Income Communities.

In practice, in the implementation of the FLPP program, generally the binding made against the house guarantee that is the object of the sale and purchase transaction is a Power of Attorney to Encumber Mortgage Rights (hereinafter referred to as SKMHT) with a validity period according to the financing period of the house.

The binding process with SKMHT is not followed up with the process of making a Deed of Granting of Mortgage Rights (hereinafter referred to as APHT) until the financing period is paid off. This condition certainly contains risks because it does not provide security for the Creditor as the holder of preference rights if in the future the Debtor is in Default on its obligations.

Article 15 of Law No. 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land (hereinafter referred to as UUHT), has regulated the validity period of SKMHT, namely the validity period of SKMHT is no later than 3 (three) months for land that has not been registered and 1 (one) month for land that has been registered.

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to Encumber Mortgage Rights to Guarantee the Settlement of Certain Credits, if the regulation of the ATR/BPN ministry is enforced, then there is a conflict of norms between Law No. 4 of 1996 concerning Mortgage Rights (UUHT) and the regulation of the ATR/BPN ministry. Regulation of the ATR/BPN ministry number 22 of 2017 overrides the UUHT in terms of the limitation of the SKMHT period. The principle of *Lex Superior Derogat Legi Inferiori* states that lower regulations may not conflict with higher regulations. Regulations with lower authority should not exceed higher regulations.

2. Research Methods

This study uses a normative legal research method, with the approach used in this legal research is the statute approach. The type of data used is secondary data, for the data sources, namely primary, secondary and tertiary legal materials. Then the data collection method is through literature studies. Finally, for the data analysis method using the prescriptive method.

3. Results and Discussion

3.1. Conflict of Legal Norms Regarding the Term of Power of Attorney to Charge Mortgage Rights in the Mortgage Rights Law with the Regulation of the Ministry of ATR/BPN Number 22 of 2017

In the provisions of Law No. 4 of 1996 concerning Mortgage Rights, there is also a Power of Attorney to Charge Mortgage Rights (SKMHT). In practice, the Power of Attorney to Charge Mortgage Rights (SKMHT) is made before the Deed of Granting Mortgage Rights (APHT). Furthermore, the Mortgage Rights Law requires that the making of the SKMHT must be followed by the making of the granting of Mortgage Rights.³ Thus, in order for a Power of Attorney to Charge Mortgage Rights (SKMHT) to be valid, it must be made with an authentic deed by a Notary or a Deed of a Land Deed Making Official (PPAT), this is intended as a notarial deed as an authentic deed that has strong evidentiary power. Where the SKMHT aims to guarantee the repayment of a certain credit.

The provisions for imposing Mortgage Rights must be carried out by the Mortgage Grantor himself, and if the Mortgage Grantor cannot be present before the Land Deed Making Officer (PPAT), then the executor must appoint another party as his attorney by making a Power of Attorney to Encumber Mortgage Rights (SKMHT). Regarding the validity period of the Power of Attorney to Encumber Mortgage Rights (SKMHT) itself, the Mortgage Rights Law also regulates in Article 15, especially paragraphs (3) and (4) which state that:

(3) A Power of Attorney to Encumber Mortgage Rights regarding registered land rights must be followed by the use of a Deed of Grant of Mortgage Rights no later than 1 (one) month after it is granted.

(4) A Power of Attorney to Encumber Mortgage Rights regarding rights to land that have not been registered must be followed by the use of a Deed of Grant of Mortgage Rights no later than 3 (three) months after it is granted.⁴

The Power of Attorney to Encumber Mortgage Rights (SKMHT) may not contain the power to sell or rent the Mortgage Right object, or extend the land rights, but only as a means of granting power to make a Deed of Granting Mortgage Rights (APHT). This is to prevent the protracted time of the implementation of the power of attorney to encumber mortgage rights and so that it can be carried out immediately, the Power of Attorney to Encumber Mortgage Rights is limited to a period of 3 (three) months for unregistered land rights, which must be followed by the making of a Deed of Granting Mortgage Rights (APHT).⁵

Regulation of the Minister of ATR/BPN No. 22 of 2017 which regulates the procedures for registering mortgage rights and related matters, in Article 12 (b) stipulates that the term of SKMHT can be valid during the credit period or until the end of the principal agreement. This is different from the provisions in the Mortgage Rights Law which stipulates that the term of SKMHT is a maximum of 3 months.

The issue of conflicting legal norms between the Mortgage Law and the Regulation of the Minister of ATR/BPN Number 22 of 2017 concerning the term of the Power of Attorney to Charge Mortgage Rights (SKMHT) has become a highlight in land law practice. The conflicting legal norms between the regulations regarding the term of the Power of Attorney to Charge Mortgage Rights (SKMHT) in the Mortgage Law (UUHT) and those regulated in the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency (ATR/BPN) Number 22 of 2017, can be analyzed by referring to the principle of *lex superior derogate legi inferiori*. This principle means that higher regulations override lower regulations.

The Mortgage Rights Law occupies a higher position compared to the Regulation of the Minister of ATR/BPN Number 22 of 2017. Therefore, in terms of formal legal matters, the Mortgage Rights Law should be the main reference.

3.2. Implications of SKMHT Validity Period According to Subsidized Home Financing Period Linked to the Lex Superior Derogate Legi Inferiori Principle

SKMHT is a letter containing a power of attorney made or given by the collateral provider or land owner, in this case the Debtor or buyer as the party granting the power of attorney to the creditor as the party receiving the power of attorney to represent the principal in granting the mortgage rights to the creditor over the principal's land.

SKMHT is generally used in credit agreements. The procedure for using SKMHT in credit agreements is generally the same as agreements that give rise to other debts that use SKMHT as collateral for debt repayment.

The principle of lex superior derogate legi inferiori can be interpreted that laws and regulations that have a lower degree in the hierarchy of laws and regulations may not conflict with higher ones. One of the policies that strengthens this principle is Law No. 12 of 2011 concerning the Formation of Laws and Regulations, in Article 7 dividing the types and hierarchy of Laws and Regulations in order from the highest degree, namely:

1. The 1945 Constitution of the Republic of Indonesia;
2. Decree of the MPR RI;
3. Law/Perpu;
4. Government regulations;
5. Presidential decree;
6. Provincial Regulation; and
7. Regency/City Regional Regulations.

The implication of the application of the *lex superior* principle in this case is that the regulation of the Minister of ATR/BPN which states that the term of the SKMHT can be valid during the credit period or until the end of the principal agreement must be considered contrary to the provisions of the Mortgage Law which states 3 months. Thus, for legal certainty, the applicable period is 3 months in accordance with the provisions of the Law. However, to avoid uncertainty or potential disputes in the future, it is better to update or revise the ministerial regulation so that it is in line with the provisions of the Mortgage Law, or further clarification is carried out by the competent authority.

The conflict between the provisions in the Mortgage Law and the Regulation of the Minister of ATR/BPN No. 22 of 2017 concerning the SKMHT period can be resolved by the principle of *lex superior derogate legi inferiori*, which emphasizes that the norms in the Law must take precedence over the norms in lower ministerial regulations.

The hierarchical structure of laws and regulations has the consequence that a lower level of law and regulation may not conflict with a higher level of law and regulation. This is in line with the legal principle of *lex superior derogat inferiori* (a higher law defeats a lower level law). This is intended to create legal certainty in the legal system.

4. Conclusion

Conflicts in legal norms occur due to differences in regulations regarding the period of use of SKMHT between the Mortgage Rights Law and Regulation of the Minister of ATR/BPN No. 22 of 2017. The Mortgage Rights Law regulates the maximum period of SKMHT for 3 months, while Regulation of the Minister of

ATR/BPN No. 22 of 2017 regulates that the period of SKMHT can be valid during the credit period or until the end of the principal agreement. The Mortgage Rights Law as a law has a higher degree compared to the Regulation of the Minister of ATR/BPN which is an implementing regulation. Therefore, based on the principle of *lex superior derogate legi inferiori*, the regulations in the Mortgage Rights Law should apply. In formal legal terms, the regulations in the Mortgage Rights Law which have a higher degree will defeat the regulations in Regulation of the Minister of ATR/BPN No. 22 of 2017. However, in its application, careful interpretation and attention to the objectives of each regulation are needed. Regulation of the Minister of ATR/BPN No. 22 of 2017 was created with the aim of supporting the government's program to meet basic needs, namely housing for low-income people (MBR) who have had difficulty buying a house. The existence of ATR/BPN Regulation No. 22 of 2017 helps to ease the costs in terms of managing home ownership, namely in terms of the cost of making a Mortgage Grant Deed (APHT) which is considered burdensome for low-income people who are the target market of the subsidized home ownership program managed by the Ministry of Public Works and Public Housing (PUPR). The positive implication is that it provides legal certainty and protection for parties in subsidized home ownership transactions. In practice, these two regulations need to be harmonized so as not to cause legal uncertainty. The negative implication if the validity period of the SKMHT is shorter than the financing/credit period according to the UUHT, it can cause additional burdens for debtors and the potential for disputes related to the expiration of the mortgage because there are no further provisions governing the consequences of FLPP debtors if they default. The validity period of the SKMHT should be adjusted to the subsidized home financing period. This will provide legal certainty, protection for both parties, and prevent disputes. However, in practice, there needs to be a balance between the interests of debtors and creditors and compliance with applicable laws and regulations.

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