THE DUTCH URBAN GROUND LEASE: IN FATAL CRISIS OR A BRIGHT FUTURE?

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Keywords: leasehold, housing, property rights

Once abolished by the French, being a product of feudalism, reintroduced by the Dutch after the downfall of Napoleon’s empire. Heralded by both liberals and socialists after 1900 as a tool for governments to prevent land speculation and to implement spatial policies. A century later despised by many, considered to be a governmental cash cow. The ground lease (or right of emphyteusis) of land, was subject of strong debate in the past and is likely to remain so. In the view of many, lessees should have the right to become owner. However what is really the meaning of ‘ownership’ of land, so highly valued, both by the early nineteenth-century bourgeois society in France and Dutch citizens in the twenty-first century? Is ground lease really an obsolete legal concept? Or does a bright future dawns as ground lease provides an instrument to redeem a logging land market after the financial crisis.

1. Introduction

In the (re)development of urban areas in the Netherlands, often the municipal government plays an active role by developing the land itself, the so-called ‘active land policy’. Land to be developed is acquired by the government, the government makes the lay-out plan for the area and services the land and buildable plots are delivered to housing associations, developing companies and future house owners.

For Dutch municipalities, active land policy makes it possible to have a better control on the development of an area. The government can directly influence the future use of the area and – if appropriate – allocate land to specific categories of users. Active land policy also makes it more easy that the government profits from the rise of the land value in an area to be urbanized. Besides these, active land policy is used to ensure that sufficient land is available for expected future demands for building land. Although the financial crisis with the stagnation in new housing development also shows the risks of this approach, active land policy is still common practice in many Dutch municipalities.

One of the decisions to be made in active land policy, is about the land tenure situation under which the land is delivered. Several possibilities exist in the Dutch legal system.

As a continental civil law system, based on Roman law principles, Dutch private law distinguishes between rights in personam and rights in rem. The first being rights which can only be exercised against one specific person (e.g. the purchaser's rights under a contract of sale), the second being property rights that 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; the latter are property rights over another person’s object. An important aspect in this system is also the principle of numeros clausus of property rights: the Civil Code limits the number, but also the content of property rights (Akkermans, 2008).

The subject of this paper is the most important right of the category of rights in rem aliena that can be used for land delivery: erfdepacht. This right, in comparative legal studies also known as emphyteusis (Akkermans, 2008), will be translated in this paper as ‘ground lease’ (City of Amsterdam, 2005).
However one will find in literature also other translations such as ‘land lease’, ‘long lease’ or ‘long-term lease’.

The Dutch right of ground lease is a property right that entitles the lessee to hold and use land that is owned by someone else (the lessor) (Akkermans, 2008). The main characteristic of this right is that – in principle – it provides the holder of the ground lease the right to use the whole property of the lessor if he was the owner, i.e. land, including the buildings. For the use of the property, the holder of the lease normally has to pay the lessor a payment, in a lump sum or periodic. In most cases the right is established for a limited time period (e.g. 99 year). If this period ends, the enjoyment of the property goes back to the owner. However the lessor normally has to compensate for the value of buildings, planting etc. on the land realized by the lessee.

Until the twentieth century ground lease was mainly used in the Netherlands for the grant of not yet cultivated land for agricultural purposes. In the past century all kind of applications were introduced. Amongst them, the one this paper focuses on: urban ground lease, used in land delivery by the government. Once heralded by both liberals and socialists as a tool for governments to prevent land speculation and to implement spatial policies, nowadays despised by many and considered to be a governmental cash cow. Is ground lease really an obsolete legal concept? Or is it an instrument to redeem a logging land market after the financial crisis?

In this paper, first a more general introduction of ground lease is given. After this, this paper will take a closer look at the different types of this lease. Than we focus on urban ground lease in Dutch municipalities, and the developments in the use of this instrument. After that, we deal with some misconceptions and try to assess the meaning of urban land use, also for the future challenges in municipal practice. We finish the paper with some conclusions.

2. Ground lease in a nutshell

2.1. Introduction

There is no need to sketch in detail the complex development of *emphyteusis* in Dutch civil law from Roman-Dutch law to the modern version. However, it should be noted that the French Code Napoléon of 1804, as a result of the revolution of 1789 and the end of the *ancien régime*, in fact abolished the feudal ground lease (*bail emphytéotique*). This is of importance because the French codification of private law, was applicable in the Netherlands after its annexation by the French empire of Napoleon I in 1811 until the enactment of the first Dutch Civil Code in 1838.

During the process of drawing up a ‘real’ Dutch Civil Code, in order to replace the Code Napoléon (see Meijer & Meijer, 2002), a small part of the draft dealing with ground leases, got already enacted: the Act on ground lease (*Erfpachtwet*) of 1824. Later, in 1838, this Act became part of the Civil Code, with one important change. According to the original Act of 1824 a ground lease could not be established for less than 27 years and more than 99 years.¹ The legal system laid down for the establishment of the ground lease has been maintained until today, with some modernisations in 1992.

Ground lease is not limited to land for housing and not limited to use in land delivery by the government. Dutch literature on ground lease (Nelisse, 2008; De Jong & Ploeger, 2008; Van Velten, 2012; Vonck, 2013) generally distinguishes several situations in which ground lease is used, depending on their application (table 1).

¹ The original Act of 1824 is still in use in Belgium,. This because this country was a part of the United Kingdom of the Netherlands after the fall of Napoleon until the Belgian uprising in 1830.
Table 1. Different situations in which ground lease is used

<table>
<thead>
<tr>
<th>Name</th>
<th>Application</th>
<th>Motive</th>
<th>Lessor</th>
<th>Lessees:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Urban ground lease / municipal ground lease</td>
<td>Housing area</td>
<td>Ground lease as alternative for ownership</td>
<td>Land leased by local government.</td>
<td>private house owners, housing associations, institutional investors</td>
</tr>
<tr>
<td>Rural / agricultural ground lease</td>
<td>Agricultural area</td>
<td>Ground lease as alternative for agricultural tenancy (<em>pacht</em>) (more freedom in lease conditions compared to tenancy)</td>
<td>Land leased by for example institutional investors, local government. Parishes</td>
<td>farmers</td>
</tr>
<tr>
<td>Industrial / commercial ground lease</td>
<td>Industrial and commercial (e.g. harbour areas in Rotterdam, Schiphol airport).</td>
<td>Ground lease as alternative for tenancy (more suitable for facilitating investments in property)</td>
<td>Land leased by the government, a port authority, etc.</td>
<td>companies, institutional investors</td>
</tr>
<tr>
<td>Green ground lease</td>
<td>Housing or agriculture in nature areas.</td>
<td>Ground lease as alternative for ownership (housing) and agricultural tenancy for better control by the lessor</td>
<td>Land leased by the government or private parties that own and manage natural reserves</td>
<td>farmers, private house owners</td>
</tr>
<tr>
<td>Private ground lease</td>
<td>Housing in areas / periods in which selling houses is difficult (e.g. financial crisis).</td>
<td>Ground lease as alternative for ownership to ease the financing problem of future house owners (measure to stimulate the housing market in economic crisis)</td>
<td>Land leased by developer or institutional investor.</td>
<td>Lessees: private house owners</td>
</tr>
</tbody>
</table>

However, the value of this typology is limited. Not only because a fixed typology does not exist, but also because the Civil Code provides only a general set of rules irrespective of the use of the land. There are only two minor exceptions:

- The reimbursement of the value of the buildings by the lessor at the end of the lease is only mandatory if the land was used for housing (article 5:99 Civil Code);
- In case of a ground lease for agricultural land for less than 25 years, or for an unlimited time, the mandatory rules for agricultural tenancy (*pacht*) are also applicable (article 7:399d Civil Code).
In general the rules of the Civil Code with regard to land lease are not very strict; the lessor and the lessee have a lot of freedom to make their own arrangement, and may differ from the general rules. Clearly the legislator had equal parties in mind who can protect their own interests, when this part of the Civil Code has been enacted.

Ground lease should not be confused with tenancy (huur) (see Haffner, Van der Veen & Bounjouh, 2014). The main difference is that a ground lease is a property right while tenancy is a right in personam. This leads to some important practical differences:

- Ground lease makes it possible for the lessor to establish a mortgage on his right. The mortgage is necessary to get a financial institution to finance the building of a house. A tenant cannot establish a mortgage.
- In the event of the death of the lessee the leasehold passes to his successors, while in this case (except for some specific exceptions) the contract of tenancy will end.
- The lessee may transfer his right to anyone he wants (although the deed of establishment may explicitly require the consent of the lessor); the tenant is not allowed to transfer his right.
- Ground lease is established by a notarial deed and registration in the land book (public registers kept by the land administration). The conclusion of a tenancy contract does not require any specific requirements (even an oral contract is valid) nor is registration needed.

Besides these differences, another important difference is the assumption of the position of the tenant. Contrary from the regulations on land lease, the legislator did not had equal parties in mind. In tenancy law, the legislator introduced regulations to protect the position of the tenant. Dutch tenancy law can therefore be considered to be a mix of public and private law. Although it is a private law contract (like sale), there is a strong regulation by the government, e.g. with respect to the fee to be paid and the protection of the tenant against decisions of the owner. This is a striking difference with ground lease. The Civil Code gives the parties involved a lot of freedom to shape their relationship, in particular the enjoyment of the land by the lessee. Any intervention by the government is absent, while only a few rules in the Civil Code are written in favour of the lessee (De Jong & Ploeger, 2008; Akkermans, 2008; Van Velten, 2012; Vonck, 2013). The lessee going into a lease contract, has to be aware that the agreement takes his interest sufficiently into account.

Because ground lease makes it possible to establish a mortgage, and because the right can be transferred, for local government it provides – different from tenancy – an alternative for ownership in the process of land delivery.

2.2. Ground lease: time

The Civil Code (article 5:86) reads ‘Parties may regulate the duration of the long leasehold in the notarial deed [by which the long leasehold has been established].’ The ground lease may therefore be limited in time (without a minimum) or unlimited (‘perpetual’). In practice, three types can be observed, however different variants are possible:

- Lease for a limited period of time (usually 30 – 75 years) (erfpacht voor bepaalde tijd). The lease right will end by law. If the parties want to continue the use by the lessee a new right must be established. This system is used in the municipality of Rotterdam.
- Lease for an unlimited period of time (erfpacht voor onbepaalde tijd or eeuwigduende erfpacht). Usually this is called “perpetual” ground lease. Although the name suggests that the right will last forever, in special cases foreseen in the Civil Code (e.g. non-payment of the ground rent) or in the deed (termination of the lease for reasons of general interest, a kind of private law expropriation) the ground lease can still be terminated by the land owner. This system is nowadays used in the municipalities of Utrecht and The Hague.
- The continuous ground lease (voortdurende erfpacht). Also this might be considered to be a right for an unlimited period of time, however the lease is divided in periods of e.g. 50 years. After the
ending of each period the lessor is allowed to change the conditions unilateral (e.g. the system to determine the ground rent). This is the actual system of Amsterdam.²

2.3. Ground lease: fee

Regarding to the fee (the money paid for the use of the right), the freedom of contract rules. The regulation in de Civil Code is very limited; the law only mentions that the notarial deed by which the leasehold has been established, may impose an obligation on the lessee to pay a sum of money, the ‘ground rent’ to the owner. The sum of money payable by the leaseholder in exchange for the use of the land, might be a sum in once or periodically (mostly annually).

This leaves the question how to determine the amount of this rent completely to parties involved, without any protection for the lessee. Generally the initial ground rent will be related to the value of the land (without the construction) (De Jong & Ploeget, 2008; Nelisse, 2008). The value used often is the so called residual value of the land: the expected market value of the future building as if it was full ownership of which the estimated construction costs are deducted. In municipalities that have been using urban ground lease for a long time (like Amsterdam), this method has some problems, because a market based on the transfer of full ownership rights does not exist.

In practice, different types of rent regulations exists also related to the type of the ground lease system. Within these regulations, it is often possible for the lessor to opt for a lump sum payment. In the system of the perpetual ground lease, this means that the rent is paid in once for always. In that system, for the lessee ground lease might therefore feel like ownership: in general there are no financial obligations to the lessor anymore.

In the system of continuous ground lease, a lump sum payment is for covering the rent for a fixed period (e.g. 50 years). When this period ends, for the next period rent has to be paid again. In the system of lease for a limited period of time, a lump sum payment is only for the period that the ground lease right exists.

If the rent is paid periodically, parties has to decide upon the way the rent is calculated every year. Different methods exists; the two main groups are:

1) Fixed ground rent:

The rent is based on for example the costs to attract loan capital at the moment the right is established. In in ground leases established until the 1960’s it was not unusual to have a fixed ground rent during the duration of the lease (De Jong & Ploeget, 2008). The consequence of this method is that when time goes by, the height of the fee seems very low, with regard to the actual value of the property. So, for example, if the land value in 1950 was 2000 euro and the percentage is 5% the yearly amount of money to pay is 100 euro. However, the market value of the built up plot might be in 2014 300.000 euro, and the residual value of the land might be 100.000 euro.

2) Periodical revision of calculated rent

In more modern urban ground lease systems, the conditions usually provide scope for a periodical revision. The way this revision takes shape can vary per conditions used by the lessor as the Civil Code does not provide any rules or limitations on this. Often some price indices are used, to revise the rent. Also, the rent may be revised based on a new determination of the value of the land. Because the latter is more time consuming, often these kind of revisions are only done within a longer interval of time (e.g. 25 years).

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² A English translation of the Amsterdam Algemene Bepalingen voor voortdurende erfpacht 2000, (General Conditions for Perpetual Ground Leases 2000) made available by the Development Corporation of the City of Amsterdam on the website <www.amsterdam.nl>. 
Example: Article 12 Amsterdam General Conditions 2000

The new ground rent will be calculated using the formula: $A + ( (B - C) \times D )$, in which:
- $A$ is the ground rent applying at the time of the revision;
- $B$ is the land value applying at the time of the revision with a view to the change of use and/or the altered development;
- $C$ is the land value applying at the time of the revision with a view to the authorized use and the authorized development at the time of the revision respectively;
- $D$ is the relevant ground rent rate applicable at the time of the revision.

As we will see, the issue of the determination of the initial ground rent and the revision is an important point of debate on urban land lease systems in the Netherlands.

2.4. Ground lease: restrictions in use

The right of ground lease provides the holder of the ground lease the right to use the whole property of the lessor, as if he was the owner. However this use can be restricted. The conditions in the deed of establishment\(^3\) will put restrictions to the lease. It is common practice that governments that use urban ground lease in land delivery, make use of these restrictions. In some cases, these possible restrictions in use are the most important reason a municipality uses urban land lease in land delivery in an area.

A often used restriction is that the enjoyment of the land is limited to a certain type of land use, e.g. housing, industry or commercial use. This is in line with article 5:89 Civil Code that reads that without ‘authorisation of the owner, he [the lessee] is, however, not entitled to change the function of the land, nor to perform an act that is contrary to that function.’ The use restriction can be more detailed than is possible in the legally binding land use plan (bestemmingsplan) in the Netherlands according to the Dutch supreme court (Hoge Raad, 8 July 1991, NJ 1991/691, Lelystad-case).

In general, several types of limitations are used (see table 2 with some examples):

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\(^3\) Governments often use a set of general conditions, to which in the deed of establishment of the right is referred to.
Table 2. Limitations in use within ground lease contracts

<table>
<thead>
<tr>
<th>Field of limitation</th>
<th>Description</th>
<th>Some often used examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction</td>
<td>Obligations about the time and the volume of the construction.</td>
<td>The duty to construct buildings on the land within a certain period of time, according to a building plan imposed by the lessor. A limitation of the volume of the buildings (especially a maximum number of floors). The duty not to build on certain parts of the land. The duty not to demolish the buildings.</td>
</tr>
<tr>
<td>Use</td>
<td>Obligations about the allowed use of the land (including the construction) and also about tolerating some other use of the land.</td>
<td>The duty to use the buildings according to their function; A limitation to changes in the use of the land. The duty to tolerate the use of a part of the land for public services (road, sewerage system, etc).</td>
</tr>
<tr>
<td>Transfer</td>
<td>Obligations about the transfer of the right.</td>
<td>The duty not selling the right without permission of the owner. A pre-emption right for the owner.</td>
</tr>
<tr>
<td>Administrative</td>
<td>Administrative obligations.</td>
<td>The duty to pay all taxes relating to the land.</td>
</tr>
</tbody>
</table>

2.5. Ground lease as an instrument in land policy

In Dutch municipalities that are using urban ground lease in land delivery, the instrument is often used as an instrument to provide better possibilities to reach certain policy objectives.

The possibility of restrictions in use, for example, can be used to have better control of the developed area. A municipality can, for example, in realizing a new industrial area use the urban ground lease to limit the possibilities for specific forms of retail business in the area and in steering the type of industrial use in the area (for example to prevent nuisance in the area).

Another important possibility, is the use of ground lease as a value capturing instrument. If the lessee wants to change the use or the volume of the building, the lessor has to give permission for this by changing the conditions of the lease. If the intended change creates a ‘surplus value’ of the land, the ground fee can be adjusted before permission is granted.

3. Ground lease for housing (‘urban ground lease’)

3.1. Motives behind the urban ground lease

In the Netherlands land is scarce, and that is one of the reasons why the government is for a long period seriously involved in land development

Since the beginning of the twentieth century, many municipalities started with some kind of active land policy. In this policy, many Dutch municipalities decided not only to sell land for housing, but also to make it possible to grant ground leases. Some municipalities only offered ground leases, other offered a mixed set of both ownership and ground lease. There were several reasons to adopt the
ground lease within the land delivery system (Amsterdam, 2005; Nelisse 2008; De Jong & Ploeger, 2008)

- Facilitation of urban planning by the possibility to better control the use of land (early 20\textsuperscript{th} century especially important because public law offered little or no possibilities to do so).
- Facilitating housing associations, by introducing the possibility of paying a ground rent instead of buying the land to stimulate the realisation of affordable housing.
- The opinion that the community should benefit from the expected future increase of the land value, and not the individual owner. The periodically adjustment of the ground rent taking changes in the land value into account, will make it possible to capture (part of) this increase. In this way urban ground lease served also as a tool to prevent land speculations.
- In case of a change in the use of the land which creates a ‘surplus value’ to the land (e.g. the construction of an extra floor or the change of use for housing to commercial use), the ground fee can be adjusted. The extra income for the municipality makes it also possible to realize public investments which might be necessary because of the changes in use (for example the realization of more parking space in the area)

3.2. Application

Quantitative data on the application of urban ground lease by all Dutch municipalities are not available, but recent research provides some insight (Nelisse, 2008; Compaenen, 2013). Until today the most important user of a land delivery system only based on urban ground lease is the City of Amsterdam, the same municipality that was the first to introduce the ground lease for urban land policy in 1896. The importance of ground lease varies per municipality as illustrated by some examples in the figures 1-5.

Figure 1. Amsterdam, land in leasehold in red, other land owned by the municipality in yellow (source: Rekenkamer van Amsterdam)
Figure 2. The Hague, land in leasehold, October 2012 (Compaenen, 2013)

Figure 3. Rotterdam, land in leasehold, October 2012 (Compaenen, 2013)

Figure 4. Groningen, land in leasehold, October 2012 (Compaenen, 2013)
Figure 5. Maastricht, land in leasehold, October 2012 (Compaenen, 2013)

The figures shows that Amsterdam is the number one on the list of municipalities with regard of the surface of land leased. In other cities, ground lease was only one of the land delivery rights which were used or there were periods in which the system of land delivery has changed. Because of municipal involvement in urban renewal and urban redevelopment projects, also in the historic parts of the city’s urban ground lease is found.

There is no standard system of urban ground lease used by the different municipalities; the systems differ to a greater or lesser extent between the cities. Besides these, also the cities itself used different systems during the time they are using some kind of ground lease system. For example, in 2000 the three major cities of the Netherlands had three different leasehold systems:
- Amsterdam: continuous ground lease, revision after periods of 50 years;
- Rotterdam: ground lease with a fixed term (generally 99 years);
- The Hague: perpetual ground lease.

And, with regard to the second point, the variation in time, in the municipality of The Hague, besides the perpetual ground lease, ground leases with a fixed term can be found. And within these leases, some have a fixed ground rent and others have a ground rent which is updated periodically.

3.3. Recent changes in policy

At the end of the 20th century / beginning of the 21st century, in many municipalities that were using the urban ground lease system, a discussion started to change the municipal policy (De Wolff, Ploeger & De Jong, 2006; Nelisse, 2008; Compaenen 2013). Sometimes ground lease got abolished, often the choice between ownership and ground lease was left to the person interested in the land or ground lease was restricted to special cases. Interesting is that the question if the ground lease policy should be maintained or changed seemed to be mainly a matter of ideology.

The abolition of ground lease in Rotterdam was mainly the result of the efforts of *Leefbaar Rotterdam*, the right-wing party of Pim Fortuyn who, until his death by a political assassin in 2002, severely criticised the policies of the left-centre national government led by Labour prime-minister Wim Kok. In 2003 the city of Rotterdam introduced a new land delivery system, whereby the ground lease was abandoned. Existing leaseholders can convert the leasehold to ownership. In specific cases, such as intended long-term development of an area and for specific parties (e.g. housing associations and non-profit organizations) a system of perpetual lease is followed. The main argument for modification of the system was that the view that the leasehold system underlies an appreciation of land in favour of the community, and should not benefit the individual is no longer upheld. Also the municipality (although not based on any research) was of opinion that the use of ground lease made the city less attractive to settle (De Wolff, Ploeger & De Jong, 2006).
Rotterdam was followed by other municipalities, like the city of The Hague. Also in this city the decision to favour the transfer in ownership of land seems to be more the result of political ideology than based on a debate on the usefulness of the ground lease as an legal instrument. Unlike Rotterdam, the system in The Hague was based on perpetual lease. Lessees would be offered the possibility to buy the ownership and therefore become full owner of the land previously leased. In this case the price was limited to – at first – 3% of the land value, later even reduced to a mere 1.5 %. However all transaction costs (notarial deed, cost of cadastral registration and taxes) must be paid by the lessee. In special cases, like reconstruction areas, ground lease will be maintained.

The most remarkable political shift in Amsterdam took place early this year. For a long time the Amsterdam policy was heavily cruised and ground lease considered to be a municipal cash cow. An idea of the objections of leaseholders against the land allocation system can be obtained by consulting the websites of the Dutch Association of Leaseholders (NLVE, Nederlandse Vereniging van Erfpachters <www.erfpachters.nl> and the Foundation leaseholders interest Amsterdam (SEBA, Stichting Erfpachters Belang Amsterdam) <www.erfpachtinamsterdam.nl>). This opposition was further fuelled by the case of City of Amsterdam v Honnebier (Amsterdam Court of Appeal 20 September 2011, ECLI:NL:GHAMS:2011:BT6895), in which the Court ruled in favour of the lessee. The court upheld the opinion in which independent experts reduced the new yearly ground fee nearly one-third compared to the first estimation by the municipality (€ 3135 instead of € 4441). The final blow came spring 2014. As one of the major political parties in favour of the ground lease system lost at the local elections this opened the road for changes. A national (right-wing) newspaper, reported this news under the heading “Finally the end for ground lease” (Eindelijk einde voor erfpacht) and quotes a local political leader: “We put an end to the shameless fleecing of the value of houses by the City and return the control to the homeowners (...)”.4 This news item makes it clear what is wrong with the ground lease policy in the eyes of many. The newspaper calls the ground lease a feudal tax, referring to the fact that the City of Amsterdam collects annually around € 100 million of ground rent.

4. Misconceptions

The ideological approach to urban ground lease, can partly be explained by the caricature that is sometimes made of urban land lease in the Netherlands. That caricature is related to misconceptions about urban ground lease.

Urban ground lease as use in many municipalities in daily life looks very similar to ownership (Akkermans, 2008). This offers food for the misconception that the lease is just a rent for the land, while the lessee is owner of the buildings. Economically, this is not a very strange conception, because during the lease the land owner has a limited power over the land and buildings, while at the end of the lease he must compensate the lessee for the value of the constructed buildings. Indeed Dutch literature mentions often the ‘economic ownership’ of the lessee. However this easily leads to lack of understanding, especially in the case of a ground lease for a fixed term or the case of continuous ground lease. As we have seen the ground lease is a limited use right, and therefore subjected to limitations (in these two cases both in use and time). The ending of the right, normally followed by an offer to issue a new ground lease (under new conditions) or the periodical revision of the ground fee based on the (increased) value of the land, might offer a nasty surprise for the lessee if he considers himself to be an owner.

An illustration of the latter is the supreme court case of the “The Hague leasehold” (Hoge Raad 26 March 1999, NJ 1999/446). In this case each of the lessees had purchased a 75-year lease a few years before the ending date. The purchase price was rather high due to rising house prices in general. The ground rent payable to the municipality however had not been changed from the beginning, and was therefore – as a result of inflation - a very low sum: the Hague used in those days a fixed ground rent

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4 In Dutch: “We maken een eind aan de schaamteloze afroming van de woningwaarde door de stad en geven huizenbezitters zelf de touwtjes in handen” De Telegraaf 18 April 2014 <www.telegraaf.nl/binnenland/22525464/__Eindelijk_einde_erfpacht__.html>
based on the original land value. A few years later, at the ending of the lease, the municipality of The Hague offered to grant a new lease (for an unlimited time), against a ground rent based on the actual land value. The lessees complained about the – in their view – exorbitant and unreasonable increase of the ground rent and claimed in court that the municipality did not act in good faith. The Dutch supreme court ruled that the local government did not act unreasonable. One may add to this that according to the conditions of the (expired) lease the municipality even had the right to order the lessee to vacate the land. Therefore the conclusion must be that the lessees did not realize that they paid too much money to their predecessor for a ground lease of a rather limited value.

If one takes a closer look at the ideological discussions about ground lease in different cities, they can often be traced back to some dissatisfaction with people that did not took notice of the temporary character of urban ground lease.

In the municipality of the Hague, already in 1984 for new ground leases the perpetual ground lease system is used. However, due to the political debate because of the “old” cases, the municipal government decided to change the ground lease system. In new situations of land delivery, a private person may also opt for ownership of the land. The strange thing is that, by altering these regulations, the municipal council did not solve the problem of the “old” cases: people with temporary ground lease rights that come to an end, still have to pay the land value if they want to continue living in the area.

The misconception might also be related to the difference between tenancy and urban land lease. As far as tenancy concerns, the law protects the tenant against the owner. Raising rent is bounded by all kind of public regulations. As far as urban ground lease is concerned, the lessee is not protected by public law so the boundaries have to be found in the private contract in which the right is established.

5. In fatal crisis or a bright future?: an assessment

So, recently in all major Dutch cities a major change of the ground lease system has been realised or is at least in discussion. Ground lease is not anymore the exclusive option for urban land delivery, in those cities. Therefore the question can be raised whether the Dutch ground lease is in fatal crisis or does it still has a bright future?

5.1 point of view of the user of the land

The first question is, whether it can be in the interest of a private person, that the municipality offers an urban ground lease.

As we have seen, the French Code Napoléon, not only a codification of private law but also intending to reform the French legal system in accordance with the ideas of the French Revolution, did not mention the ground lease. As being a relict from a feudal past this was something to be abolished. Remarkably enough, although early nineteenth-century bourgeois society clearly favoured ownership, soon French case law and later-on legislation itself reintroduced the bail emphytéotique in France. Indeed, one may argue there will always be a need for the possibility to grant a limited right in rem for the use of land to private persons for housing, next to ownership of the land. Notwithstanding the protection of the tenant in Dutch tenancy law, the ground lease offers more: a secure and transferrable right that can be used as collateral than tenancy does. So it is in the interest of private parties, that they can obtain for urban ground lease in some circumstances.

5.2 Point of view of the municipality

The second question is, whether the municipality is still in need of using the instrument of urban ground lease. If we look at the three main rationales to upheld a ground lease system used in Dutch municipalities (see 3.2) we can conclude the following:
1) **Facilitation of urban planning by the possibility to better control the use of land.**

The possibility to control the use of land is not really needed nowadays because spatial planning and the possibility to create specific public law restrictions provide in general enough tools for the government. However, in specific situations (e.g. industrial areas) ground lease can make more detailed regulations, than possible using exclusively the legally binding land use plan.

2) **Facilitating housing associations and more general facilitating development.**

Using ground lease makes it possible to help an end user or a developer in his financing requirement: the amount of capital needed is lower, because only the costs for building needs to be financed, not for buying the land. Especially when financing is difficult (which is nowadays the case due to the financial crisis), ground lease can help the functioning of the housing market. Recently, this might especially be interesting for developers (Deloitte, 2013). An example of a redevelopment project that could only be realized by ground lease is the Calypso in Rotterdam (figure 6). Here the municipality purchased the land from the developer and delivered a ground lease in return.

![Figure 6. Use of ground lease during the financial crisis: the Calypso in Rotterdam](photo by FaceMePLS under CC license. Source: wikimedia commons)

3) **The opinion that the community should benefit from the expected future increase of the land value, and not the individual owner.**

For this objective it is important that the municipality owns all the land in a certain area. Practice is, that only part of the land in an municipality is leasehold. That means that some people in the municipality have to give the plus on the land value away for the general benefit, and some ate allowed to keep it. However, both of them have to pay the same amount of municipal taxes. From a political point of view this argument is hard to maintain unless all land in the municipality or in an area is in leasehold. In the perpetual ground lease system of The Hague, the municipality already choose for a system in which this element of ground lease was not present anymore. The future increase of the land value is for the lessee, and not for the lessor.

4) **The possibility to capture the ‘surplus value’ of the land if more intensive land use is allowed.**

For this objective, ground lease is of importance. The Dutch legal system has hardly any other instrument which is useful for value capturing in these situations. An example of the meaning of ground lease for this objectives, is an urban restructuring project in a post war area. One of the measures often taken in the Netherlands to improve those areas, is to replace social housing to housing in the commercial sector. Because of these measures, the land values rise. If the land was delivered in ground lease, the municipality is also involved as a land owner in these projects. And the permission of the land owner is needed for the change of the use of the land. The municipality can use this authority, to safeguard that the plus value is captured. Often this plus value is invested elsewhere in the area, for covering an unprofitable part of the urban restructuring program for the area.

5.3 **Ideological point of view**
A third point is that the much heralded “free and unlimited ownership” does not exist. So: why should one be too ideological about accepting urban ground lease?

In the first place, this image of a free and unlimited ownership does not exist because of a lot of public law restrictions (the most important being the legally binding land use plan). Secondly, in practice the government will impose many civil law restrictions even in the case of the transfer of land in ownership. Although in the case of transfer in ownership these restrictions do not bind third parties (future owners) as such, the use of easements, restrictive covenants (article 6:252 Civil Code) and/or stipulations in the contract of sale that the buyer (under a penalty clause) has to pass on these obligations to the next owner in case of a further transfer it is practically assured that these restrictions will remain a perpetual land burden. It is interesting to have a closer look at the conditions of sale of a big municipality in the Netherlands, in which recently the urban ground lease system is set aside.

Within the conditions of sale are the obligations:

- to realize the buildings on the land, according to the building plan;
- to keep the land and buildings in good condition (maintenance);
- to use the land according to the function given in the deed of sale;
- to tolerate cables and other small constructions.

As we have seen, all these restrictions can also be found in the general conditions for urban ground lease.

In addition to this, ground lease offers the opportunity to fine tune the right to the user’s needs. The user has no need to get more rights than he really can and want to use. As the ground lease offers less rights compared to ownership, it should be cheaper to obtain. This argument in favour of the ground lease will especially be relevant in case of a lease for an unlimited time, with a ground rent that will be paid in once.

5.4 New challenges

Next to this (or in combination) ground lease offers perspectives in the case of multiple use of land. As it allows to restrict the enjoyment of the land to a certain volume (and in fact it does so in most cases). It is also considered to be possible to establish two or more land leases (or one land lease and one building lease) on the same plot. This allows not only for the combination of underground parking spaces and buildings, but also the option to avoid the need to create apartment rights; the latter being a demand of investors in recent development projects, such as the Amsterdam South-Axis (figure 7) (De Jong & Ploeger, 2008; Groetelaers & Ploeger, 2010; Van Velten, 2013; Mouthaan 2013).

Figure 7. Use of ground lease for multiple use of space: Amsterdam South Axis (photo by Massimo Catarinella under CC licence. Source: wikimedia commons)
6. Conclusions

The Dutch ground lease (*erfpacht*) dates from Roman law. In its modern form it has been introduced in 1824 by a special act and incorporated in the Dutch Civil Code of 1838. Although a further modernisation took place 1992, the principles stayed the same until today. At first mainly used for the development of uncultivated lands for agricultural use, the application of this property right became far wider. Early 20th century, following the example of Amsterdam, several Dutch municipalities started to issue land for housing in leasehold instead of transferring the ownership. One century later the ground lease seems to be in crisis. Nearly all municipalities decided to change their land allocation policy in favour of transfer in ownership.

This decisions are almost always based on ideological reasons, and not founded very rationally. However, if we do assess the meaning of urban ground lease for municipal policy, the instrumental reasons to use ground lease, are less important than in the past. However, still ground lease can be a powerful instrument especially in situations where redevelopment takes place (and, in theory: on the longer term this will be the case in every municipal area). It offers the government an instrument for value capturing, and gives the government the opportunity for investments in the area. And in specific situations (multiple land use), urban ground lease is an important tool for a good management of the area.

It’s hard to make any predictions about the use of urban ground lease in near future. However it is the only instrument for the municipalities to capture a surplus value as a result of changes in land use. From a legal point of view this right is indispensible because it makes it possible to shape the enjoyment of land to user’s needs, e.g. providing interesting perspectives in cases of multiple use of space or to be used as an tool to finance (re)development projects. Therefore we may expect that ground lease remains a valuable tool for land policy if used with care and provided its possibilities are well understood by both lessors and lessees.

References