

Implementation the Precautionary Principle For Land Deed Officials In Making Deeds of Granting Mortgage Rights

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Abstract: PPAT in carrying out legal actions must always act carefully. PPAT before making a deed, must examine all relevant facts in its considerations based on applicable laws and regulations. This study aims to determine the application of the principle of caution of PPAT in making APHT and to determine the responsibility of PPAT in making APHT whose formal requirements are not met. This study is an empirical juridical legal study, namely legal research on the implementation of normative legal provisions in real behavior in legal events that occur. The results of the study explain that PPAT must apply the principle of caution and pay attention to the procedures in making APHT, as per Article 10 of the Mortgage Law. If PPAT is not careful in checking important facts, it means that PPAT violates the Principle of PPAT caution only explained in Article 22 of PP PPAT that the PPAT Deed must be read/explained to the parties in the presence of at least 2 (two) witnesses before being signed immediately by the parties, witnesses and PPAT. PPAT is personally responsible for the implementation of his duties and positions in every deed, including making APHT. Therefore, the role of PPAT in making APHT for creditors and debtors is to bridge the interests of debtors with the interests of creditors so that both parties get a sense of justice, benefit, and legal certainty in binding the Mortgage Right guarantee so that there are no legal defects.

Keywords: *PPAT, Precautionary Principle, APHT*



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I. INTRODUCTION

Land Deed Official (PPAT) is a public official who has been given the authority by law to make authentic deeds. As in Article 1 number 1 of the Regulation of the Head of the National Land Agency Number 1 of 2006 concerning Provisions for the Implementation of Government Regulation Number 37 of 1998 concerning the Regulation of the Position of Land Deed Official (hereinafter referred to as Perkaban Number 1 of 2006), states, "PPAT is a public official who is given the authority to make authentic deeds regarding certain legal acts regarding land rights or Ownership Rights of Apartment Units".

PPAT is a public official who has been appointed by law to have the authority to express the will of the parties in the form of an authentic deed. An authentic deed is the strongest and most complete evidence, having an important role in every legal relationship in the life of society.¹ An authentic deed made by a PPAT has very strong legal force considering that an authentic deed is a perfect evidence, so it is not uncommon for various laws and regulations to require certain legal regulations to be made in the form of an authentic deed, such as in Article 95 paragraph (1) of the Regulation of the Minister of State for Agrarian Affairs/Head of the National Land Agency Number 3 of 1997 in conjunction with Article 2 of the District Regulation Number 1 of 2006, which states that the PPAT has the main duty to carry out part of the land registration activities by making a deed as evidence that certain legal acts have been carried out regarding land rights or Ownership Rights for Apartment Units which will be used as the basis for registering changes to land registration data resulting from the legal act.²

The legal acts referred to are buying and selling; barter, grant, company investment (inbreng), distribution of joint rights, granting of Building Use Rights/Use Rights over Land Ownership Rights, granting of Mortgage Rights, and granting of power to encumber Mortgage Rights. PPAT in making authentic deeds must uphold the principle of caution, ensure the truth of time, location, identity of the parties, and its contents, so that it is the same as the facts in the field. Failure to fulfill these formal requirements can cause APHT which is in fact an authentic deed to be downgraded to a deed under hand. Such deeds are no longer authentic, thus such deeds have no value as Official Deeds (PPAT) which function as a tool for the transfer or encumbrance of land rights. The conclusion is that such deeds cannot be used as evidence of the transfer or encumbrance of land rights.³ If the Land Office finds out that such a thing has happened, the Land Office has the right to reject the registration of the transfer or encumbrance of its rights (because it is not an authentic

¹ Kurnia Rheza Randy Adinegoro, "Tantangan Implementasi Sertipikat Tanah Elektronik di Kementerian Agraria dan Tata Ruang/Badan Pertanahan Nasional Republik Indonesia", *Jurnal Ilmu Kenotariatan* 4, No. 2, (2023): 134.

² Hilbertus Sumplisius M. Wau, and T. Keizerina Devi Azwar, "Analysis of the Role of PPAT as a Shield in Illegal Property Transactions to Intercept the Land Mafia", *Jurnal Ilmu Kenotariatan* 4, No. 2, (2023): 90.

³ Mustofa, *Tuntutan Pembuatan Akta-Akta PPAT*, (Yogyakarta: Karya Media, 2014), p. 10.

deed). Of course, this will be detrimental to the parties interested in the APHT and of course, the PPAT himself as an official who is authorized to make the APHT can be held accountable.⁴

Therefore, in practice, PPAT is required to always pay attention to the principle of caution. Acting in accordance with the mandate of the provisions of the law must be the obligation of PPAT. Considering that in the civil trial process, the truth sought and realized by the judge is sufficient formal truth (*formeel waarheid*) from the judge's heart, not required conviction. The parties to the case can submit evidence based on lies and falsehoods, but such facts must theoretically be accepted by the judge to protect or defend the individual rights or civil rights of the parties concerned. The author will conduct research on the application of the principle of caution of PPAT in making a Deed of Granting Mortgage Rights (APHT) and the responsibility for the deed of granting mortgage rights that do not meet the formal requirements.

II. METHODS

The research method section contains the type of research taken by the author. If the type of research is normative juridical, there must be a component of the approach to the problem using the statutory regulatory approach, conceptual approach, case approach or comparative legal approach. However, if the author uses an empirical or sociological juridical research type, there must be a component of the type of data, namely primary, secondary or tertiary data, as well as data collection techniques.

III. ANALYSIS AND DISCUSSION

The Precautionary Principle for Land Deed Officials in Making Deeds of Granting Mortgage Rights

For Indonesians, land is the most fundamental issue, as can be seen from the many civil and criminal cases brought to court, which revolve around land disputes. These land disputes include inheritance disputes, debts with land as collateral, state administrative disputes regarding the issuance of land certificates, and other unlawful acts. Based on the many cases involving land, it can be seen that land plays a central role in the life and economy of Indonesia.⁵ The need for land for business or investment purposes also increases the rampant buying and selling of land, especially the emergence of land speculators who buy and sell land for profit, causing land buying and selling to become increasingly crowded in society.⁶ The busy traffic of

⁴ Bhim Prakoso, "Pendaftaran Tanah Sistematis Lengkap Sebagai Dasar Perubahan Sistem Publikasi Pendaftaran Tanah", *Journal of Private and Economic Law* 1, No. 1, (2021): 66.

⁵ Sunaryati Hartono, *Beberapa Pemikiran ke Arah Pembaruan Hukum Tanah* (Bandung: Alumnus, 1978), p. 7.

⁶ Ahmad Farich Sultoni, "Batas Pertanggungjawaban Notaris atas Pembuatan Akta Otentik", *Jurnal Ilmu Kenotariatan* 2, No. 1, (2021): 69-90.

buying and selling of land causes land prices to increase in price over time, so that land prices continue to increase.

The problem of housing and land rights is not only dimensional in the problem of property ownership that requires legal certainty for its ownership, but also has a dimension in sociological problems, so that in Javanese society there is a term "sak sengkak tanah akan dibela dengan nyawa". So that a careful process and the principle of caution are needed both by the parties who will carry out transactions in the form of land objects and officials who will issue related documents. One of the main tasks of PPAT is to issue a Deed of Granting of Mortgage Rights (APHT). APHT, which in English is called granting deed mortgage, while in Dutch it is called *het verlenen van akte mortgage*, is a deed to transfer land rights to be used as collateral for the bank.⁷ The Deed of Granting of Mortgage Rights (APHT) regulates the terms and conditions regarding the granting of Mortgage Rights from the debtor to the creditor in connection with the debt secured by the Mortgage Rights. The granting of these rights is intended to provide a preferred position to the creditor concerned (preferred creditor) over other creditors (concurrent creditors) as stated in the UUHT Article. Thus, the granting of Mortgage Rights as a guarantee of payment of the debtor's debt to the creditor in connection with the loan or credit agreement in question.

In practice, PPAT must apply the principle of caution and pay attention to the procedures in granting a Deed of Granting Mortgage Rights (APHT).⁸ The procedure has been determined in Article 10 of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land, which states that the Granting of Mortgage Rights is preceded by a promise to provide Mortgage Rights as collateral for the payment of certain debts, which is stated in and is an integral part of the relevant debt agreement or other agreements that give rise to the debt. The Granting of Mortgage Rights is carried out by making a Deed of Granting Mortgage Rights by PPAT in accordance with applicable laws and regulations.⁹ If the object of the Mortgage Rights is in the form of land rights originating from the conversion of old rights that have met the requirements to be registered but the registration has not been carried out, the granting of Mortgage Rights is carried out simultaneously with the application for registration of the relevant land rights.

Examining all the completeness and validity of the evidence or documents shown to the PPAT, as well as hearing the statements or statements of the parties must be done as a basis for consideration to be stated in the deed. If the PPAT is not

⁷ Salim H.S, *Teknik Pembuatan Akta Pejabat Pembuat Akta Tanah (PPAT)*, Cetakan Kedua (Jakarta: Raja Grafindo Persada, 2016), p. 312.

⁸ Meralda Amala Istighfarin, "Perlindungan Hukum Kreditur Dan Pemilik Jaminan Dalam Pelaksanaan Perjanjian Kredit Dengan Jaminan Tanah Milik Orang Lain", *Acten Journal Law Review* 1, No. 1, (2024): 64-84

⁹ Khafid Setiawan, et.al., "Notaris Dalam Pembuatan Akta Kontrak Yang Berlandaskan Prinsip Kehati-hatian", *Jurnal Ilmu Kenotariatan* 2, No. 2, (2021): 47.

careful in examining important facts, it means that the PPAT is acting carelessly.¹⁰ The principle of PPAT's caution is explained in Article 22 of Government Regulation Number 37 of 1998 that the PPAT Deed must be read/explained to the parties in the presence of at least 2 (two) witnesses before being signed immediately by the parties, witnesses and the PPAT. According to Eddy Susanto Purba, the application of the principle of PPAT's caution in making APHT is by carrying out a certificate check at the local National Land Agency (BPN) Office or the local Land Office where the object is located. Matching all documents with data obtained from the bank as the creditor. In making a deed, of course, all documents must be in accordance and can be accounted for their truth to avoid complicated problems that may arise in the future due to data inconsistencies.¹¹

The stages of granting Mortgage Rights are regulated in Article 10 of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land, namely the granting of Mortgage Rights is carried out by making a Deed of Granting Mortgage Rights by stating the Name and identity of the grantor and holder of the Mortgage Rights, Domicile of the parties, Clear designation of the debt or debts guaranteed, Collateral value, and a clear description of the object of the Mortgage Rights. There are a number of clauses that can be included in the Deed of Granting Mortgage Rights (APHT), namely, First, a promise that limits the authority of the Grantor of Mortgage Rights to rent out the object of the Mortgage Rights; change the form or arrangement of the object of the Mortgage Rights; and not release his rights to the object of the Mortgage Rights without prior written consent from the holder of the Mortgage Rights. Second, a promise that gives authority to the Recipient of the Mortgage Rights to manage, save, empty and/or obtain compensation from the object of the Mortgage Rights This section is the most important section of your article. The analysis or results of the research should clear and concise.

Responsibility of Land Deed Officials in Making Deeds of Granting Mortgage Rights Which Formal Elements Are Not Fulfilled

Discussion Since the enactment of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land, the imposition of collateral rights on land as collateral for credit is carried out by granting Mortgage Rights according to Law Number 4 of 1996. Thus, collateral rights in the form of Mortgages and Credietverbands that use the old regulations, namely those governing Mortgages and Credietverbands, which have been used in the imposition of Mortgage Rights on land are no longer valid. Mortgages are still valid for ships measuring 20 m³ and above and aircraft.¹² However, Law Number 4 of 1996 also provides a way out for

¹⁰ Rifandika Naufal Afif, et.al., "Akibat Hukum Bagi Notaris Terhadap Penyalahgunaan Keadaan Dalam Pembuatan Akta Autentik", *Jurnal Ilmu Kenotariatan* 5, No. 1, (2024): 45-61.

¹¹ Dinda Suryo Febyanti, et.al., "The Legal Consequences of Heirs Not Submitting the Notary Protocol To The Regional Supervisory Board", *Jurnal Ilmu Kenotariatan* 4, No. 2, (2023): 123.

¹² Adrian Sutedi, *Hukum Hak Tanggungan*, (Jakarta: Sinar Grafika, 2012), p. 115-116.

the Mortgage Rights and Power of Attorney to Encumber Mortgage Rights or Install Mortgage (SKMH) which existed before the enactment of Law Number 4 of 1996. This is explained in Article 24 of Law Number 4 of 1996.¹³

In granting Mortgage Rights, the grantor of Mortgage Rights must be present before the PPAT. If for some reason he cannot be present himself, he must appoint another party as his attorney, with a Power of Attorney to Charge Mortgage Rights, abbreviated as SKMHT in the form of an authentic deed. At the time of making the SKMHT and APHT, there must be a belief in the relevant PPAT that the grantor of Mortgage Rights has the authority to carry out legal acts against the object of the Mortgage Rights that is charged, although certainty regarding the possession of such authority is only required at the time the granting of the Mortgage Rights is registered.¹⁴ At the stage of granting the Mortgage Rights by the grantor of the Mortgage Rights to the creditor, the relevant Mortgage Rights have not yet been born.¹⁵ Mortgage Rights are only born when they are recorded in the land book at the Land Office. Therefore, certainty regarding when the Mortgage Rights are registered is very important for creditors.¹⁶

The procedure for registering Mortgage Rights is regulated in Article 13 paragraph (2) and paragraph (3) of the Mortgage Rights Law, namely: After the signing of the Mortgage Rights Granting Deed (APHT) made by the PPAT is carried out by the parties, the PPAT sends the relevant APHT and other documents required by the Land Office. The delivery must be carried out by the relevant PPAT no later than 7 (seven) working days after the signing of the APHT. Mortgage Rights Registration is carried out by the Land Office by making a Mortgage Rights land book and recording it in the land book that is the object of the Mortgage Rights and copying the record on the relevant land rights certificate. The date of the Mortgage Rights land book is the seventh day after the complete receipt of the letters required for registration and if the seventh day falls on a holiday, the relevant land book is dated the following working day.¹⁷

Namely a Mortgage Right Certificate consisting of a copy of the Mortgage Land Book and a copy of the APHT. The Mortgage Right Certificate has the same executorial power as a court decision that has obtained permanent legal force and is valid as a substitute for the Grosse Acte as far as land rights are concerned. One of the characteristics of a Mortgage Right is that its execution is easy and certain, if at

¹³ Ibid., p. 116.

¹⁴ Misbah Imam Soleh Hadi, and Bayu Indra Permana, "Konstruksi Hukum Pembebasan Pajak Penghasilan Terhadap Peralihan Hak Atas Tanah Dalam Pembagian Hak Bersama Waris", *Jurnal Ilmu Kenotariatan* 3, No. 1, (2022): 1-13.

¹⁵ Piters Djajakustio, "Surat Kuasa Membebaskan Hak Tanggungan (SKMHT) Batal Demi Hukum (urgensi dan alternatif membangun konsep baru perlindungan hukum bagi kreditor)", *Jurnal Ilmu Kenotariatan* 4, No. 1, (2023): 25-44.

¹⁶ Dinda Suryo Febyanti, "Kepastian Hukum Pensertipikatan Tanah Secara Massal Melalui Proyek Operasi Nasional Agraria", *Jurnal Ilmu Kenotariatan* 3, No. 1, (2022): 84-94.

¹⁷ Tatiek Sri Djatmiati, *Prinsip Izin Usaha Industri di Indonesia*, Disertasi Program Pasca Sarjana, (Surabaya: Universitas Airlangga, 2002), p. 18.

any time the debtor defaults.¹⁸ Article 20 of the Mortgage Right Law stipulates that if the debtor defaults, then based on the rights of the Mortgage Right holder, namely: If the debtor defaults, then based on: the right of the first Mortgage Right holder to sell the object of the Mortgage Right or the executorial title contained in the Mortgage Right certificate as referred to in Article 14 paragraph (2), the object of the Mortgage Right is sold through a public auction according to the procedures determined in the laws and regulations for the settlement of the Mortgage Right holder's receivables with priority rights over other creditors.¹⁹

The existence of APHT is very important related to the process of issuing Mortgage Certificates. It is the obligation of PPAT to guarantee the authenticity of the APHT that he made. If the PPAT is not careful in checking important facts, it means that the PPAT is acting carelessly.²⁰ This principle of caution is an application of Article 16 paragraph (1) letter a of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary, among others, in carrying out his duties, he must act carefully and thoroughly. The implementation of the principle of caution must be carried out in making a deed by introducing the person appearing, based on his identity shown to the Notary.²¹ Asking, then listening and observing the wishes or desires of the parties (questions and answers); Checking documentary evidence related to the wishes or desires of the parties; Carrying out other obligations related to the implementation of the duties of a Notary.²² In practice, PPAT in carrying out his/her position must act carefully (applying the principle of caution) and pay attention to every procedure in the imposition of Mortgage Rights. Acting carefully means examining all documents and reading the contents of the deed to the parties and witnesses. The principle of caution must be applied so that PPAT is always in the correct procedure and thus the level of public trust in PPAT will also increase.

Based on the case of the position that arose in the Decision of the West Jakarta District Court Number 1003/Pdt.G/2019/PN.Jkt.Brt, it was found that in applying the principle of caution of PPAT, Notary IRW as PPAT in carrying out the process of encumbrance of Mortgage Rights did not work carefully or did not apply the principle of caution. Notary IRW as PPAT should first match all existing documents with the documents provided by the creditor (in this case the bank), including matching the

¹⁸ Bayu Indra Permana, et.al., "Responsibility of Notary for Registered Private Deed in the Perspective of Law of Evidence", *Jurnal Justiciabelen* 7, No. 1, (2024): 66-75

¹⁹ Ister Angelia, "Kedudukan Hukum Notaris Merangkap Jabatan Sebagai Arbiter Ditinjau Dari Undang-Undang Jabatan Notaris", *Jurnal Ilmu Kenotariatan* 5, No. 2, (2024): 157.

²⁰ Malik Hariyanto, et.al., "Implementation of the Article 32 of Government Regulation Number 24 of 2016 Concerning Land Deed Official's Honorarium", *Jurnal Ilmu Kenotariatan* 5, No. 2, (2024):117.

²¹ Abdul Talib, et.al., "Authority and Power of the Law Relating to Cyber Deed Notary in Indonesia Era Industrial Revolution 4.0", *International Journal of Engineering and Advanced Technology* 9, No. 1, (2019): 974-952

²² Habib Adjie, *Hukum Notaris Indonesia* (Tafsir Tematik Terhadap Undang-Undang Nomor 30 Tahun 2004 Tentang Jabatan Notaris), (Bandung: Refika Aditama, 2014), p. 35.

collateral object for the loan contained in the Credit Agreement. Thus, the identity of the land rights contained in the Working Capital Credit Facility Agreement with the APHT will be the same and there will be no errors in writing the identity of the land rights as collateral for the loan.²³

One of the efforts that can be made by the PPAT is to make improvements to the Deed of Granting of Mortgage Rights dated September 18, 2014, Number 311/2014, which was made before Notary IRW as PPAT along with related documents including Mortgage Certificate Number 08961/2014 to the local Land Office and attach a letter of application for improvement of the Mortgage burden. Another effort that can be made is to file for the cancellation of the APHT based on a court decision made by the Land Rights and Land Registration Section on the certificate that is the object of collateral for the land, 18 and in order to increase the authentic value of a deed, the APHT can contain promises if the APHT has administrative defects then null and void.²⁴

Officials who violate or are negligent in fulfilling the provisions as referred to in Article 11 paragraph (1), Article 13 paragraph (2), and Article 15 paragraph (1) of this Law and/or its implementing regulations may be subject to administrative sanctions, in the form of verbal or written warnings, temporary or permanent dismissal from office.²⁵ PPAT may be sued to pay compensation to the injured party. Article 55 of the Regulation of the Head of the Indonesian Land Agency Number 1 of 2006 also indicates the personal responsibility of PPAT for losses arising from the making of PPAT deeds, "PPAT is personally responsible for the implementation of his duties and positions in each making of deeds." Therefore, the role of PPAT in making APHT for creditors and debtors is to bridge the interests of debtors with the interests of creditors so that both parties get a sense of justice, benefit, and legal certainty in binding the Mortgage Right guarantee.

VI. CONCLUSION

PPAT must apply the principle of caution and pay attention to the procedures in making APHT, as per Article 10 of the Mortgage Law. If PPAT is not careful in checking important facts, it means that PPAT violates the Principle of PPAT caution only explained in Article 22 of PPAT that the PPAT Deed must be read/explained to the parties in the presence of at least 2 (two) witnesses before being signed immediately by the parties, witnesses and PPAT.

PPAT is personally responsible for the implementation of his duties and positions in every deed, including making APHT. Therefore, the role of PPAT in making APHT for creditors and debtors is to bridge the interests of debtors with the

²³ Ayu Sulviani Mega Saputri, et.al., "Tinjauan Yuridis Terhadap Pembatalan Sertifikat Hak Atas Tanah Karena Cacat Hukum," *Krisna Law* 3, No. 2 (2021): 1–10.

²⁴ Fasatama Prakasa, et.al., "Pembatalan Sertifikat Hak Milik Dibeberikan Hak Tanggungan (Putusan Mahkamah Agung Nomor 1138 K/Pdt/2012)," *Recital Review* 2, No. 1 (2020): 39–53

²⁵ Bayu Indra Permana, et.al., "Kedudukan Pembagian Hak Bersama Waris Sebagai Peralihan Harta Yang Dibeberikan Pajak Penghasilan", *Jurnal Mimbar Yustisia* 7, No. 1, (2023):44-62.

interests of creditors so that both parties get a sense of justice, benefit, and legal certainty in binding the Mortgage Right guarantee so that there are no legal defects.

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