



# Position Paper

Version 1.1

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## Targeting the right context for building-related sustainability services

“nobody wins unless everybody wins”

1 DECEMBER 2020

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**Economic Board Utrecht**



Supported by EIT Climate-KIC



In cooperation with:  
Municipality Amersfoort, Municipality Leusden,  
Province of Utrecht

“We would like to cordially invite parties who wish to contribute constructively to vision formation and further development to work together.”

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This position paper was drawn up as part of the international RESETTLE!-project – supported by EIT Climate KIC – and in conjunction with the “regional pilot program object-related financing” – funded with contributions from the cooperative municipalities from the Eemland region and the Province of Utrecht.



PROVINCIE UTRECHT



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## ATTRACTIVE PROPERTY SUSTAINABILITY FOR ALL HOMEOWNERS

*Towards a scalable private service with (public) control. It's possible.*

### SUMMARY

Making the built environment more sustainable is a complex task. This is the case in particular for private housing stock. For many owners and/or residents improving the environmental sustainability of their homes becomes more attractive if they are relieved of the burden of having to arrange work to improve their homes and to independently organize how the work will be paid for.

#### 'An offer you can't refuse'

By organizing a long-term based service and making that service transferable to the next owner-occupier, homeowners can enjoy impactful renovations without having to make their own financial investments. An intrinsic link between the periodic payments for sustainability on the one hand and the comfort and savings enjoyed on the other would also make the costs and benefits logical and balanced for the owner-occupier. In short: building-related services will function as a combined implementation of unburdening and financing.

#### Opportunities for the market...

Based on the legal figure of qualitative law (Article 6:251 BW), the market can provide such services with the right contracts. In the Amersfoort region the appeal of such contracts for residents and private service providers are currently being investigated through field trials – of course with due regard for the various development tasks the market still faces.

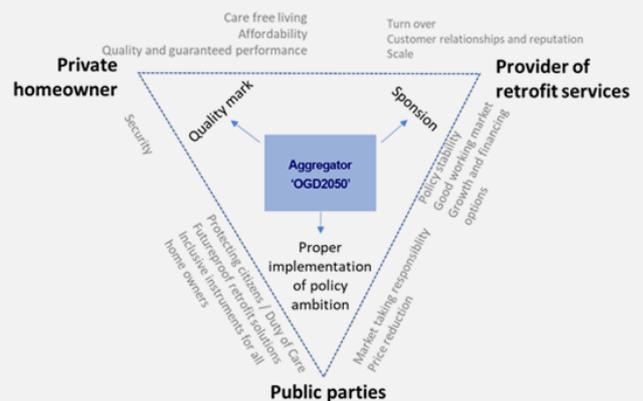
### ... but with direction

At the same time, it is important to ensure that the services the market will develop in this respect are in line with the requirements of the societal challenges.. The housing improvement and efficiency services offered must be in line with the Regional Energy Strategies, municipal Heat Transition Visions and the district implementation plans. The services must be futureproof and not create divestments of which individual citizens of society will soon bear the costs. Some form of (public) management will be required to guarantee this.

### Working directly on an upscaling structure: balance for citizens, companies and management

We therefore argue in favor of both actively stimulating the development of these new sustainability services as described above, for example through guarantees, as well as directing them on conditions that are important for a socially responsible transition. In this way – right from the development phase and onwards – residents are protected, renovations can be integrated into the larger energy system and a level playing field is safeguarded for the entrepreneurs involved.

In order to organize the scalability of this approach, the issuance of guarantees can be appointed to a compact implementation organization, for example a "foundation for object-related services" or other entity. Governments can then easily join in and market parties will have a single point of contact. This creates the desired perspective on scale.



*Figure: implementation organization ("OGD2050") functioning as central guarantor of common interests with regard to object-related services*

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# Table of Contents

Table of Contents	5
Introduction	7
FOR HOMEOWNERS - Building-related services: financing and unburdening in one	8
FOR ADMINISTRATIVE AUTHORITIES - Inclusion in a complex social challenge with the market	9
FOR BUSINESS - Stability and scale	10
FOR COMMON INTEREST - Guidance on preconditions	11
Proposal for upscaling	12
Now get going	13
Appendix 1: set-up for a roadmap to upscaling	15
Appendix 2: qualitative law as the basis for housing sustainability services	16



# Introduction

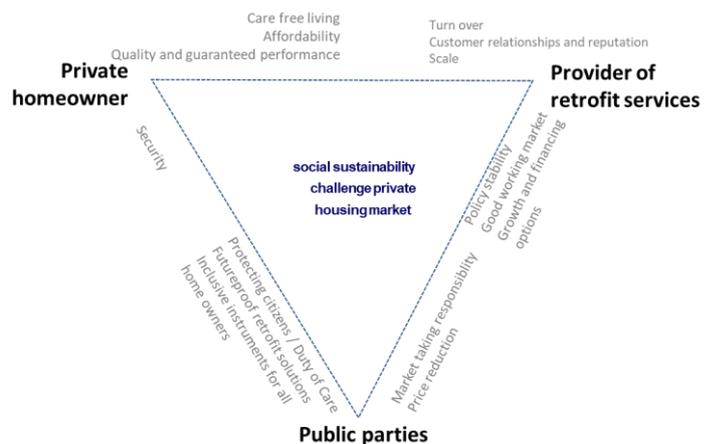
In the Paris UN Climate Agreement, the EU member states agreed to reduce CO2 emissions. In the Netherlands we must emit 49% less CO2 in 2030 compared to 1990. The Climate Agreement of June 2019 outlines how we want to achieve this for various sectors. For the built environment of the Netherlands, all homes must be made more sustainable by 2050 and transition to heating without natural gas.

That is a huge challenge that involves major investments, for the private housing market as well. In order to realize these investments effectively and in a sustainable manner, the interests of residents, businesses and administrative authorities must be properly balanced.

The concept of a building-related sustainability service in combination with guarantees subject to conditions, for example through a concession or otherwise, offers a promising opportunity, with pilots underway. This paper examines the positioning of this solution with a focus on upscaling. The elaborated design will meet the interests and wishes of residents, businesses and administrators.

The positioning is explained from the three perspectives of residents, businesses, and administrations.

By doing so we show the importance of a good implementation of the approach, with which we can create the desired balance. In this way – right from the development phase and after – residents are protected, renovations can be integrated into the larger energy system and a level playing field is guaranteed for the entrepreneurs involved.



**Figure 1: sketch of the interrelated interests of residents, management and businesses within the social sustainability challenge of the private housing market**

# Building-related services: financing and unburdening in one

In the climate agreement it has been decided that the parties will work on both unburdening and financing private home sustainability. These aspects are merged in the Building-related Services.

The Economic Board Utrecht, together with the municipalities of Amersfoort, Leusden and the province of Utrecht, supported by the Eemland region, have taken the initiative to start a program with the aim of developing an inclusive and scalable instrument that makes sustainability feasible and affordable for all private homeowners.

Within this program a model has been developed for building-related services based on the legal figures of qualitative law, documented in Article 6:251 of the Dutch Civil Code. This article describes that the rights and obligations with regard to the sustainability of the home will pass to subsequent homeowners. This establishes a long-standing performance agreement with an “object-related” character. Please refer to Appendix 2 for more information on this.

The appeal of qualitative law in relation to the sustainability task is that, as an intrinsic part of the concept, the costs and benefits for the homeowner converge directly in the agreement with the service provider. The homeowner does not have to make a pre-investment for the sustainability of their home and does not have to take out a separate personal loan. This is in line with the need for worry-free, affordable and comfortable living for everyone.

The operation of this service and its appeal to residents and private service providers will be further researched and developed through field trials – of course with due regard for the various development tasks the market still faces. The experience gained in the trials will be used to optimize the services and to properly organize the possibilities for upscaling.

# Inclusion in a complex social challenge with the market

Central government, provinces, municipalities, housing corporations and network operators are working hard to arrange the frameworks for sustainability through the Regional Energy Strategies (RES), natural gas-free neighborhoods, heat transition concepts and neighborhood plans. This is a huge challenge and getting from initial idea to actual implementation can be a difficult and demanding process.

The built environment is so heterogeneous that each district, neighborhood and sometimes even street or house requires its own unique mix of measures. Owner-occupiers must be able to choose an optimal sustainable solution for their home. This specific solution must be future-proof and must fit into the RES and heat transition plans.

In some neighborhoods individual solutions will be possible while in others a collective approach is essential for the feasibility of the measures. The latter means not only a need for a coordinated approach to housing, but also for an instrument that is inclusive: everyone must be able to participate. At the same time, it must be sound; the owner-occupier must be protected as much as possible against unwanted contract conditions and promised performances must be fulfilled. The latter is not only important for the homeowner themselves, but also for achieving the sustainability goals. In addition, the administrative authorities want the market to participate, who in turn wants to ensure a market that is both properly functioning and has a wide reach.

The proper integration of the building-related sustainability services into these complex social challenges in collaboration with the market requires some form of direction from the government that can accommodate the above. The solution described later in this document with a (public) guarantee subject to conditions meets this requirement.

## Stability and scale

Construction and installation companies (potential future sustainability service providers) are interested in the large market for extensive integrated housing sustainability. However, they run into a lack of enthusiasm about major renovations among homeowners. For this reason, the existing market focuses in particular on "easy" measures such as installing solar panels and insulating roofs and air gaps; measures that homeowners are able to take a decision about with relative ease. One of the reasons that the market for major renovations is still small is because there are currently too few options to implement those renovations on a large scale. The sector is also suffering from uncertainty with regard to national government policies to stimulate the transition. There is a need for long-term certainty. The model presented here meets these needs.

It is an inclusive tool because it can also serve homeowners with limited credit facilities and is an attractive alternative for owners who do not want to invest themselves. Providers can thus reach a much larger target group that was previously unwilling or not able to invest. This way it fulfills the precondition from market parties that there must be sufficient volume (scale).

Another common complaint from the market is that there is a lack of long-term policy certainty. Although in the first instance publicly supported, we believe that the introduction of a service fee (see below) makes it possible to use this instrument in the future without any form of public guarantee. This means that the instrument does not depend on political support and the availability of subsidy resources. Continuity is thus largely guaranteed.

In the coming period propositions, associated business operations and other challenges will have to continue being developed through large-scale trials. The experiences in the trials and feedback from the market will form the basis for further development of the model and its preconditions. Potential financiers (banks and insurers) are following this development with interest to orientate themselves on possible financing of future sustainability service providers. This contributes to the scalability of business operations.

The provision of building-related housing sustainability services can be done by different types of companies; the legal form and operational management are not prescribed by the model. Further development of this service will have to prove which type of management can make the most appealing propositions for homeowners.

## Steering on preconditions

As has been made clear, a certain degree of general interest is involved in the task of making the existing built environment more sustainable. This includes the achievement of a minimum sustainability level, and with it a logical integration at neighborhood level as well as all kinds of other aspects related to the protection and freedom of choice of residents. It is desirable that residents receive an offer that fits their situation instead of an offer that only focuses on "low-hanging fruit" without prospects of achieving the required end result.

However, the private housing market is, quite literally, completely private. There is only limited control via building regulations and eventual permit granting procedures. The situation is therefore fundamentally different compared to new constructions where direction and planning can be regulated through policy planning. Direction and planning, which in fact boils down to ensuring proper coordination of all interests relevant to the assignment, must therefore be organized in a different way.

The still relative unfamiliarity with the instrument of qualitative law offers a starting point. Most parties will need a guarantee in the initial phase to be able to (pre)finance their service concept, and conditions can be linked to or included in this guarantee. With respect for everyone's roles, responsibilities and freedoms, a form of management can still be organized to safeguard the common interest.

Governments play an important role here, especially in the initial phase, to make the guarantees available and to formulate good framework conditions for them. In this way, the government can take up and fulfill its role of director of energy transition.

# Proposal for upscaling

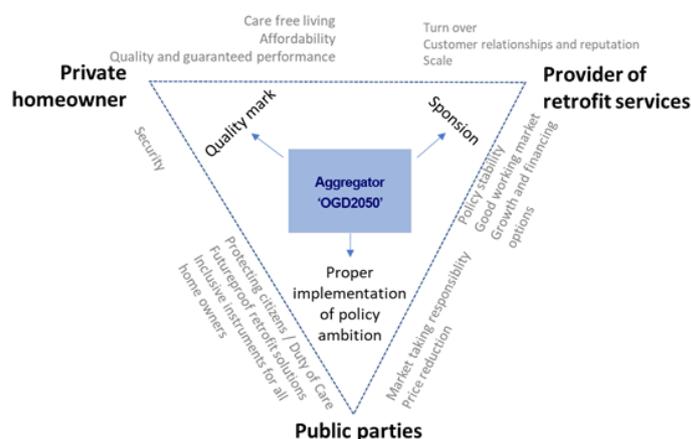
Putting such guarantees on the market can be a complex and time-consuming process, and as such an obstacle to further upscaling both for municipalities and the market. On the other hand, this can stimulate the development of housing sustainability services while the various interests are safeguarded in a relatively simple manner.

The idea is therefore to place the issue of (public) guarantees in a compact executive organization, for example a "foundation for object-related services" or other entity. See figure 2. A possible set-up is now being investigated and further developed. Governments can easily join, and market parties will have a single point of contact. The interests of a diversity of stakeholders can be properly safeguarded through an Advisory Board or Supervisory Board.

Moreover, this method also provides certainty and standardization for financiers. When it comes to upscaling, easy access to financing is crucial.

Certainty is not only provided by the (financial) guarantee itself, but also because such a method ensures that the financing is in line with a coordinated set of social interests and perspectives. This contributes to the stability of the investments and thus the security of the financing. When future financing applications are also based on propositions that meet the same set of basic conditions and are provided with the same type of guarantees, the sector can largely standardize its procedures. As a result, these procedures will fit into their processes better and enable large-scale financing.

By introducing a premium for services when the market is more mature, the model can in principle also run without public guarantees. At that stage, the entity will likely be known as a quality mark among private owners. Supervision will continue to be guaranteed through the structure mentioned earlier, and the public surety agreements will be able to (partly) make way for private agreements based on the same preconditions. The operation is visualized schematically in figure 3.



**Figure 2: implementation organization ("OGD2050") functioning as central guarantor of common interests with regard to object-related services**

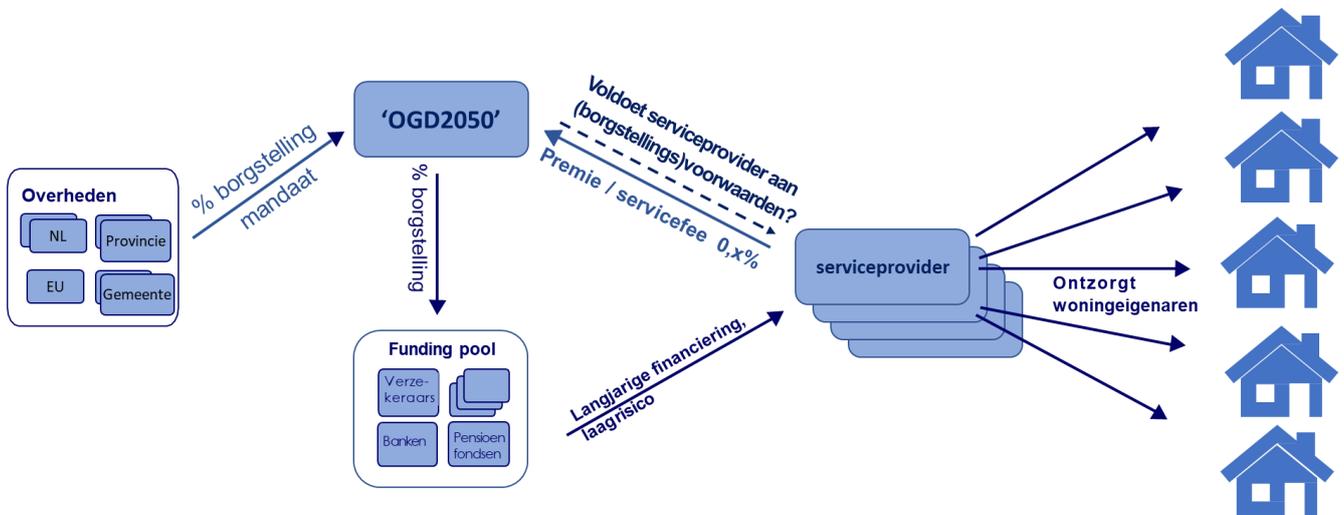


Figure 3: schematic visual of the operation of the implementation organization (“OGD2050”)

The set-up with security conditions via a shared implementation organization is therefore also relevant for the further development of the sector of sustainability service providers. After all, by using similar conditions it is possible to create a level playing field with clear market forces and national upscaling potential. It provides the opportunity for sector collaboration to make it known to owner-occupiers, stimulating familiarity and acceptance. When the trials are carried out, observations of these can be used for making warranty agreements, possible risks can be shared, and cost reduction by way of standardization will be a possibility. Although at first sight it may seem conflicting, the surety conditions with their long-term strategies will protect entrepreneurs, too.

We are currently still in the trial phase. To provide insight on how we can achieve the upscaling outlined above, Appendix 1 contains set-up for a roadmap.

## Now get going

It is possible that sustainability service providers will be able to attract financing without guarantees for building-related services based on qualitative law. In that case, it will not be possible to manage minimum sustainability levels and other important agreements directly through guarantee conditions. The question is, then, how the interests of the homeowner and society itself can best be safeguarded. It is up to the joint stakeholders, including the government and potential service providers, to provide clarity on this in the short term.

We are convinced that, if properly embedded and deployed in combination with some form of conditions, the model of building-related sustainability services in which the

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rights and obligations in relation to sustainability are transferred to subsequent homeowners will contribute to the desired sustainability of the built environment. Regardless of the actual, eventual implementation and the challenges that still exist in all kinds of areas, it is important to start working on and organizing the management for this instrument NOW.

*“nobody wins unless everybody wins”*

TENDER FOR TRIALS AS FIRST STEP IN CREATING A COHERENT ECOSYSTEM

## Amersfoort takes up the challenge

In Amersfoort, the first important step is now being taken with a trial for a 'proof of concept' of building-related services based on a contract with qualitative rights. Together with the stakeholders involved, Amersfoort hopes to make good progress on this project in the coming period. The legal construction has been worked out and tested by various parties recently.

At the same time, the trial will be embedded directly into the system of guarantees under conditions, so that it will be possible to address this right away if the proof-of-concept of the building-related services are successful.

For this trial the municipality of Amersfoort is making a surety of up to €1.0 million available for a service provider, who is yet to be selected. A tender will be organized in order to select a provider, which will also include a dialogue with the market. Afterwards, the final conditions will be published, which potential service providers must meet in order to make use of the surety.

The blueprints, experiences and observations from the trial in Amersfoort will be shared with municipalities, provinces, central government and other parties, so that they can be used to achieve national upscaling – for example in the same way as outlined in this paper.

# Appendix 1: set-up for a roadmap to upscaling



					System change
					Geaccepteerd en bewezen instrument
				Delivering & implementing	Volwassen werkwijze
		Opbouw organisatie	Private commitment voor opschaaling	Riskrating met een GO voor institutioneel geld	Institutionele beleggers willen instappen
	Pilots	Inzet borg-stellingsmodel gefund door gemeenten en provincie	Inzet borg-stellingsmodel op landelijk niveau	Waarborgfonds groeit door private servicepremie	Dekking waarborgfonds op orde
Idee en planvorming	Start pilot 10 woningen	Start pilot 100 woningen	1000 woningen	Schaalbare uitrol	Minimaal 100.000 woningen per jaar
Onderbouwing kwalitatief recht	Toets kwalitatief recht	Toets kwalitatief recht; eventueel verkenning aanpassing BW of anderszins	Finetuning contracten kwalitatief recht	Geen juridische onzekerheid	
Uitwerking schaalbaar borg-stellingsmodel	Test inzet schaalbaar model	Doorbouwen model	Via Uitvoeringsorganisatie		
Bestuurlijk draagvlak in de regio en principe GO op pilot	Commitment in de regio en verbreding draagvlak	Draagvlak en commitment landelijk	Harde commitment vastgelegd in meerjarenafspraken		
Omvang borgstelling: € 0	Omvang borgstelling: € 1.000.000 (100%)	Omvang borgstelling: € 5.000.000 (100%)	Omvang borgstelling: € 25.000.000 (50%)	Start afbouw publieke borgstelling naar 0%	Waarborgfonds gevuld met servicepremie (0,x %)
<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>2022</b>	<b>2025</b>	<b>2030</b>
inzet	Rijk				
	Provincie				
	Gemeente				
	Privaat				

Parallel: Development Service Providers and their services



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## Appendix 2: qualitative law as the basis for housing sustainability services

The aim of the aforementioned work program is to develop an inclusive and scalable tool that makes sustainability feasible and affordable for all private home owners. This has led, among other things, to the development of a model for building-related services based on the legal figure of qualitative law, recorded in Article 6:251 of the Dutch Civil Code. Model contracts have been developed and a first trial is in preparation. This appendix provides some more background on the application of this legal figure.

### Basis

The legal provision regarding qualitative rights can be found in article 6:251 BW (Dutch Civil Code). The first paragraph of art. 6:251 DCC reads: “Where a transferable right arising from an agreement is connected in such a way to a specific property of the creditor that the creditor only has any interest in that right as long as he retains this property, this right will pass by operation of law to the person who acquires that property under particular title.” This article contains a legal exception to the principle that agreements can only entail rights and obligations for parties. The person acquiring a home through purchase sometimes also acquires certain contractual rights related to that home. Rights attached to a property will be transferred if three requirements are met:

1. The right arises from an agreement.
2. The right is subject to transition.
3. The right is qualitative, that is to say: it is related to the property in such a way that the creditor has an interest in that right only as long as he retains the property. The term "qualitative" refers to the quality of the entitled party.

If the aforementioned requirements are met, the right will pass by operation of law – without the need for further action by the parties – to the acquirer of the property. Article 6:251 of the Dutch Civil Code also determines that if a compensation has been agreed upon for the right (for example, through the payment of a periodic fee), the obligation to fulfill that agreement can be legally enforced.

In the contract form proposed here, the qualitative right concerns the right to sustainability measures tailored to the home and their maintenance. The homeowner enters into a long-term agreement with the provider who supplies/installs and maintains/repairs/replaces the measures, resulting in a reduction in the energy bill. The

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home owner pays a monthly contribution in return. As soon as the owner sells the house, they will no longer have an interest in the right (the sustainability agreement), as these are after all part of the house they no longer own. The buyer of the house does have an interest as they have bought the house and are thereby claiming the right. As such the buyer will receive the right and the associated obligation to pay the monthly contribution.

## Arguments for qualitative law as the basis for a building-related service that unburdens the homeowner

- It makes use of existing legislation and regulations. It is therefore not necessary to wait for an amendment to the law.
- Because nothing changes in the ownership situation of the house, there is no need to “break open” titles and/or mortgage deeds.
- The sustainability agreement, which includes warranty, monitoring, maintenance, repair and replacement, assures the home owner of the worry-free and effective functioning of the measures taken.
- Qualitative law offers a basis that is also maintained in the event of a forced sale of the home by third parties (foreclosure sale by mortgagee or receiver). The buyer is then bound by the continuation of the qualitative right.

## The risks of qualitative rights

It is essential that the sustainability agreement automatically transfers to the new owner when the home is sold. The law article determines that the buyer has the right to refuse the automatic transfer of the qualitative right and the related consideration. In principle, a (potential) buyer is free to reject the qualitative right. This means a small risk for the seller. To minimize this risk, a condition is included in the sustainability agreement that the homeowner explicitly mentions the sustainability agreement in the purchase or sale agreement and notarial deed of transfer of the home. This way the new homeowner explicitly agrees to the sustainability agreement when they purchase the house, and will not be able to invoke their right to refuse the transfer of the qualitative right at a later stage.

It is important that (potential) buyers receive all relevant information so they can make an informed decision about the transfer of the sustainability agreement. To ensure this, a perpetual clause is included in the agreement in which the homeowner (and successive homeowners) undertake to inform (potential) buyers about the content of the agreement, which includes the monthly financial obligation of the home owner to the provider.

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There is a small chance that in situations where sale is the result of inheritance, the existence of the qualitative right is not known to the heirs, resulting in the buyer not being properly informed. This instance would mainly arise during the first sale of the home after it has been made more sustainable, if the qualitative rights have not previously been included in the notarial deeds of transfer of the home. There is currently no specific public register for qualitative rights. It will therefore be investigated whether it is possible to register the sustainability agreement as a qualitative right in the public registers of the Land Registry.

Theoretically, a situation may arise where the seller knowingly ignores their obligations and sells the property without properly informing the buyer of the existence of the qualitative rights. The likelihood of this situation would also mainly occur during the first sale of the home after it has been made more sustainable, if the qualitative rights have not previously been included in the notarial deeds of transfer of the home. In that case, the buyer can waive the qualitative rights and the provider will no longer be paid. To discourage this, a penalty clause is included in the sustainability agreement where the former homeowner must pay a fine to the provider should they intentionally fail to inform the new homeowner of the existence of the qualitative rights. Moreover, if a termination option is included in the sustainability agreement, paragraph 2 of article 6:251 DCC determines it will be the responsibility of the previous owner (the seller) to continue paying the obligations if the new owner fails to do so. This will remain the case until the agreement has been canceled in accordance with the agreed-upon conditions.

## Case law

The legal literature contains views and interpretations regarding qualitative rights. The statutory provision on qualitative rights has not yet been explicitly applied to building-related sustainability services in the Netherlands. There is therefore no case law on the exact application and scope of qualitative rights yet. This entails risks: a judge may ultimately interpret the legal article differently than we have done above, after all. Only specific case-based court rulings can clarify this, and time will tell whether proceedings for qualitative rights are will be instituted. In any case, this will not be likely in the short and medium term. Additionally or alternatively, central government can make an important contribution in further limiting residual risks in the context of Article 6:251 of the Dutch Civil Code, by adjusting or supplementing the Dutch Civil Code if necessary, or by clarifying application options.

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