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The Dutch urban ground lease: A valuable tool for land policy?

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ABSTRACT

Once heralded by both liberals and socialists as a tool for Dutch municipal governments to prevent land speculation and to implement spatial policies, a century later the Dutch ground lease (erfpacht) is now despised by many. The ground lease was the subject of strong debate in the recent past and is likely to remain so. It has been argued that lessees should have the right to become owner of the land, and this 'right to buy' has indeed been implemented in the land policies of several municipalities. The Dutch urban ground lease seems to be under serious pressure. Is it outdated or is it still a valuable tool for land policy? Before we answer this question, we firstly will provide an historical overview of Dutch ground lease. Secondly, the different types of ground lease will be elaborated. Thirdly, the focus will be on the urban ground lease used by Dutch municipalities and the developments in the use of this instrument. Fourthly, the recent policy changes will be dealt with, followed by an assessment.

1. Introduction

In the Netherlands, the municipal government often plays an active role in the development and redevelopment of urban areas (Needham, 1997; Hartmann and Spit, 2015). The Government acquires the land to be developed, makes the plan for the area and buildable plots are delivered to housing associations, developing companies or private individuals.

By means of this active land policy, Dutch municipalities are able to maintain control of the development of an area. The Government can directly influence the future use of the area and – if necessary – allocate land to specific categories of users. Active land policy also makes it easier for the Government to profit from the increasing value of the land in areas to be urbanised (Hobma and Jong, 2016). Besides these advantages, active land policy is used to ensure that sufficient land is available for expected future building demands. Although the stagnation in new housing development as a result of the financial crisis of 2008 also shows the risks of this approach, active land policy is still common practice in many Dutch municipalities (Buitelaar, 2010; Hartmann and Spit, 2015; Van Straalen et al., 2015).

One of the decisions that must be made in active land policy concerns the type of land tenure. Two possibilities exist in the Dutch legal system: transfer in ownership or establishment of a limited proprietary right. As a continental civil law system, based on Roman law principles, Dutch private law distinguishes *rights in personam* and *rights in rem*. Rights in personam can only be exercised against one specific person (e.g. the purchaser's rights under a contract of sale). Rights in rem are proprietary rights, which can be enforced against everyone. In the category *rights in rem* a distinction is made between ownership and the so-called *rights in rem aliena* (limited proprietary rights); the latter are proprietary rights over another person's object. An important aspect of this system is the principle of *numerus clausus*: the Dutch Civil Code limits the number, but also the content of the limited proprietary rights (Akkermans, 2008; Struycken, 2007), although in practise the system offers scope for flexibility (Mostert and Verstappen, 2015).

The subject of this paper deals with the most important right of the category of *rights in rem aliena* that can be used for land delivery in the Dutch context: *erfpacht* (Vonck, 2013). This right, in comparative studies also known as *emphyteusis* (Akkermans, 2008; Korthals Altes and Tambach, 2008; Paasch, 2011), will be translated in this paper as 'Dutch ground lease' (City of Amsterdam, 2005; Hobma and Jong, 2016). However, in the literature on land tenure in

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the Netherlands other translations such as 'leasehold', 'land lease', 'building lease', 'long lease' or 'long-term lease' are also common.

Until the twentieth century, the Dutch ground lease was mainly used for the grant of uncultivated land for agricultural purposes (Vonck, 2013). In the past century, a variety of applications were introduced. Amongst them, the one this paper focuses on, the urban ground lease, is used in land delivery by the local government. Once heralded by both liberals and socialists as a tool for local governments to prevent land speculation and to implement spatial policies, nowadays many despise it.

In this paper, first a more general introduction of the Dutch ground lease will be provided. Subsequently, this paper will take a closer look at the different types of this lease. Focus will then shift to the urban ground lease in Dutch municipalities, and the developments in the use of this instrument in three major cities: Amsterdam, Rotterdam and The Hague. Furthermore, an attempt will be made to assess the meaning of urban land use, also for the future challenges in municipal practice. The paper will be finished with some conclusions.

2. Dutch ground lease in a nutshell

2.1. Introduction

The history of the modern ground lease in the Netherlands starts with the Act on Ground Lease (*Erfpachtwet*) of 1824. This act was introduced because the *Code Napoléon* – applicable from 1811 to 1838 in the Dutch territory – did not mention the ground lease. A few years later, in 1838, the Act of 1824 became part of the Dutch Civil Code.[1] The legal system laid down for the establishment of the Dutch ground lease has been maintained until today, with modernisations by the enactment of a new Civil Code in 1992 (Mijnssen et al., 2008; Vonck, 2013).

The Dutch ground lease is a limited proprietary right that entitles the lessee to hold and use land that is owned by someone else (the lessor) (Akkermans, 2008; Paasch, 2011; Vonck, 2013, Hobma and Jong, 2016). The main characteristic of this right is that – in principle – it provides the holder of the ground lease the right to use the lessors' property as if he was the owner, i.e. land, including the buildings (Mijnssen et al., 2008). For the use of the property, the holder of the lease normally has to pay the lessor a payment, in a lump sum or periodically. The right may be established for a limited period of time (e.g. 75 years) or is open-ended (i.e. indefinite). If the right ends, the full enjoyment of the property returns to the legal owner including the buildings. In this case the lessor has to reimburse the lessee for the value of buildings, planting etc. on the land realised by the lessee. However, the Dutch Civil Code allows that in specific cases the conditions of the ground lease may exclude the reimbursement, the most important being that the land is not used for housing.

2.2. Typology

In this article we focus on the ground lease as used by the Dutch municipalities for land delivery to housing associations (social rental sector) and private developers, commonly referred to as 'urban ground lease' or 'municipal ground lease'. However, the Dutch ground lease is not limited to land for housing and not limited to use by the Government. Based on Dutch literature (Nellisse, 2008; Jong and de Ploeger, 2008; van Velten, 2015) the following typology is used (Table 1).

[1] The original Act of 1824 is still in use in Belgium, as its territory was a part of the United Kingdom of the Netherlands after the fall of Napoleon until the Belgian uprising in 1830.

Although this typology offers insight in the practical use of ground lease, it should be noted that the Dutch Civil Code only provides for a general set of rules irrespective of the use of the land, with two minor exceptions:

- The reimbursement of the building's value by the lessor at the end of the lease is mandatory if the land has to be used for housing (Article 99, Book 5, Dutch Civil Code).
- In case of a ground lease for agricultural land for less than 25 years or an indefinite time, the mandatory rules for the renting a farmland (pacht) are also applicable (Article 399d, Book 7, Dutch Civil Code).

2.3. Ground lease compared to rental housing

Ground lease should not be confused with a contract of renting (hiring) a building or a part thereof (*huur*). Such a rental contract (or 'hire contract') has no proprietary status, but is a special contract on the basis of which one of the parties, 'the landlord' (or 'hirer'), engages himself towards the other party, 'the tenant' (or 'hiree'), to grant him the use of an immovable or movable thing or of a part of such thing, opposite to which the tenant engages himself to pay the rent (Haffner et al., 2014). It is important to notice that the Dutch rental contract creates a *right in personam*, while a ground lease is a proprietary right. This leads to some important practical differences:

- Ground lease is established by a notarial deed and registered in the land register (public registers kept by the land administration). The conclusion of a rental contract does not require any specific conditions (even an oral contract is valid), nor is registration required.
- Ground lease makes it possible for the lessee to encumber the ground lease with a mortgage. The mortgage is necessary for a financial institution to finance e.g. the development of the property or the building of a house. The rights from a rental contract, being a *right in personam*, cannot be encumbered with a mortgage.
- In the event of the death of the lessee, the ground lease passes to his or her heirs, whereas in the case of a rental contract (save for a few specific exceptions) the rights derived from the rental contract will cease.
- The lessee is not restricted in transferring his right to a third party (although the deed of establishment may explicitly require the consent of the lessor); a rental contract cannot be transferred.
- Rental contracts for housing are subject to Title 4, Book 7, Dutch Civil Code, namely those provisions related to contract law. The ground lease is addressed in Title 7, Book 5, Dutch Civil Code, part of the provisions related to property law.

Besides these differences, another important contrast is the assumption of the position of the tenant under a rental contract. As the legislature did not have equal parties in mind, it introduced regulations to protect the position of the tenant. Although a rental contract is a private law contract (such as a sale) it is subject to strong government regulation e.g. with respect to the rent to be paid and the protection of the tenant against the owner's decisions. The Dutch rental contract for housing can, therefore, be considered to be a mix of public and private law (Haffner et al., 2014). This is a striking difference with the Dutch ground lease. The Dutch Civil Code sets almost no boundaries for the parties to shape their relationship, in particular the enjoyment of the land by the lessee or the restriction thereof. The lessor and the lessee have a great deal of freedom to make their own arrangements, and may differ from the general rules as laid down in the Dutch Civil Code. Any intervention by the Government is thus absent, while only a few rules in the Dutch Civil Code are written in favour of the lessee (Jong