

Legal Certainty for Creditors on Subsidized Home Ownership Loan Collateral Based on Law Number 4 of 1996 Concerning Mortgage Rights

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Received : 01 October - 2025

Accepted : 03 November - 2025

Published online : 04 November - 2025

Abstract

Subsidized Mortgage (KPR) serves as a crucial government policy instrument aimed at fulfilling the housing needs of low-income communities. This financing scheme involves a credit agreement between banks and debtors, where the main collateral is secured through Mortgage Rights over land, formalized via a Deed of Granting Mortgage Rights (APHT). However, in practice, delays in executing APHT are common, prompting banks to initially use a Power of Attorney to Encumber Mortgage Rights (SKMHT). This practice raises concerns regarding legal certainty for creditors, especially when debtors default while the mortgage rights have not been formally registered. Such issues are reflected in the high rate of Non-Performing Loans (NPL) and unresolved certificate issuance cases. This research aims to analyze the legal regulation of collateral in Subsidized Mortgages based on Law Number 4 of 1996 concerning Mortgage Rights and to examine the juridical implications for creditors when guarantees have not been fully established. The study employs a normative legal research method with a juridical-normative approach, utilizing primary, secondary, and tertiary legal materials analyzed qualitatively through legal identification and doctrinal review. The findings indicate that while Mortgage Rights provide preferential legal standing for creditors, implementation challenges persist due to administrative inefficiencies, delays by Notaries or Land Deed Officials (PPAT), and complications from developers. Although the law grants time flexibility for SKMHT in subsidized mortgage schemes, it inadvertently creates potential legal uncertainty. Therefore, strengthening regulatory enforcement, expediting APHT processes, and enhancing oversight mechanisms are imperative to ensure legal certainty and protection for all stakeholders.

Keywords: Creditor, Guarantee, Legal Certainty, Mortgage Rights, Subsidized Mortgage.

1. Introduction

Housing and urban development aims to satisfy a fundamental human need and enhance the quality of living conditions, while also guiding regional expansion and boosting economic endeavors in line with the principles outlined in Article 33 paragraph (4) of the 1945 Constitution of Indonesia. This study highlights the significance of structuring the country's economy based on economic democracy, fostering collaboration, equitable productivity, sustainability, environmental awareness, self-reliance, and ensuring a harmonious advancement to enhance societal well-being. Economic progress is essential for achieving fair and prosperous social welfare in accordance with Pancasila and the 1945 Constitution of Indonesia. With the growth of development activities, the need for funding also increases, with a significant portion coming from borrowing.



The rapid growth of development activities has led to an increasing demand for financial resources, much of which relies on borrowing. Adequate funding is therefore essential to sustain economic development, involving both governmental and private participation. For individuals, housing represents not only a basic necessity alongside food and clothing but also a means of ensuring safety, dignity, and stability. As the population continues to grow, housing demand also rises, encouraging many to purchase homes in planned developments rather than building independently (Dewi, 2021).

The provision of housing by the government for the community through granting subsidized mortgages (KPR) to realize the availability of affordable shelter for citizens who need it, but also still provides benefits for developers. Subsidized housing refers to residences designed for individuals with low incomes. It is regulated by the government, and potential buyers are restricted based on their income levels. Subsidized Mortgage, also known as Subsidized Home Ownership Credit/Financing, involves receiving government assistance or benefits to facilitate the purchase of a home. This support may come in the form of low-interest loans, long-term financing, or subsidies provided by both conventional and Sharia-compliant banks, as outlined in Article 1, paragraph 1 of Regulation Number 21 of 2016 from the Ministry of Public Works and Public Housing.

The concept of collateral arises because of needs in banking practice in terms of credit or financing applications to reduce risk. Collateral in a debt agreement is something given by the debtor to the creditor as an effort to provide assurance of the debt payment obligation and arises because of an agreement. Such incomplete collateral binding weakens the legal position of creditors, as they lose both preferential and executorial rights over the object of security. In the context of banking, collateral serves as a legal safeguard ensuring repayment in the event of default (Purwaningsih, 2019). Collateral agreements are accessory to the main credit agreement, meaning they depend on the existence of the principal debt (Hidayah & Fidhayanti, 2022). When collateral binding is incomplete, the creditor's legal protection diminishes, exposing banks to higher risk and potential financial loss. The 1996 Mortgage Rights Law regulates the use of land as collateral, focusing on land and associated items. It outlines Mortgage Rights as assurances tied to land ownership, with or without additional assets, to resolve particular debts and give preference to specific lenders. Mortgage Rights are considered supplementary to a specific receivable, based on a debt or other agreement, and come into effect upon the existence of the guaranteed receivable.

In practice, however, these provisions are often not fully implemented in the subsidized mortgage (KPR) system. Many cases show that the conversion of SKMHT to APHT is not completed within the required timeframe, resulting in legal uncertainty for creditors, as the collateral that should provide legal security does not yet hold full legal force. This problem may arise due to several factors, including delays by notaries or land deed officials in finalizing the documentation, incomplete subdivision of land titles by developers, or failure to transfer land ownership from developers to consumers (debtors) who receive the subsidized mortgage facility.

Empirically, the rising number of problematic mortgages can be observed in data published by the Financial Services Authority (OJK), which reported total NPLs in housing credit reaching IDR 17.12 trillion as of June 2023. Among the contributors, Bank Tabungan Negara (BTN), Indonesia's primary bank for subsidized mortgages, recorded problematic mortgage loans amounting to IDR 7.14 trillion or 2.94% of total outstanding mortgages worth IDR 243 trillion (Hutauruk & Mayasari, 2023). Furthermore, the Indonesian Ombudsman identified more than 600 BTN debtors who had not yet received their land certificates despite fully repaying their mortgages. The Ombudsman attributed these issues to both internal

factors, such as administrative delays and poor coordination, and external factors, including missing developers, unresolved parent title splits, and lost land certificates (Prilatama, 2023).

Furthermore, BTN is serious about handling customer complaints related to delays in certificate delivery by forming a Certificate Settlement Task Force Team. The special team under the Credit Operation Division (COD) is tasked with profiling for efforts to accelerate certificate completion, as well as freezing Notaries/PPAT who do not perform well. In addition to forming a Task Force Team, BTN has also made a Cooperation Agreement (PKS) related to accelerating certificate completion with the Ministry of ATR/BPN (Setiawan, 2023). Based on the above background, this study has two main objectives. First, to analyze the legal framework governing the use of Mortgage Rights as collateral in subsidized mortgage credit as regulated under Law No. 4 of 1996 on Mortgage Rights. Second, to examine the legal application and juridical implications faced by creditors when the collateral provided in subsidized mortgage programs has not yet been perfected through the establishment of Mortgage Rights. This analysis is essential to understand the extent of legal certainty and creditor protection within Indonesia's housing finance practices.

2. Literature Review

2.1. Theoretical Framework

2.1.1. Theory of Legal Certainty

Understanding of legal certainty can be divided into three, namely (Sudira et al., 2024):

- 1) Certainty in law (*Rechtssicherheit, security juridique, seguranca juridica*). This means in law (legislation) it is coherent, clear and does not contain ambiguity. This is in line with the eight characteristics of good law according to Lon L. Fuller. Certainty in law is understood as a static dimension of law because it relates to the quality that must be possessed by law (legislation).
- 2) Certainty through law means that law can be a means to create certainty or guarantee the existence of rights owned by a person or certain group. Certainty through law is a dynamic dimension of law because it relates to the functioning of law to guarantee human rights.
- 3) Legal certainty as certainty before the law, namely law contains provisions that are procedural in nature both through administrative efforts and courts to obtain their rights

2.1.2. Theory of Economic Development

The existence of law is very important to regulate economic activities so that they run in an orderly and fair manner, while the economy also influences the development of the law itself. In this context, the theory of law and economics (economic analysis of law) developed by Richard Posner provides a new perspective in understanding the relationship between law and economics. This theory analyzes law from an economic point of view, with the assumption that individuals act rationally to maximize profits and minimize losses. According to Posner as quoted by Sudira et al. (2024), law must be designed in such a way that it can create the right incentives for efficient economic behavior.

The Relevance of Richard Posner's Theory in the Development of Economic Law in Indonesia is very significant, considering that this theory provides a pragmatic and economic efficiency-based approach to the arrangement of regulations and legal policies. The economic approach to law promoted by Posner can help Indonesia in formulating legal policies that are not only fair and predictable, but also effective in creating the right economic incentives. By

understanding law as a tool to achieve efficiency, policymakers can design regulations that encourage economic growth and reduce unnecessary social costs (Sudira et al., 2024).

The application of Richard Posner's theory in the development of economic law in Indonesia promises a more modern and adaptive framework, capable of answering the challenges of globalization and rapid economic change. Thus, economic law developed based on the principles of efficiency and welfare can play a more effective role in supporting sustainable economic growth and improving the welfare of Indonesian society as a whole (Sudira et al., 2024). The need to build the Indonesian economy with the concept of people's economy, also needs to create a development strategy by involving more people in various fields of economics and trade (Syarofi, 2016).

2.1.3. Theory of Agreement

The juridical and conceptual theory of agreements includes several views, one of which is the theory based on the performance of both parties, which assesses the agreement from the implementation of the obligations of the parties. In banking practice, there are two forms of credit agreements, namely agreements under hand and authentic deeds made before a notary. The parties to the agreement are the debtor (credit recipient) and the creditor (lender), both of which are legal subjects that can be in the form of natural persons (*natuurlijke persoon*) or legal entities (*rechtspersoon*).

According to Article 1381 of the Civil Code, obligations can end in ten ways, including: payment, debt renewal, compensation, release, cancellation, or over time. Full payment becomes a form of fulfillment of the debtor's performance of all its obligations. Subrogation (Article 1400 of the Civil Code) occurs when a third party replaces the creditor's rights after paying off the debtor's debt, either by direct agreement or because of a loan for payment. Novation (Article 1413 of the Civil Code) is a debt renewal by making a new agreement that replaces the old agreement. Compensation (Article 1425 of the Civil Code) occurs when two parties owe each other and agree to eliminate debt through reciprocal calculation, for example the bank offsets the collateral value against the debtor's debt.

2.2. Conceptual Framework

2.2.1. Bank

In the Indonesian banking system nowadays, various types of banks are governed by the Banking Law. The primary functions of banks, as financial entities, involve gathering funds from the general population and disbursing them, which are consistent across all banks. The type of banking is also divided into how to determine the selling price and purchase price or in other words how to seek profit (Hasan, 2014). A successful bank is one that is able to effectively fulfill its duties. In simpler terms, a successful bank is one that can establish and uphold trust from the public, can facilitate financial transactions, can assist in the flow of payments, and can assist the government in executing various policies, particularly monetary policies. Through performing these duties, Banks are anticipated to offer quality service to society and contribute positively to the economy overall (Yuhelson, 2018). As stated in Article 29, paragraphs (2) and (3) of the Banking Law amended in the PPSK Law, banks are required to operate effectively by having adequate capital, managing assets well, operating based on precautionary measures, achieving profits for sustainability, and maintaining liquidity in line with banking prudence principles.

2.2.2. Credit Guarantee

The concept of guarantee comes from the Dutch words *zekerheid* or *cautie*, referring to a debtor's assurance to repay their debts to the creditor by offering valuable objects as collateral. This ensures that the creditor will receive payment for the loan or debt granted to the debtor (Usman, 2008). According to Article 1132 of the Civil Code, when objects mentioned in Article 1131 are used as collateral, creditors have joint rights to these objects and the funds from their sale are distributed among creditors based on the amount they are owed, unless there are specific circumstances that prioritize one creditor over another. Based on Afhami (2023), credit guarantee function grants creditors the authority to collect payment from the sale of collateral if the debtor fails to repay the debt on time. It ensures legal assurance to the bank that the credit will be recovered through the execution of banking credit collateral. This element is crucial in financial analysis, as it involves reviewing assets provided by the debtor to manage and cover their debt to the creditor, fostering trust between the parties in credit agreements or other borrowing arrangements.

2.2.3. Mortgage Rights on Land

The concept of mortgage rights as defined in Law Number 4 of 1996 refers to a type of guarantee placed on land ownership, including any additional elements attached to the land, to secure the repayment of specific debts and provide priority to creditors over others. In the National Land Law, Mortgage Rights are the exclusive rights that guarantee land ownership. These rights, as defined by the UUPA, can be attached to Ownership Rights, Cultivation Rights, and Building Use Rights. The regulations governing mortgage rights are outlined in Article 51 of the UUPA and further elaborated in Law Number 4 of 1996, which deals with Mortgage Rights on Land and associated objects. Land rights refer to the entitlements granted to individuals allowing them to utilize or benefit from a particular piece of land. These rights are distinct from land use rights. The fundamental guidelines for land rights are outlined in Article 4 section 1 of UUPA, stipulating that the state holds controlling rights over land as mentioned in Article 2. According to these provisions, various forms of rights to land, known as land, can be allocated to and possessed by individuals, either individually or jointly with others and legal entities.

2.2.4. Mortgage (KPR)

In accordance with Article 11 Paragraph 11 of the Banking Law, Credit is defined as the supply of funds or liabilities that are treated as such, stemming from a loan contract or agreement between a financial institution and a borrower who is obligated to repay the amount borrowed with interest within a specified timeframe. Credit is extended based on confidence, indicating that issuing credit essentially involves offering trust to clients (Nahdhah, 2022). Commercial banks in Indonesia primarily focus on credit activities and rely on fundraising from the community for two main reasons: (1) The interest earned from credit is a major revenue stream (2) The majority of credit funds originate from deposits collected from the community by the banks. Paragraph 2 of Article 1 in the Permen PUPR No 20/PRT/M/2019 focuses on the provision of assistance and support for low-income communities in acquiring homes. It mentions the Subsidized Mortgage, which is a form of home ownership financing that involves government assistance in the form of affordable long-term funds and subsidies for home acquisition. This support is provided by the Implementing Bank, following both conventional and sharia principles.

2.2.5. Notary

The term Notary originates from the Latin word "*notarius*", which referred to Roman individuals responsible for writing tasks in the past. Some believe that the name Notary is derived from the term "*nota literaria*", which signifies a symbol or character indicating a word. The primary role of a Notary is to document and record various acts, events, and other matters as requested by individuals seeking legal assurance over their actions or legal events (Parapat et al., 2022). In accordance with Article 2 of Law Number 30 of 2004 about the role of Notaries, it is stated that the appointment and removal of Notaries is done by the Minister of Law and Human Rights of Indonesia. This means that Notaries hold a position of authority that serves the public interest and is legally binding for all parties involved (Parapat et al., 2022).

2.2.6. Authentic Deed

In accordance with Article 1868 of the Civil Code, authentic deeds are defined as documents created in the prescribed format by authorized public officials at the location of their creation. The concept of authentic deeds is expanded upon in Article 1870 of the Civil Code, stating that such documents offer indisputable proof of the information they contain for the parties involved. Thus, a legal document created by a Notary serves as a subject of law, providing legal validity and protection to parties mentioned within its contents. Official documents adhere to the idea that they prove themselves, meaning that as long as a document meets certain criteria, it is considered valid. In case of any dispute, the burden of proof lies with the party denying the authenticity of the document. This differs from unofficial documents, where the burden of proof lies with the party presenting the document (Parapat et al., 2022).

3. Methods

3.1. Type of Research

This study is classified as normative legal research, employing the juridical-normative method as the chosen approach. The method combines both normative and doctrinal legal research techniques to address research issues by analyzing existing secondary data sources (Soekanto & Mamudji, 2014). With the following steps:

- 1) Identifying the legal sources that form the basis of the problem formulation.
- 2) Identifying and inventorying normative provisions from primary legal materials.
- 3) Comprehensively and analytically examining primary legal materials and secondary legal materials to discuss the problems that have been formulated.

3.2. Data and Data Sources

This study employs primary, secondary, and tertiary legal materials. Primary legal materials consist of statutory instruments forming the normative basis of the research, including the 1945 Constitution of the Republic of Indonesia and several laws governing financial, housing, notarial, and banking sectors, as well as their derivative regulations such as Government Regulation No. 12 of 2021 and Government Regulation No. 24 of 2016. Secondary legal materials encompass scholarly writings, journal articles, research findings, and other sources interpreting the primary materials. Meanwhile, tertiary legal materials, including dictionaries and encyclopedias, serve as auxiliary references that support the understanding of both primary and secondary materials.

3.3. Data Analysis

The legal materials from the processing are analyzed qualitatively, then described by explaining, elaborating and describing problems regarding legal certainty over subsidized mortgage credit guarantees based on Law Number 6 of 1996 concerning Mortgage Rights.

4. Results and Discussion

4.1. Legal Regulation of Subsidized Mortgage (KPR) Credit Guarantees According to the Mortgage Rights Law

a) Legal Basis of Banking and Credit Regulation

In Indonesia, the banking sector functions in accordance with economic democracy and the principle of caution. This entails that banks in Indonesia prioritize the application of economic democracy principles rooted in Pancasila and the 1945 Constitution. As stated in Section 8 of the Banking Law, banks are required to offer credit or financing that complies with Sharia Principles following a comprehensive evaluation, sincere intentions, and the borrower's capacity to repay the debt according to the agreed terms. Article 12 of the Banking Law states that the Government, in collaboration with Bank Indonesia, can work with commercial banks to support programs aimed at raising the standard of living by empowering cooperatives and small to medium enterprises.

Article (1) sections b and c of the Decree issued by the Directors of Bank Indonesia on February 28, 1991 regarding Credit Guarantees, describe credit guarantees as the bank's belief in the debtor's capability to repay the loan as per the agreed conditions. Collateral is interpreted as a form of material or financial security provided by the debtor to ensure repayment in the event of default. Furthermore, according to Regulation No. 42/POJK.03/2017 from the Financial Services Authority, commercial banks must create and adhere to credit or financing policies that are in line with OJK regulations. These policies must cover, among other aspects, the formulation of written credit agreements, careful assessment of the debtor's capacity and creditworthiness, clear procedural guidelines, transparent information disclosure, non-discriminatory lending practices, and the inclusion of dispute resolution mechanisms.

In line with Article 51 of UUPA, the regulation of mortgage rights is further detailed in the Law. Mortgage Rights stand as the sole rights guaranteed on land according to National Land Law. UUPA dictates that Mortgage Rights can be enforced on Ownership Rights (Article 25), Cultivation Rights (Article 33), and Building Use Rights (Article 39). PP Number 18 of 2021 on Management Rights, Land Rights, Condominium Units, and Land Registration specifies that Land Rights are derived from legal relationships between right holders and Land, which encompass the control, ownership, usage, and exploitation of Land, as well as the maintenance of Land, the space above it, and/or the space below it.

b) Legal Framework for Housing Subsidies

In relation to the accessibility of homes for Low-Income Communities (MBR), who are communities with limited purchasing power and rely on government assistance to acquire homes. According to Article 54 of the Housing and Settlement Areas Law, the Government is required to fulfill the housing demands of MBR by facilitating housing development and acquisition through sustainable planning programs. One of these support initiatives could involve a subsidy for home acquisition (Paragraph 3 letter (a)), where the ease mentioned in paragraph (3) letter a is specified in a credit or financing agreement for MBR's home purchase (Paragraph 4).

Previously in accordance with Regulation of the State Minister for Public Housing Number 11 of 2010 Concerning the Provision of Housing and Settlements with Support of Housing Financing Assistance in the Form of Housing Subsidy Facilities Through Home Ownership Credit/Financing which has been amended through Regulation of the State Minister for Public Housing of the Republic of Indonesia Number 06 of 2011 concerning the Second Amendment to that regulation, it is determined that Simple Healthy Home Ownership Credit, hereinafter referred to as KPRSH, is credit or financing issued by credit or financing issuing institutions which includes Subsidized Mortgages, Subsidized KPRS/KPRS Micro, or Subsidized Simple Condominium Unit Mortgages, both conventional and with sharia principles intended for lower middle income communities including low-income communities (Article 1 Paragraph (1)). Furthermore, the Implementing Bank which is a credit or financing issuing institution that cooperates with the Ministry of Public Housing in the context of implementing the KPRSH program which is preceded by an Operational Cooperation Agreement.

The Regulation of the Minister of Public Works and Public Housing of the Republic of Indonesia Number 20/PRT/M/2019 on Facilities and Assistance for Home Ownership for Low-Income Communities constitutes the legal basis outlining the implementation schemes and eligibility criteria for home ownership assistance. Article 3 of this regulation specifies that facilitation or assistance for MBR is provided through low-cost, long-term funding mechanisms and home ownership subsidies. In relation to the legal guarantee mechanism, Mortgage Rights may be established over debts arising from one or more legal relationships. The principle of indivisibility applies to Mortgage Rights, meaning that the right encumbers the entire object until the secured obligation is fully discharged. However, where stipulated in the Deed of Granting Mortgage Rights, repayment by installments corresponding to the proportional value of each encumbered land title may result in partial release, leaving the Mortgage Rights attached only to the remaining property as security for the outstanding balance.

c) Mortgage Rights Regulation

Mortgage Rights decide the specific types of land rights that can be utilized as collateral without requiring involvement of various guarantee organizations. It is important for the institution overseeing land rights to be consistent and adhere to property guarantee laws, ensuring that the rights of property owners are preserved. The Grantor of Mortgage Rights is the person or entity authorized to take legal action regarding a particular mortgage object, while the holder of Mortgage Rights is the party owed by an individual or entity. If the person granting Mortgage Rights decides to register them, it will be done after making a commitment to use those rights as collateral to pay off specific debts. This commitment is included in the debt agreement or another relevant agreement. The type of credit agreement required to establish this debt relationship may vary depending on the legal requirements. Additionally, the official procedure for granting Mortgage Rights includes drafting a Deed of Granting Mortgage Rights by a designated Land Deed Making Official in a specific area. Ownership Rights, Cultivation Rights, and Building Use Rights are examples of Land Rights that can serve as collateral for Mortgage Rights as specified in the Mortgage Rights Law.

Under Law No. 4/1996, mortgage rights are not limited to just land rights, but can also extend to buildings, plants, and other structures that are part of the land, as outlined in Article 4 paragraph (4). These objects must be owned by the land rights holder and specified in the mortgage agreement. The scope of mortgage rights can also extend to future objects that will be part of the land. This means that buildings, plants, and works like temples, statues, gates, and reliefs can also be encumbered with mortgage rights along with the land. This includes

structures both above and below the ground, such as basements, that are connected to the land rights.

Government Regulation No. 18 of 2021 sets out the legal basis for land rights that may serve as collateral. Article 30 paragraph (1) provides that cultivation rights may be encumbered with mortgage rights; Article 45 paragraph (1) extends the same to building use rights; and Article 60 paragraph (1) allows use rights with a specified duration to be used as collateral under mortgage rights. Conversely, perpetual use rights cannot be encumbered, transferred, or converted. As per Article 1868 of the Civil Code, an authentic document is created in the correct legal format by or in the presence of a qualified public officer. According to Article 8 paragraph (2) of Law No. 4 of 1996, the right to act on mortgage rights must be present and documented at the moment of registration. As mortgage rights take effect upon registration, the grantor must demonstrate valid authority when the land book of the mortgage rights is created.

When mortgage rights are registered by the Land Office, the object of the rights must already be registered under the grantor's name. This also means that when the Deed of Granting Mortgage Rights (APHT) is created, the object of the rights does not necessarily have to be registered under the grantor's name yet. Under Law No. 4/1996, the Land Deed Making Official (PPAT) simply needs to have faith in the grantor's ability to act on the mortgage rights object. The law also clarifies that trust from the Notary or PPAT is necessary when drafting the Power of Attorney to Encumber Mortgage Rights (SKMHT) and Deed of Granting Mortgage Rights. The grantor's authority to take legal action on the encumbered object must be acknowledged at the time of registration, even if certainty regarding this authority is not initially required.

Pursuant to Article 15 of the Notary Position Law, Notaries are vested with the authority to prepare authentic deeds for all acts, agreements, and determinations mandated by law or requested by the parties. They are responsible for ensuring the authenticity and certainty of the deed's date, safekeeping, and issuance of grosse, copies, and excerpts, provided such duties are not conferred upon other officials. Failure to meet these responsibilities could lead to disciplinary actions such as receiving written notices or being terminated from your position. It could also make the Notary legally responsible for any harm caused to individuals affected by the violation. The form and substance of the Deed of Granting Mortgage Rights (APHT) are governed by Regulation of the State Minister of Agrarian Affairs/Head of the National Land Agency No. 3 of 1996, in conjunction with Regulation No. 8 of 2012, which amends the implementation provisions of Government Regulation No. 24 of 1997 on Land Registration. Under Article 11 of Law No. 4 of 1996, the APHT must contain certain mandatory elements; failure to include them renders the deed void by law. This rule reflects the principle of specialty inherent in the establishment of mortgage rights.

There are two methods to grant mortgage rights based on a Power of Attorney to Encumber Mortgage Rights. Firstly, the grantor can directly sign the Deed of Granting Mortgage Rights (APHT) before the PPAT. Alternatively, mortgage rights can be encumbered using a Power of Attorney to Encumber Mortgage Rights (SKMHT) if the grantor is unable to be present before the PPAT. Using mortgage rights as a form of collateral to repay debts begins with the issuance of these rights by the property owner in the presence of a notary public. The Deed of Granting Mortgage Rights is a legal document prepared by the notary public that assigns these rights to creditors to ensure repayment of debts.

At times, if the person in debt or the third party who owns the collateral cannot be present for the Deed of Granting Mortgage Rights (APHT), they can authorize someone else with a Power of Attorney to encumber the mortgage rights. When granting mortgage rights,

the individual must usually be present before the PPAT, but if this is not possible, they can designate a proxy with a Power of Attorney to encumber the mortgage rights (SKMHT) through an authentic deed. The Power of Attorney to Encumber Mortgage Rights (SKMHT) is a solution for cases where the grantor is unable to attend the APHT process and must be directly granted by the grantor. This power of attorney will then lead to the creation of the Deed of Granting Mortgage Rights (APHT) by the PPAT (Usman, 2008).

According to the General Explanation of Law No. 4/1996, it is recommended that mortgage rights be given by the party granting the rights. However, in cases where the grantor is unable to be present, the use of a Power of Attorney for Mortgage Rights (SKMHT) is allowed. According to Article 10, paragraph (1) of the Regulation of the Minister of Agrarian Affairs/Head of BPN No. 3/1997, it is required that parties involved in legal transactions must be present during the signing of deeds, or be represented by authorized individuals with proper documentation.

Pursuant to Article 15 of Law Number 4 of 1996, the establishment of a Power of Attorney to Encumber Mortgage Rights (SKMHT) is required in connection with the granting of mortgage rights. The SKMHT may only be utilized in situations where the grantor of the mortgage rights is unable to attend the execution of the Deed of Granting Mortgage Rights (APHT) before the Land Deed Official (PPAT). In such cases, the grantor is entitled to appoint a proxy to represent and act on their behalf in granting the mortgage rights. The extent of this authority is expressly set forth within the content of the SKMHT. The substance of the Power of Attorney to Encumber Mortgage Rights (SKMHT) is the granting of power, namely: to carry out or organize one particular matter, in this case namely "encumbering mortgage rights" or only specifically one act to encumber mortgage rights into the form of a Deed of Granting Mortgage Rights (APHT) (Usman, 2008). The SKMHT is a special legal document that allows the holder of mortgage rights or their authorized representative to act on behalf of the grantor before the PPAT in order to assist with the granting or imposition of mortgage rights. This is necessary when the grantor is unable to personally appear before the PPAT to carry out the transaction. In such cases, the grantor can authorize the granting or imposition of mortgage rights through a special power of attorney, provided it is deemed "truly necessary". This authorization must be given directly by the grantor.

The purpose of utilizing a Power of Attorney for Encumbering Mortgage Rights (SKMHT) is specifically for encumbering mortgage rights and not for any other purposes. It is not mandatory for the process of imposing mortgage rights, as the essential requirement is the granting and registration of mortgage rights. The Power of Attorney for Encumbering Mortgage Rights (SKMHT) primarily authorizes the creation of the Deed of Granting Mortgage Rights (APHT). Once the Deed of Granting Mortgage Rights (APHT) has been established, the Power of Attorney for Encumbering Mortgage Rights (SKMHT) becomes unnecessary as it has fulfilled its purpose. This document serves as a channel for granting mortgage rights when the grantor is unable to be present during the creation of the Deed of Granting Mortgage Rights (APHT) before the PPAT, allowing the grantor to authorize their representation through the Power of Attorney for Encumbering Mortgage Rights (SKMHT). Consequently, it is utilized as a foundation for generating the Deed of Granting Mortgage Rights (APHT) in cases where the grantor is unable to personally attend before the PPAT (Usman, 2008).

The Minister of Agrarian Affairs and Spatial Planning/National Land Agency of Indonesia Regulation No. 22 of 2017 offers additional details on Article 15, paragraph (5) of the Mortgage Rights Law concerning the duration of the Power of Attorney for Encumbering Mortgage Rights (SKMHT). The SKMHT, which serves as security for credit repayment,

remains effective until the main agreement for credit/financing/loans to Micro and Small Businesses (MSEs) expires, as well as for financing the procurement of housing such as core houses, simple houses, condominiums, or ready-to-build plots with certain area limits, and for other productive credit with a ceiling of up to Rp200 million. Article 3 of that regulation also stipulates that SKMHT for land that is still in the certification process is valid for three months for micro/small business financing and shop houses by MSEs.

The clause aligns with Article 6 of the Mortgage Rights Law, allowing the first Mortgage Rights holder to auction off the collateral if the debtor violates the contract. Additionally, Article 14 states that the Mortgage Rights Certificate holds the same enforceable power as a court ruling with lasting legal authority. In addition, Article 12A of the Banking Law (as amended through the PPSK Law) provides authority for banks to execute collateral, either through auction or voluntary surrender, with the obligation to return the excess proceeds of sale to the debtor after deducting related costs. Furthermore, Article 20 of the Mortgage Rights Law regulates the execution procedure, including the possibility of under-hand sales by agreement of the parties if deemed more advantageous, provided it has been announced to the public and there are no objections within one month. If the debtor pays off their debt before the auction is carried out, the execution can be cancelled. Any agreement contrary to these provisions is declared null and void by law, thus ensuring legal certainty for creditors as holders of Mortgage Rights.

4.2. Application of Law for Creditors Regarding Subsidized Mortgage (KPR) Credit Guarantees That Have Not Been Installed with Mortgage Rights

a) Establishment of Mortgage Rights

In civil law Article 1233 of the Civil Code, legislation and agreements create obligations (*verbinten*) which means binding and creating legal relations because they are caused by agreements and laws. Between agreements (*overeenkomst*) and obligations (*verbinten*) have a relationship, where agreements create obligations (Syahputra & Khalid, 2012). The relationship between banks and customers has principles, including (Sobana, 2016):

1) Fiduciary relation

Symons Jr. argues that the interaction between banks and customers can be likened to a transaction between a borrower and a lender, highlighting the limited commitment involved in the form of an absolute commitment from the borrower to reimburse a specific sum of money at a designated time to the lender who has supplied the funds. The explanation of Article 20A of the Banking Law in UUPPSK confirms that banks work mainly with public funds deposited on the basis of trust. This means that customers entrust their funds to the bank with the belief that the bank will be able to return the deposits in accordance with the agreement. On the same basis of trust, banks also provide credit to customers with the belief that customers will be able to return the loan in accordance with the agreement.

2) Confidential relation

The bank's obligation to maintain the confidentiality of customers and their deposits is both explicit and implicit, although in practice it is often not mentioned directly in the agreement. This confidentiality principle protects the entire relationship between banks and customers, both as debtors and creditors. Banks have a duty (duty of secrecy) to keep information related to customer accounts and financial conditions. The bank's binding to the obligation to keep customer secrets shows that the relationship between the two is not only based on trust, but also on the principle of confidentiality which is an important foundation in banking activities (Christiani, 2010).

3) Prudential relation

According to Article 20A of the Banking Law in the PPSK Law, paragraph (1) mandates that Banks must incorporate prudential principles, including risk management, into their business operations. Additionally, in paragraph (2), Banks are mandated to establish internal guidelines for implementing these prudential principles. When conducting their business operations, banks encounter credit risk, which includes risks stemming from the inability of other parties (debtors) to meet their obligations to the bank, such as credit risk from debtor default, credit concentration risk, counterparty credit risk, and settlement risk.

Regulation Number 18/POJK.03/2016 by the Financial Services Authority discusses the concept of risk in the context of commercial banks. It emphasizes that the banking industry is inherently exposed to various risks due to its role as a financial intermediary. With the evolving landscape of both external and internal factors, the risks faced by banks have become more intricate. Thus, banks are urged to embrace Risk Management practices to navigate the challenges of the banking sector effectively. The guarantee for bank credit provision essentially functions to guarantee certainty for the repayment of the debtor's debt if the debtor breaches contract or is declared bankrupt. With the guarantee for credit provision, it will provide guarantee protection, both for the security and legal certainty of the creditor that their credit will still return even though the debtor customer defaults, namely by executing the relevant bank credit collateral object.

Financial institutions are required to conduct a comprehensive assessment of a borrower's character, ability to repay, financial resources, security, and business outlook when applying the banking principle of prudence. The five Cs of credit analysis, which include character, capacity, capital, collateral, and business prospects, must be thoroughly considered. The 5C principle, which involves character, capacity, capital, economic conditions, and collateral, acts as a crucial framework for evaluating creditworthiness. Character pertains to the moral integrity and behavioral consistency of the debtor, which must be verified prior to the conclusion of a credit agreement. Capacity denotes the prospective debtor's ability to fulfill repayment obligations. Capital signifies the financial resources owned by the debtor, as capital adequacy and profitability are directly related to debt-servicing capability, thereby necessitating an examination of liquidity and solvency. Furthermore, the condition of economy both micro and macro must be analyzed to ensure that prevailing economic or policy environments do not adversely affect the debtor's capacity to repay (Sobana, 2016).

The magnitude of risk for credit provision in addition to the two principles above is the 3 R Principle, namely return, repayment, and risk bearing ability. Returns, namely the results that will be obtained by the debtor, meaning that the proceeds are sufficient to repay the credit plus interest, costs in addition to paying other company needs such as for cash flow, other credit if any and so on. It should be noted whether the repayment ability is matched with schedule ability or the ability to bear risk needs to be considered to what extent the debtor's ability to bear risk in matters beyond the anticipation of both parties (Nahdhah, 2022).

Prudential banking (prudential principle) in credit provision is aimed at avoiding the emergence of bad credit (Putera, 2020). So before approving a credit application, the bank needs to analyze whether the application is feasible to be accepted or not by using the 5C theory as well as 5P. In principle, banks do not expect problematic credit/financing to occur, so the determination of bank credit policy (KPB) consistently and consistently is expected to prevent the emergence of problematic credit/financing. In relation to the position as a creditor, Law No. 4/1996 confirms that a foreign citizen or foreign legal entity can also be a holder of mortgage rights, because mortgage rights have no connection with the owner of the object directly. According to Article 9 of Law No. 4/1996, the mortgage rights holder is defined as an

individual or entity acting as the creditor. The creditor in a credit agreement is typically referred to as the mortgage rights holder, representing the party owed in a specific debt arrangement.

This provision is in accordance with the purpose of issuing Law No. 4/1996, as stated in its considerations and General Explanation, that with the increasing national development, the provision of funds is needed, most of which are obtained through credit activities, a strong guarantee rights institution is needed and able to provide legal certainty for the parties concerned. Therefore, funds obtained from abroad must also be used for national development, if desired to obtain guarantee with the intended institution. As a result, anyone who is authorized to carry out civil acts to provide debt/credit can be a holder of mortgage rights, namely both Indonesian citizens and foreigners. The adherence to the principle of specialty outlined in the Mortgage Deed results in the establishment of a mortgage rights holder. By formalizing the registration of the mortgage rights in the land book, the creditor assumes the role of a mortgage rights holder.

The reason for having mortgage rights is to guarantee the repayment of designated debts. Mortgage rights represent a type of property ownership that offers assurance for the settlement of particular debts on a piece of land. These rights are granted after a primary agreement has been made, establishing a legal debt relationship that is secured by mortgage rights. A debt agreement must be in place before a mortgage rights agreement can be established, as the former triggers the latter. According to Article 3 paragraph (1) of Law No. 4/1996, debts that can be settled with mortgage rights may be pre-existing or agreed upon debts with a specific amount. The determination of the debt amount can also be based on the debt agreement or other relevant agreements at the time of applying for mortgage rights.

b) Use of the Power of Attorney to Encumber Mortgage Rights (SKMHT)

Mortgages fall under consumptive credit category due to the fact that they are typically used by borrowers to purchase a home for residence. In order to ensure timely repayment in line with the terms of the credit agreement, the borrower agrees to offer the house and land acquired using the bank credit as collateral (Suparji & Pratamalistya, 2023). Creating a Power of Attorney to Encumber Mortgage Rights (SKMHT) must adhere to specific rules and guidelines outlined in laws and regulations. Failure to comply will result in the SKMHT being invalid under the law. According to Article 15 paragraph (1) of Law Number 4 of 1996, SKMHT must be in the form of an authentic document, such as a notarial deed or PPAT deed. The granting of authority to PPAT is intended to facilitate service because PPAT has a reach up to the sub-district level. In addition to form, SKMHT must also meet the provisions regarding its content as regulated in Article 15 paragraphs (1) and (2) of that law. Failure to fulfill this condition will render SKMHT invalid under the law, and therefore cannot be relied upon for creating the Deed of Granting Mortgage Rights (APHT), resulting in the need for PPAT to disapprove the request.

In practice, notaries often use SKMHT forms provided by the National Land Agency (BPN). However, this creates inconsistency because the making of SKMHT by notaries should follow the notarial deed format, not the PPAT deed. The use of BPN forms causes SKMHT to lose its authentic strength because its form is not stipulated by law as required in Article 1868 of the Civil Code, but only based on Regulation of the Minister of Agrarian Affairs/Head of BPN No. 3 of 1997 as amended by Perkaban No. 8 of 2012. Article 15 paragraphs (3) and (4) of Law Number 4 of 1996 govern the duration of SKMHT, with distinctions between registered and unregistered land. In the case of registered land, an APHT must be created within one month of receiving SKMHT, whereas for unregistered land, this deadline is extended to three months. If this provision is not met, SKMHT becomes null and void by law as confirmed in

Article 15 paragraph (6). This time limit is intended so that the implementation of granting mortgage rights is not prolonged, although it is possible to make a new SKMHT.

Exceptions to the time limit provisions apply to certain credits, as regulated in Article 15 paragraph (5) of Law Number 4 of 1996. The certain credits in question include program credit, small credit, and mortgages (KPR) given for the interests of economically weak groups. In this case, the time limit of one month or three months does not apply. Overall, the role of notaries is very important in ensuring certainty, order, and legal protection through making authentic deeds. As public officials given authority by the state, notaries function to provide legal services to the community in the notarial field. Therefore, it is vital for the Regional Notary Supervisory Council, operating under the Ministry of Law and Human Rights (Kemenkumham RI), to offer oversight and direction to ensure professionalism, prevent misconduct, and uphold integrity in notarial responsibilities. To establish a robust guarantor system, the provision of credit with land collateral and related assets should involve meticulous collateral enforcement to safeguard the lender's interests. Imposing perfect collateral involves granting Mortgage Rights and registering them at the Land Office, as this registration grants the holder of Mortgage Rights a priority position (Agustia et al., 2019).

The SKMHT is a written contract that authorizes the receiver of mortgage rights to place a burden on a property owned by the giver. This document needs to be created with a valid deed and is not subject to the regulations outlined in Article 1813 of the Civil Code for termination. It is more similar to terminating a typical contract than anything else (Ghina, 2020). Article 15, paragraph (2) of the Mortgage Rights Law clearly states that the Power of Attorney to Encumber Mortgage Rights cannot be cancelled and remains in effect indefinitely unless acted upon or expires. Consequently, the Power of Attorney to Encumber Mortgage Rights (SKMHT) can be viewed as a legally binding contract.

c) Legal Consequences and Protection of Creditors

The basis for execution of the mortgage rights collateral object is in accordance with the characteristics of mortgage rights as a guarantee institution on land that is strong, namely: easy and certain in its implementation, the execution procedure or sale of objects that become mortgage rights collateral objects is simplified. In compliance with the guidelines established for addressing the outstanding debts owed to Mortgage Rights holders with superior priority compared to other lenders. Specifically in the execution of mortgage rights property collateral, the holder of the first mortgage rights is given the right to carry out execution outside the rules of civil procedural law, which is commonly called *parate executie*.

The presence of credit collateral offers the Bank a form of security in case the credit defaults, as the collateral can be seized to settle the borrower's obligations. In general, credit collateral is defined as the surrender of property or a statement of willingness of someone to bear the repayment of a debt. The uses of collateral are (Affandi, 2022):

- 1) Providing rights and powers to obtain repayment from the sale of collateral goods, with customers who have breached contract with payment of their debts.
- 2) Ensuring that customers with roles and projects harm themselves, which may happen by minimizing it.
- 3) Providing encouragement to debtors (collectible) in fulfilling what was agreed, about paying back in line with the agreement conditions and property pledged.

The Bank will get legal certainty that the unregistered object that is used as collateral has been bound by the Power of Attorney to Encumber Mortgage Rights (SKMHT) and continued with the installation of the Deed of Granting Mortgage Rights (APHT) which makes the creditor's (Bank's) position become preferred (preferent right) with the birth of the

Mortgage Rights Certificate (SHT). Mortgages (KPR) in principle are the same as credit in general whose object is funds or money which is then given a house. KPR is also the same as other credit agreements that require collateral (collateral) to secure funds issued by the bank (Moertiono, 2021).

Bank Tabungan Negara (BTN) experienced an increase in mortgage NPL. As of June 2023, problematic mortgages reached Rp7.14 trillion or 2.94% of outstanding mortgages of Rp243 trillion, up from Rp5.47 trillion (2.45%) in June 2022. BTN found thousands of developers did not issue certificates for housing projects purchased using mortgages. Since 2019 to early 2025, at least 120,000 BTN mortgage houses have certificate problems due to developers disappearing and being irresponsible for maladministration or legal defects. Several cases involve legal disputes and duplicate certificates due to developer negligence. BTN also reported a number of problematic notaries to the authorities (Nugraha, 2025). For mitigation so that similar incidents do not recur, BTN will implement ratings on developers based on sales volume, NPL, and certificate processing time limits. Mortgage distribution banks are responsible for housing projects purchased by debtors with mortgages if there are administrative problems. Before the debtor agreement, the bank is required to ensure through thorough verification that the house and land are free from legal and administrative problems (Nugraha, 2025). PT Bank Central Asia Tbk. (BBCA) also experienced an increase in mortgage NPL to 1.54% as of March 2025, up 0.26% from the end of 2024. Banks implement prudential principles through in-depth analysis of prospective debtors, strengthening the Know Your Customer system, and assessing property value and area to ensure collateral can cover credit value (Aprilia, 2025).

In subsidized mortgage agreements, debtors only make SKMHT because land rights are not yet in the name of the Grantor of Mortgage Rights, certificates have not been split individually, and are still in the name transfer process. With the signing of the sale and purchase agreement between the Developer and the debtor, the rights and obligations of each party arise as per the agreement (Mulyono, 2022). To ensure legal certainty, SKMHT functions as a legal means in implementing credit agreements between creditors and debtors, so it requires the presence of a notary or PPAT to facilitate the arrangement of mortgage rights objects until the issuance of APHT. Based on Article 15 paragraphs (3), (4), and (5) of the Mortgage Rights Law, SKMHT that is not followed up with APHT within the specified period is null and void by law.

SKMHT made by Notaries based on credit agreements does not bind perfectly, so the Bank has not obtained executorial rights over collateral if the debtor defaults. Therefore, the Bank is required to request the making of APHT which is continued with the issuance of SHT by BPN. The Power to Encumber Mortgage Rights cannot be withdrawn unless it has been implemented or expired. If receivables are transferred due to *cessie* or transfer of receivables from old creditors to new creditors, subrogation, inheritance, or other causes, Mortgage Rights are also transferred and must be registered by the new creditor (Hidayah & Fidhayanti, 2022). Mortgage Rights are extinguished due to the following matters (Article 18 paragraph (1) of the Mortgage Rights Law):

- 1) Extinction of the guaranteed debt
- 2) Release by the holder of mortgage rights with a mortgage cancellation letter
- 3) Clearing based on the determination of the Chief of the District Court
- 4) Extinction of land rights encumbered.

Pursuant to Article 1 of the *Vendu Reglement* (1908), a public sale (*openbare verkopen*) is defined as an auction or sale of goods to the public conducted through open

bidding. Auctions are governed by the principles of transparency, competition, justice, legal certainty, efficiency, and accountability. They function in both private and public capacities: privately, as a medium for commercial transactions, and publicly, as a mechanism for enforcing the law and managing state assets, thereby generating non-tax state revenue (PNBP) from auction-related fees. The forms of auctions consist of execution auctions, mandatory non-execution auctions, and voluntary non-execution auctions (Usman, 2008).

The implementation of auctions ensures legal certainty, is carried out quickly, and produces optimal, reasonable, and efficient prices. Creditors holding mortgage rights have preferent status, while other parties are only concurrent creditors, so that guarantee seizure cannot be placed on collateral land and the auction remains valid. The Mortgage Rights Certificate (SHT) has executorial power with the heading "For the Sake of Justice Based on the Almighty God" and serves as a grosse of mortgage deed. SEMA No. 7 of 2012 confirms that holders of Mortgage Rights in good faith must be protected, even though the grantor of rights is not entitled. This provision is strengthened by SEMA No. 5 of 2014. Thus, creditors holding mortgage rights as third parties in good faith have the right to carry out execution auctions, and buyers as auction winners must also be protected by law so that guarantee seizure cannot be placed on auction objects that have been validly sold (Sudiarto, 2021).

5. Conclusion

The legal framework governing collateral for Subsidized Mortgage (KPR) is founded on the principles of legal certainty and prudential banking, as stipulated in the Mortgage Rights Law, the Civil Code, and related banking regulations. Mortgage Rights (Hak Tanggungan) provide preferential status for creditors and serve as the primary legal instrument protecting against default risk in housing finance. In practice, however, the implementation of collateral through the Power of Attorney to Encumber Mortgage Rights (SKMHT) and the Deed of Granting Mortgage Rights (APHT) has not been fully effective due to administrative constraints, delays in deed execution, and weak institutional supervision by notaries or land deed officials. The delayed conversion of SKMHT into APHT has created legal uncertainty for creditors, as collateral that should possess executorial power remains incomplete. Moreover, the legal flexibility that allows an extension of the SKMHT validity period for subsidized housing programs is often misapplied without adequate oversight. This condition undermines the principle of prudential banking and weakens the legal protection of creditors, revealing a gap between normative regulation and actual implementation in the field.

The Government, together with financial and agrarian authorities, must strengthen technical regulations on the establishment of Mortgage Rights within subsidized mortgage schemes to ensure legal certainty and prevent creditors from losing their preferential position. Mechanisms for accelerating and simplifying the APHT process should be implemented to reduce burdens on debtors, accompanied by strict supervision of banks and PPAT/Notaries in the SKMHT–APHT transition. The Financial Services Authority (OJK) and the National Land Agency (BPN) should enforce compliance standards and provide legal education to debtors to enhance awareness of their rights and obligations. Furthermore, improving the competence and integrity of PPAT/Notaries through certification and periodic professional training should be prioritized, considering their crucial role in ensuring the legality and legal strength of housing credit collateral.

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