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## OWNERSHIP IN 3D - THE NEW BUILDING RIGHT

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*As of 1 September 2021, Book 3 "Goods" of the new Civil Code, and in particular the new building right ("opstalrecht"/"droit de superficie"), creates many useful perspectives for the real estate sector, particularly for more complex real estate projects. The division into volumes will be more clearly regulated and, under certain conditions, the building right can even be established in perpetuity.*

As of 1 September 2021, the building right ("opstalrecht"/"droit de superficie") is no longer "a right in rem to have buildings, works or plantings, as a whole or partly, on, above or below another person's land", but becomes "a right in rem **conferring the right of ownership on volumes, whether or not built**, as a whole or partly, on, above or below other person's land".

### *Ownership of a volume*

The law of 4 February 2020, which introduces a Book 3 "Goods" into the new Civil Code, including a Title 8. - Building rights, explicitly mentions a right of ownership of a volume. However, the law does not impose any rules on what that volume should look like. As a result, parties are free to determine the shape (width, depth and height) of such a volume, of course within the limits of the rights of the person granting the building right. In other words, it does not always have to be a "horizontal layer" above or below ground level (general building right). Several volumes next to and/or on top of each other are equally possible (specific building right). These volumes may take any desired shape.

The beneficiary of the building right simply becomes the owner, for the duration of his building right, of a volume located on, above or below someone else's land or building, in order to have existing or yet to be erected buildings or plantings. In other words, the actual object of the building right is the volume, not the buildings and plantings in that volume, which are, as they were, merely the result of the building right.

The new law clarifies that when buildings or plantings are already present in a volume, object of a building right, the beneficiary of the building right becomes the contractual owner of the building, unless explicitly agreed otherwise.

During the duration of his building right, the beneficiary of the building right may exercise all prerogatives of ownership, including the use and enjoyment thereof, within the limits of the rights of the landowner and without prejudice to any other pre-existing rights on the land. However, he may not demolish or remove any buildings and plantings that the beneficiary of the building right is obliged to carry out or maintain. On the other hand, consequently, the beneficiary of the building right may not exercise any rights in respect of *other* volumes on, above or below the land, except for any easements from which he could benefit.

However, the building owner may only alienate or mortgage the immovable property of which he is the owner - in his volume - by *simultaneously* alienating or mortgaging the building right of which he is the beneficiary.

During the term of his right, the beneficiary of the building right must pay all charges and taxes relating to the volumes, buildings and plantings of which he is the owner. The landowner or his successors in title, for their part, shall bear these charges and taxes for the parts they own. Each party must, as far as its property is concerned, carry out maintenance and major repairs which it is legally or contractually obliged to carry out, as well as those necessary for the exercise of other existing rights of use of the land. The parties may, however, deviate from this division of shares and duties.

At the end of the building right, ownership of the volume is transferred to the landowner or his legal successor. However, the latter must compensate the beneficiary of the building right for the buildings and plantings erected or acquired within the limits of his right; as long as that compensation has not been paid, the building owner has a retention right on the volume. Here too, however, the parties may agree otherwise.

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## *Up to 99 years or even perennial*

From 1 September 2021, the maximum duration of a building right is no longer limited to 50 years but can be established for a maximum of 99 years.

Moreover, an independent building right can even be perpetual, when and as long as (these words are of great importance) it is established by the owner of the land either for the benefit of the public domain (e.g. a public square on top of an underground car park), or to enable the division into volumes of a complex and heterogeneous real estate property. Such an entity must include several volumes, each of which is eligible for independent and different use (functional requirement) and has no common parts.

If such a perpetual building right has lost all usefulness, even future or potential, and, moreover, has existed for at least 99 years, the court may order its abolition.

These strict conditions and modalities underline that the perpetuity, although expressly permitted, remains the exception to the rule and that the building right is therefore essentially a temporary right. It is also clear that the building right and the possibility of (temporary) volume ownership do not constitute an alternative option for co-ownership rights. As soon as there are common parts in a real estate property and/or the building has only one function or purpose (e.g. residential), a perpetual division into volumes is no longer possible and one must make use of the legal co-ownership structures.

For the sake of completeness, we point out that a building right can also be perpetual, even under current law, when it is a consequence of another "principal right " and that principal right itself is perpetual, such as certain perennial easements. The new regime applicable to such an ancillary building right deviates to some extent from the rules (to be) applied to the independent building right, inter alia as regards its (non) transferability.

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