

What land-owners and developers should know about the Sectional Properties Act, 2020 (“the Act”) and the Sectional Properties Regulations, 2021 (“the Regulations”).

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Introduction

The Act provides for the division of buildings into units (either residential or commercial units) owned by individual owners as well as the ownership of the common property in the building by all the unit owners proportionately.

The Act requires that a sectional plan in respect of the units is prepared by a surveyor and registered. Upon registration of a sectional plan, it is mandatory to form a Corporation whose members will be the owners of the units and this Corporation will be responsible for the control, management and administration of the units and the common property.

Unlike the management companies which are companies formed in accordance with the provisions of the Companies Act (2015), the Corporation is registered under and regulated by the Act and the Regulations.

The Regulations are intended to operationalise the provisions of the Act and provide for the implementation of the Act.

Broadly, the Regulations cover the following areas:-

- (i) The requirements for registering a sectional plan;
- (ii) Conversion of long-term leases to sectional units;
- (iii) The long-term leases that are exempt from conversion; and
- (iv) Prescribed forms for registration under the Act

Who is subject to the provisions of the Act?

From its onset, the Act provides that it is applicable to parcels of land having both freehold titles and leasehold titles with an unexpired term of not less than 21 years.

The threshold of applicability of the Act in relation to the units comprised in a given building is a minimum of 2 units and thus excludes undeveloped plots of land.

What is required under the Act?

The Act provides that a developer shall not sell or agree to sell a unit or proposed unit unless the developer has delivered to a purchaser copies of the following:

- a) The purchase agreement i.e. an agreement whereby a person acquires a right to purchase a unit or proposed unit;
- b) The by-laws or proposed by-laws of the corporation;
- c) The management agreement or proposed management agreement (if any);
- d) The recreational agreement (if any);
- e) The lease or title of the parcel on which the unit is located or the certificate of title/lease of the unit;
- f) Any charge or proposed charge affecting the unit; and
- g) The sectional plan or proposed sectional plan.

With respect to an existing structure, **critically, Section 4 of the Act states that an existing structure may be designated a building containing a unit or part of a unit divided into two or more units by the registration of a sectional plan. An interpretative understanding of this section is that the use of the word ‘may’ imputes that the application of the Act is not compulsory for at least “existing structures”.** Further the Act provides that, an owner of a building that contains premises that are rented to a tenant that is not a party to a purchase agreement and not included in a sectional plan is prohibited from selling the units until a sectional plan for the property is registered.

Requirement for conversion

The Act stipulates that all long-term sub-leases that are intended to confer ownership of an apartment, flat, maisonette, town house or an office that were registered before the commencement of the Act shall be reviewed to conform to Section 54(5) of the Land Registration Act, 2012 (“LRA”) within a period of **2 years** from the commencement of the Act (i.e. 28th December 2020).

Section 54(5) of the LRA provides for issuance of title deeds by the Registrar of Land Titles (“Registrar”) upon registration of long-term leases provided that a sectional plan is presented upon registration of a long-term lease as provided for in the Land Registration (General) Regulations (2017).

The Act provides that the above steps can be initiated by a developer, management company or the owner of a unit. Further, that the Registrar can dispense with the production of the original

title to the parcel of land on which the building is comprised, if the developer is not willing or is unavailable to surrender the title to the parcel for purposes of conversion.

Pursuant to Section 59 of the Act, the Regulations were gazetted on 26th November 2021. The Regulations provide that long-term leases shall be converted to sectional units where:-

- a) All the units have been transferred to their respective owners and the reversionary interest has been transferred to the management company to hold in trust for the owners as noted on the title; or
- b) All the units have been transferred to their respective owners and the reversionary interest is by written agreement intended to be transferred to the management company to hold in trust for the owners'; or
- c) Part of the units have been transferred to their respective owners and the reversionary interest has been transferred to the management company to hold in trust for the owners.

Exemption from conversion

The Regulations provide that the long-term leases falling under the following categories are exempt from conversion:-

- a) where it is expressly provided by agreement that reversionary interest belongs to the developer or lessor or management company as legal owner and not as trustee;
- b) large mixed-use developments and phased developments where it is by agreement provided that reversion shall be retained by the developer or to be otherwise held by a management company; or
- c) Projects of strategic national importance, substantial transactions, and special economic zones, which by their nature, renders it impractical to relinquish reversionary interest.

What is the effect of registering a sectional plan?

Upon registration of a sectional plan, the Registrar shall close the register pertaining to the parcel of land on which the building is comprised and open a separate register in respect of each unit. The proportionate share in the common property will be noted in the respective unit registers as well as those interests (if any) affecting the parcel of land on which the building is comprised.

Each unit will have its own title (i.e. a certificate of title or certificate of lease, as the case may be) and the Act does provide that for the purposes of assessment of rates and ground rent, each unit (including its share in the common property) constitutes a separate parcel of land and improvements. This means that each unit owner will be liable for payment of the applicable rates and ground rent (if any) in respect of their unit.

Further, upon registration of the sectional plan, a corporation is also formed comprising of the owners of the units to which a sectional plan relates.

The Registrar shall issue the certificate of registration of the Corporation and there is no need for registration under the Companies Act (2015).

Consequences of failing to comply with the provisions of the Act

The Act provides that the Registrar shall register a restriction against the title of the parcel of land on which a building is comprised to prevent any further dealings on it if an owner or a developer fails to comply with S.13 (conversion of units) of the Act.

The Act further provides that a person who fails to comply with S. 13(1) i.e. registration of a sectional plan for existing developments or S. 43 i.e. regarding the copies of documents to be provided to a purchaser by a developer, is guilty of an offence and shall be liable to a fine not exceeding KShs.20,000,000.00 or imprisonment for one year.

Conclusion

It is noteworthy that the Act commenced on 28th December 2020 and that the aforesaid two year period for compliance has lapsed. At present, there is uncertainty as to whether or when the said deadline will be extended.

Additionally, from a practical perspective, there are a number of challenges presently being faced, particularly at the Central Lands Registry, which can be attributed to among others, a lack of clear directives on the manner in which the conversion of the long-term leases is to be undertaken and the digitization of the lands processes which has resulted in a backlog of transactions.

We continue to monitor the developments in this sector.

The contents of this article are intended for general use only and should not be relied upon before seeking specific advice on any matter. Should you have any queries or need any clarifications with respect to sectional properties, please do not hesitate to contact Faiyaz Anjarwalla or Ruby Njenga at A.B. Patel & Patel LLP.



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