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## **URGENCY OF NOTARY ENGAGEMENT AS A LIMITATION ON THE FREEDOM OF CONTRACTS ON THE PRE PROJECT-SELLING EVENTS**

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**Abstract:** Agreement is an uncountable number of events occurring even in one day. Considering agreement is a civil sphere, and events in the civil sphere are certainly more likely to occur than criminal events. The agreement itself in the rule of law in Indonesia, is regulated by *Burgerlijk Wetboek (BW)* that its nature is free to determine its substance, which is the incarnation of the freedom of contract principle which is contained in Article 1338 BW. This freedom of contract principle can be utilized by all parties in all agreements, provided that the agreement is valid as Article 1320 BW. One kind of agreement that utilizes this principle, is the pre project selling agreement, which is one of the selling methods that rife today. Nevertheless, this principle is one of the causes of loss to the buyer (prospective owner) which often occurs when the object is ready. Therefore, it is necessary to limit this principle in the event of pre project selling. The results of this study are the need of a public notary role in the pre project selling agreement, as one way to limit the freedom of contract principle which often resulting in detrimental to the buyer (prospective owner).

**Keywords:** Notary, Pre Project-Selling, Freedom of Contract.

### **1. Introduction**

The level of community needs is increasingly increasing, thus causing the community difficulties in terms of determining which are primary needs and which are secondary needs. However, of the many human needs, food needs, clothing, and shelter are still basic needs that must always rank in terms of the demand for community needs. Food is a basic need for humans to be able to sustain life, therefore the adequacy of food for everyone at all times is a very important thing that must be met. As a basic human need, food has an important role for the survival of human life.

Home is a very important requirement for humans. Humans need these needs as a place to live and as a place for shelter. The house is a requirement for welfare, even a measure of welfare. In this statement it means that this shows that the board / house is

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a basic need as a form of meeting basic human needs. The need for land today is increasing in line with the increase in population and other land-related needs. Land is not only a place to live, a place to farm but also used as collateral to get a loan at the Bank, for the purposes of buying and selling, renting. In addition, land is currently the object of investment and causes the value of land prices to be increasingly high. As the population grows, the need for land for residential needs and development needs is increasing, while the area of land is relatively fixed. These matters often result in disputes, conflicts and land cases.

Along with the development of increasingly modern times, a residence is not just a unit of the house. The current residence can be in the form of housing complexes, to apartment units. Where there are currently flats units also equipped with good and elite facilities, which are often known as apartments. Apartments and housing are basic human needs that are closely related to land and buildings. Along with population growth in Indonesia, the need for housing will increase and more land is needed. Meeting the needs of houses and apartments has made many companies (developers) develop their businesses. In other words, it is now often used as a job opportunity called the property world.

Apartment development actors now often use the strategy of selling pre project - selling, the picture is offered to a prospective buyer. When prospective buyers agree, then be indent agreement that is quite simple. When the pre-project selling object has been completed, various problems often occur. Whether it's the location, specifications, and others who do not conform to what is offered and bound together in a promised picture or spec.

The problem as stated above, due to the principle of freedom of contract which are separated from the limits of reasonableness. Such things are concerned, and so must find mechanisms for controlling freedom of contract principle in Pre Project-Selling. One of which is the involvement of a Notary. Based on the background above, the formulation of the problems that will be addressed in this study is the Urgency of Notary Engagement as a Limitation on The Freedom of Contracts on the Pre-Selling Project Events.

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## 2. Theoretical Framework and Hypothesis Development

A contract or agreement is a legal event in which a person promises to another person or two people to promise each other to do or not do something, this is as stipulated in Article 1313 BW. Basically, everyone can make a contract with anyone who desired, throughout the person is not prohibited by the law to make a contract. The parties to this contract may be individuals or business entities that are not legal entities or incorporated entities. In a contract three elements are known, namely the essential element, the natural element, and the accidental element. In a contract, it must fulfill the principle of consensual, which is important that an agreement is reached. In addition to the principle of consensual, the contract is known as the principle of freedom of contract. The principle of freedom of contract is one very important principle in contract law. This freedom of contract is based on Article 1338 BW. (Agus Yudha Hernoko, 2011)

An agreement is a relationship between two or more people in the property field where one party has rights and the other party has an obligation on an achievement. There is no definition of engagement in Book III of BW, but the definition of engagement is expressed by scholars (J. Satrio, 1999). In terms of content, it turns out that the engagement was there for someone debtor it should done an achievement, and can be enforced against creditors. If necessary, with the help of a judge. Based on the definition of such scholars, there is elements of an engagement, which is an association law, the assets, the parties, and achievement. Engagement set in Book III BW, which is in Article 1233-1456 BW. Based on the provisions in Article 1233 BW, an engagement can be born because of an agreement, and because of the law. (Kartini Muljadi, 2008)

## 3. Research Method

Considering that the character of jurisprudence is actually a science that discusses the norms and problems of the norm itself, which is the character of such

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science is called normative, then this research is a normative study, which in its discussion relies on the existing statute approach, bearing in mind, the problem in this study stems from a legal vacuum which then requires legal discovery, either through interpretation and/or legal formation (Peter Mahmud, 2010).

#### 4. Results and Discussion

In an agreement, there are at least 5 (five) important principles that must be considered, including: The principle of freedom of contract (freedom of contract); The principle of consensual; The principle of legal certainty in the agreement (*pacta sunt servanda*); The principle of good faith; The principle of personality (privity of contract). (Munir Fuady, 2011)

Another thing that must be considered is the element or part of the agreement, namely: The Essentialia element (must exist because of the connection with the essence of the agreement); Naturalia Element (it does not need to be regulated further by the parties, because the gap has been regulated by the Law, just follow it); Element of Accidentalialia (desired by the parties, but not regulated in the Law, so it must go through an agreement of the parties).

The principles and elements or parts of the agreement will determine the substance of the agreement, but one thing that must be considered again is its validity. The instrument of contract validity is Article 1320 BW, which has 4 (four) conditions, namely: Agree; Proficient; Certain objects; Causes are allowed. Not fulfilling the first and second conditions, the meaning violates subjective conditions (relating to the subject), therefore the legal effect is that it can be canceled (*vernietigbaar*), whereas the third and fourth conditions are not fulfilled, resulting in the agreement being null and void by law (*nietig*). (Charles Fries, 2015)

In a Pre-Project Selling (PPS) agreement, be it principles, elements or parts, and terms of the agreement, it can be easily proven that everything has been fulfilled, which consequently is that the agreement is valid, accepted in the legal constellation in Indonesia, personal, and court assistance can be sought for its fulfillment.

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The last point, namely court assistance for fulfillment, is the privilege of an engagement, be it an engagement born of the Act or born of an Agreement. Including the PPS agreement. However, in order to succeed, the limitation is that as long as the evidence is successful in court, this is difficult because since the beginning of the agreement, the buyer (prospective owner) is offered only through brochures, leaflets and the like, which for realization is often not in accordance with the offer.

This is actually reasonable, considering that it is very difficult to realize the exact same building as the brochure, but what is unnatural is that this blemish is used by several developers to attract the attention of buyers (potential owners) willing to spend funds, and the agreement clause is minimal, so that parties The developer can specify his own clauses which are deemed agreed by the buyer (potential owner) when interested in the offer to pay a price.

Various cases have arisen regarding the PPS agreement as above, starting from the case of the finished building, to the building not being built and even being criminally processed. Indeed, buying and selling using this kind of method can take place properly, when the principle of caution is more considered. Remember, when explored vertically, things like this are due <sup>5</sup> to the principle of freedom of contract.

<sup>The</sup> author has stated above, that in a PPS agreement, meeting the legal conditions of the agreement will be very easy. Whereas when observed, there are conditions regarding certain objects, meaning that there must be an object. While in PPS the object does not yet exist. The makers of BW in the past have been proven to think about future business developments, the age of BW which is currently 181 (a hundred and eighty one) years, apparently is still the key to success in PPS, namely through Article 1334 BW, whose editors emphasize that objects which will still exist can be used as the object of the agreement. This also shows that the law needed is flexible law when serving the ever-changing business world.

The object of the agreement in this case is basically an economic value that can be transferred (ownership transferred). This means that certain object requirements in Article 1320 BW in the PPS event are indeed not a problem.

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PPS agreement because it is not specifically regulated by BW, then it is an anonymous agreement, this is as confirmed in Article 1319 BW whose redaction is when the agreement is not known by a certain name, then it is still subject to general provisions. Again, this is a form of the long thinking of BW makers to facilitate business activities that are increasingly growing, BW makers have been able to guess, later there will be an extraordinary variety of agreements that cannot be mentioned one by one in BW.

Although as an anonymous agreement, the elements or parts of the agreement mentioned above must still be fulfilled. Considering the essence of this PPS is buying and selling, it is necessary to note the existence of Article 1458 BW which confirms that buying and selling is considered to have occurred between the two parties, as soon as an agreement is reached regarding the goods and the price, even though the item has not been delivered and the price has not been paid. In the event of buying and selling, the parties are called sellers and buyers, therefore for the above, in PPS, even if paid in full or paid in installments with a mark to be the amount of funds determined at the time of bidding, the prospective owner in this case is called the buyer.

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The principle of freedom of contract as in this paper is a cause of the PPS problem, the provisions in Article 1338 BW are the essential joints of the agreement, this Article confirms that each agreement made properly has the same binding force as the law for the parties.

In essence, the principle of freedom of contract has a noble goal that is in line with the essence of BW, namely for the sake of business development and smoothness. In practice, business operators have prepared draft agreements to offer other rights, for the sake of time efficiency and rapid realization of agreements. Nevertheless, it must be remembered that in an agreement it would be very difficult to get the party to have the same bargaining position, of course there is one that is slightly higher, including in the case of the draft agreement prepared in advance for the sake of efficiency, the position of the it was almost completely biased, because the interests of the agreement maker would take precedence over legal protection for the

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opposing party. It is different when the parties discuss with each other, to produce the same will and agreement for the clauses in the agreement, this is actually more expected by law.

The situation described above was used by PPS entrepreneurs by making standard agreements so that agreements could occur quickly because they were too free, to the detriment of buyers (potential owners). The principle of freedom of contract that is so special and plays an important role in the success of this PPS agreement, certainly cannot be eliminated, and even if it is limited it will be judged to cause losses. Therefore, we need a mechanism of limitation or control of the principle of freedom of contract which is understood and synergic in good faith at the time, no party will feel disadvantaged, even in the pursuit of efficiency and the aim of fast pace of business development.

It should be noted and remembered, that in terms of the standard agreement itself there are limitations, namely in the Consumer Protection Act, which there are some things that should not be included. It is not surprising that the current standard agreement, especially regarding PPS, does not contain the prohibited subject, but in essence, the bargaining position between the seller and the buyer is too unbalanced, and the potential for adverse events as above, also need to be remembered that not everyone knows about the law, understands about how the law is. People with urgent needs, and with the desire to have something because of a tempting offer, is a natural thing when immediately making legal relations with the other party, without thinking whether he in the law would be in a position of potential loss or not. Things like this can still be used by business actors for the smooth running of their business, especially in the case of PPS. The proof is that problems regarding PPS are still rife today.

In order not to be used to oppress by parties who have high bargaining power, it is necessary to have a controller, solely so that the legal function remains oriented towards justice. One of the ways in the PPS incident is by standardizing instrument agreements by the government. The standardization of the form of this agreement is not new, for example only in the guarantee institutions that are very much in demand,

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namely Mortgage Rights. At the guarantee institution, it is stressed that in the APHT Deed, certain clauses are required, this callus which limits and controls the freedom of contracting between the parties. Mortgage is also that way, it is provided the raw form for its mortgage agreement, which must be used by the parties.

It is not uncommon and new when there are restrictions or controls in the manner above, for this PPS incident to be done as well, whether the government issues a separate law, or through other instruments that must be obeyed by the parties. Mechanism that can immediately be used while waiting for such a law exist, namely involving officials of the public, that the Notary. This notary involvement is mandatory. Thus, the PPS agreement can be made by a Notary Public or before a Notary Public. Through this a notary role, of course, will reduce the high number of losses caused by the principle of uncontrolled or unlimited freedom of contract in the PPS event. However, in order for this to be realized, the Government through its authority must issue a legal instrument that requires the involvement of a Notary Public in the PPS incident.

## **5. Conclusion, Implication and Limitation**

### *5.1. Conclusion*

Pre project selling is a promising selling mechanism today, by utilizing the principle of freedom of contract and other norms in BW, this agreement can pass the test for its validity. To keep up with the pace of business development and efficiency, these agreements are often made by only one party, the seller, which is then offered. This agreement often brings loss to the buyer (prospective owner), therefore limits or control of the principle of freedom of contract is required, which is the main pillar of such a business frame. The mechanism is by standardization of agreements or PPS agreement clauses, in addition to involving the Notary, then for the norm there needs to be synergy of principles that are related to the same Article (1338 BW), and there must also be synergy with other laws and regulations. Then for the mechanism that can be quickly implemented now, for controlling the freedom of contract, is to require

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the Notary to be involved in the agreement that is bound in the pre-project selling system.

### 5.2. Implication, Suggestion and Limitation

The government needs to be more sensitive and act for urgency like this, remembering that this is actually not something new for the losses suffered by the buyer (prospective owner) in the event of pre-project selling. The government with its authority is expected to be able to provide solutions either through the above mechanism, or through other mechanisms. It is solely for the purpose of facilitating business activities and their development.

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