



Legal Alert | December 01, 2021

The Sectional Properties Regulations, 2021

Introduction

The Cabinet Secretary for Lands and Physical Planning has gazetted the Sectional Properties Regulations, 2021 (“the Regulations”). Their objective is to operationalise the Sectional Properties Act, 2020 (“the Act”). The Act covers ownership of units in a building such as offices, apartments, flats, and townhouses. We summarize below the key provisions of the Regulations.

Key Parties

The Regulations deal with two key elements:

- ❖ registration of sectional plans for developments where no long term leases are yet to be registered; and
- ❖ conversion of registered long term leases over sectional properties.

The Parties with key roles under the Regulations are:

- ❖ Surveyor – prepares the sectional plan and endorses it with their license number for registration.
- ❖ Developer – endorses the section plan.
- ❖ Department of Surveys – authenticates the sectional plans prepared.
- ❖ County Executive Committee Member (Approval of buildings) – confirms the sectional plans prepared conform to the approved building and architectural plans.
- ❖ Land Administration Officer – for leasehold properties, confirms that rent has been apportioned to each unit.
- ❖ Advocates – assist in the drawing up of by-laws, management and recreational agreements as well as compliance with the Act and Regulations.
- ❖ Ministry of Lands – registers the sectional plans and issues sectional titles over individual units, as well as the Corporation’s Certificate of Registration and notes any changes to the Register of owners.

In conversion, we have the same parties as above. However, the Developer’s role may be undertaken by the following parties in the circumstances below:

- ❖ Management Company – responsible for conversion where the reversionary interest has been transferred to it or if the developer fails to.
- ❖ Unit owners – responsible for conversion where the Developer or management company do not.

Salient features of the Regulations

A key aspect of the Act is that ownership of the unit is devolved to the unit owners and held exclusively by them. This is illustrated by the below:

Sub-division and Consolidation

Owner may sub-divide or consolidate their unit by registering a sectional plan of sub-division, or consolidation respectively.

Where the subdivision or consolidation is likely to affect the incidental rights of other unit owners, their consent will be required. If the property is charged, the chargee’s consent will be required, as well.

Apportionment of Rent and Rates

The obligations to pay rent and rates is now on the unit owners.

Rates Apportionment is determined by the County Government of the area the parcel is located.

The Unit factor attributable to the unit, as computed below is one of the factors taken into account in determining rates or rent payable.

Unit factors

Each registered unit shall be allocated a unit factor/unit entitlement. The unit factor is critical in determining the ownership of Common Property held by all the unit owners as tenants in common and the number of votes that a person may cast in a poll.

The unit factor may be determined in reference to any of these 3 factors or a combination:

- ❖ by the unit floor area; or
- ❖ by the selling/ value of the unit; or

- ❖ by location/position of the unit e.g. a penthouse or a riverfront unit as opposed to the other units.

The recommended basis under the Regulations is the use of unit floor area, which is the simplest. The total of the unit factors for all units in the parcel is assumed to be 10,000, for ease in determining unit factors in whole numbers.

To illustrate this, take a unit whose floor area is 200 m² in a building with a total floor area (less the Common area) of 1000 m². The unit factor will be calculated as follows:

$$\frac{200 \text{ m}^2(\text{Unit floor area})}{1000 \text{ m}^2(\text{total floor area})} \times 10,000 (\text{reference}) = 2,000$$

$$1000 \text{ m}^2(\text{total floor area}) (\text{less common area})$$

In a sub-division or consolidation, the unit factor or factors for the unit or units to be sub-divided or consolidated will be apportioned among the newly created units. That is, if the unit above is sub-divided into A and B measuring 100 m² and 50 m² respectively with the common area resulting from such sub-division measuring 50 m² then A's unit factor shall be determined as follows:

$$\frac{100 \text{ m}^2 (\text{Unit A floor area})}{100 \text{ m}^2 + 50 \text{ m}^2 (\text{total floor area of A and B})} \times 2,000 = 1,333$$

$$100 \text{ m}^2 + 50 \text{ m}^2 (\text{total floor area of A and B})$$

The size of the Common area is not factored in when determining the total area.

Conversion

Documents supporting a conversion application are the: sectional plan, sub-lease/ long term lease and the Title or a Copy of the Title of the parcel. Where the original title is unavailable, the applicant shall apply for a replacement title.

After conversion, the Registrar shall issue the unit-owner with a Certificate of Title/Lease.

Upon conversion, the management company should transfer all its assets and liabilities to the corporation within a period of one year from the date of registration of the corporation.

If the property is charged, the application for conversion may be prepared by the developer, Management Company or unit owners but submitted by the chargee or its appointed representative for processing at the Lands Registry. Failure to make an

application for conversion shall not invalidate a charge over a Unit meant to secure the unit owner's obligations to a chargee. A charge may as well exercise its statutory power of sale and the Registrar shall issue a new sectional title in the name of the transferee upon registration of transfer by the chargee.

The Corporation

An application for registration of a corporation will be submitted together with the application for registration of a sectional plan. The Corporation is meant to manage the common property and is bound by the provisions of the Act and not by those of the Companies Act, 2015.

The following changes in the Corporation are required to be notified to the Registrar:

- ❖ amendment to its by-laws
- ❖ termination of the sectional status of the property
- ❖ transfer of common property by the Corporation.
- ❖ change of the Corporation's address.
- ❖ Change to membership of board or of the Corporation on transfer by a unit owner.

Completion Documents- What Changes?

Typically, once long term leases are registered, the following completion documents among others are issued in practice: a registered sub-lease, head title with the sub-lease entry, management company Certificate of Incorporation and Articles of Association and the Share Certificate in respect of the unit owner's interest in the management company. All these are to be done away with and the following will then apply as Completion Documents (i) Certificate of title/lease with the unit factor noted as well as rent payable, if leasehold; (ii) registered Sectional Plan; (iii) the Corporation's Registration Certificate; and (iv) the Corporation's by-laws. In addition to this a Management or Recreational Agreement, where applicable. The customary documents such as government approvals, remain in place.

Properties exempt from the Regulations

During stakeholder consultation, concerns were raised as to the Act's applicability to certain

developments. As a result, the Regulations have exempted the following properties from its application:

- ❖ 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;
- ❖ 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
- ❖ projects of strategic national importance, substantial transactions, and special economic zones, which by their nature, renders it impractical to relinquish reversionary interest.

It would be important that these exemptions:

- ❖ are introduced in the Act, as well.
- ❖ Are a bit clearer as to what constitutes a Mixed Use Development for the purposes of the Regulations in terms of minimum acreage or diversity;
- ❖ Provide for a formal procedure for an application for exemption, not only to ensure the end-purchasers have necessary assurances but also ensure the integrity of the objectives of the Act are preserved, particularly as to a unified and harmonized land titling system.

Possible considerations would include:

- ❖ Allow for a partial surrender of portions of phased developments to allow the issuance of Sectional Titles over the ready sections. The portion surrendered would be noted on the Head Title with the ultimate goal being that once the phased development is complete the entire Title will be surrendered;
- ❖ For Mixed Use Developments, allow for the registration of Mixed Use Sectional Schemes with governance at both individual use level and at top level aggregating representation from different uses; and
- ❖ Exempt Management Agreements entered into in respect of the properties that are exempt under the provisions of the Act allowing termination, without cause, after the lapse of two years. Ensuring the developer or lessor maintains

management where it is necessary for the continued viability of the development where it is integrated.

Conclusion

The Regulations are a positive step towards the implementation of the Act, which seems to have a lot of confidence from the end purchasers.

The Act requires conversion of long term leases within 2 years from its commencement i.e. December 28, 2020. With almost a year having lapsed before the publishing of the Regulations and considering any operational delays, it may be prudent that the Act is amended to allow the CS by gazette notice provide for the period within which conversion must be complete.

In addition, conversion where the Property is charged as security may be problematic for example where only a portion of the units have been sold. There would need to be co-operation between the developer and the buyers who were issued with long term leases, pursuant to a Partial Discharge. If these individual buyers had then used their units as security to other financial institutions, it presents another hurdle. Even where transfer of all units is complete to individual buyers, noting that securities are noted against the individual leases and not the Head Title, the accuracy of data to ensure no gaps in transition should be ensured. A transparent and phased approach such as the one for Conversion of Land parcels, where a gazette notice is published identifying parcels that will be converted may be of some utility, as well as any records by Management Companies for any consents to charge also presented with the application.

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