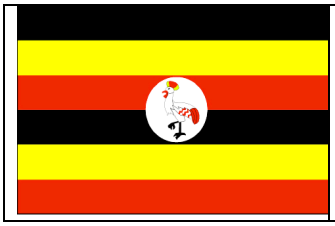

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# Review of the Legal Framework for Land Administration

# FINAL DRAFT ISSUES PAPER – REVIEW OF THE CONDOMINIUM PROPERTY ACT 2001

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**THE REPUBLIC OF UGANDA**

# Final Draft Issues Paper – Condominium Property Act 2001

## Scope of this Draft Final Issues Paper

This section of our Final Draft Issues Paper deals with the *Condominium Property Act 2001.*

We considered key aspects of the *Condominium Property Act* in para 2.9.6 of our **Inception Report**, and again in Section 9 of our **Consultation Paper: Revision of the Land Sector Laws**, October 2007.

The Law Reform Working Group (LRWG), at its retreat on 24-27 January 2010 made no comments about our discussion of the Condominium Property Act – or, if it did, none have been relayed to us.

Nevertheless, we have reviewed our earlier discussions, and now present our Final Draft Issues Paper on the subject.

## Background

The *Condominium Property Act* has been in operation for a number of years. However, we understand that relatively few titles have been issued under the Act. In fact, we were informed at a meeting at the Ministry on 19 July 2007 that, at that stage, only about 100 titles had been issued under the Act. We are not clear whether this is because the Act is not popular with developers, or because it is not popular with the general public (whose views would, of course, influence developers in their choice of legal structure). Whatever the reason, the slow "take-up" rate under the Act suggests the need for review.

Of course, other condominium-like schemes are possible. Examples are company title[1] and tenancy in common[2]. However, in our view the legal structures under which they operate are unsuited to modern property development. They lack the sophistication, convenience, and the consumer safeguards of modern condominium law.

In making recommendations in relation to this area—as with others we have considered in our Review—we are conscious of the need to keep legislation as simple and as practical as possible. In the present context, that requires a balance between the need for a legal structure that is sufficiently detailed to protect consumers and ensure the equitable day-to-day running of condominium properties, and the need to keep the market free from undue restrictions. A condominium law that is unnecessarily complex will discourage development.

We now turn to substantive matters. In our view, the Act needs revision in the following areas.

## Substantive reforms required

### *1 Accommodating "mixed" development and community schemes.*

In our view, the scheme of the Act is too rigid adequately to meet the needs of modern mixed development (eg, ground floor shops, with upstairs residences or offices). Likewise, it is too rigid adequately to meet the needs of "community

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1 Under this system, a company is formed to build and own the land and the buildings on it. "Purchasers" of units in the building are allocated shares in the company, each group of shares entitling the holder to occupy a particular unit. The "purchasers" do not own their unit, but only the shares.

2 Under this system, all owners are tenants in common of the land and building; a purchaser therefore acquires a proportionate interest as tenant in common with other owners.

schemes" (as they are termed in other jurisdictions), such as residential schemes that allow for high rise buildings on one part of the property, and single-storey or low-rise buildings on another part, with different facilities to be enjoyed by the different components.

In particular, under the *Condominium Property Act* contributions to outgoings are based purely on "unit factor" (or "unit entitlement", as similar legislation in other jurisdictions terms it). This in turn is based on criteria such as size, location and views. However, apportionment on these bases is not always equitable. For example, a development might comprise both a high-rise tower with lift access, and low-rise buildings without lift access. An apportionment based on "unit factor" effectively requires those in the low-rise buildings to contribute to the cost of repairing the lift in the high-rise tower. But a more equitable apportionment might rather require the high-rise owners to pay the entire cost of lift maintenance.

Again, in "mixed use" development—for example, where some units used as shops, others as offices, and yet others as residences—a more equitable share of outgoings would be based on frequency of use of common resources and wear and tear on public areas, and not purely on the "value" of the respective premises.

***Recommendation 1:*** *the provisions regarding unit factor should be revised to introduce more flexibility into the apportionment of outgoings.*

## *2 Bye-laws (or "rules")*

The "bye-laws" or "rules" of the condominium corporation are important in regulating day-to-day living in condominium properties. The Act deals with the bye-laws or rules in a number of sections. However, in our view, the

provisions are not always easy to interpret or apply. We consider three matters in particular:

- *First: what is the content of the rules?* Under section 30, the condominium corporation must make "rules" for the management of the units and common property. However, the Act gives almost no guidance as to the content of the rules. Then, section 41 requires the developer to give prospective purchasers a copy of the "proposed rules". Again, no guidance is given as to the content of the rules—and of course at this stage the "corporation" may not be in existence.

  In some other jurisdictions, the relevant condominium or strata title statute prescribes basic "rules" that apply from the time of registration of the condominium plan. The rules can later be changed by the corporation; but unless and until they are changed, they apply. This helps ensure consistent (and fair) rules across the whole country. Further, the statutes tailor the rules to particular types of properties: for example, the rules governing residential properties differ from those governing commercial properties, and those governing industrial properties, and so on.

  The Ministry has issued *Model Rules for Residential Condominiums* (2003). We presume that most condominium developments have adopted them. However, they do not have statutory force – in the sense that they are not a formal regulation or statutory instrument. They merely purport to be made by the corporation under its power in section 30 to make rules for the management of the units and common property. In our view, this may give rise to problems, as some of the rules (in our view) may go beyond the corporation's legal powers. For example, the rules purport to bind tenants of lot owners (Rule 97), including requiring tenants in certain circumstances to give up possession of the lot in possible breach of the terms of the lease (Rule 57). Again, the rules

contain provisions in relation to insurance which, on one view, might breach common law rules about insurable interests (Rule 38(4), which may been seen to permit "double insurance"). And again, the rules may be thought to impose restrictions on lot owners' freedom to deal with their lots, in possible breach of section 30(4) of the Act. It would be better, in our view, if the key rules had statutory force – either by inclusion in the Act itself or by way of regulation made under the Act.

- *Second: whom do the rules bind?* Under section 30, the rules are expressed to bind "the corporation and the owners". No mention is made of the rules binding tenants. Yet later sections (eg sections 31, 32) assume that tenants are also bound by the rules. Further, nowhere are the rules said to bind occupants who are neither owners nor tenants. As we have noted above, the *Model Rules* purport to bind tenants; but we would question the power of these rules, which do not have the force of a regulation, to bind persons who are not bound by the terms of the Act or a regulation made under the Act.

- *Third: what is the correct terminology?* The Act seems to use the terms "bye-laws" and "rules" interchangeably. We would recommend adopting the term "rules" throughout.

***Recommendation 2:***

- *that the Act prescribe basic rules for condominium properties, to apply unless and until changed by the corporation;*
- *that the Act provide that the rules bind all occupants, whether owners, tenants, licensees, or others in occupation; and*
- *that the Act be amended to replace references to "bye-laws" with references to "rules".*

### *3 Maintenance: sinking fund*

One of the corporation's functions is to maintain a fund for "administrative expenses": section 21(1)(c). This fund is for meeting the expenses of the control, management and administration of the common property, for payment of insurance premiums and rent, and for the discharge of the corporation's obligations. In other words, it is for recurrent expenditure. Nowhere does the Act require the corporation to set aside funds for future expenditure of substantial proportions, such as structural repairs or substantial repainting. In almost all jurisdictions with strata or condominium legislation, the corporation must set aside funds for such expenditure. In our view, that should be the position in Uganda also.

***Recommendation 3:*** *that the Act be amended to require the corporation to maintain (in addition to a maintenance fund) a sinking fund for future substantial expenditure.*

## *4 Insurance*

The corporation must insure the building against fire (section 21(1)(f)). For this purpose, it is deemed to have an insurable interest in the building (section 21(8)). However, the Act does not expressly prescribe, or give guidance about, the amount of the insurance. In particular, it does not specify that the policy must be a replacement policy. Perhaps this is implied; but in our view, it is too important a matter to be left to implication.

In addition, many other jurisdictions allow an owner to take out insurance (despite the existence of the policy taken out by the corporation) for the amount of any mortgage over the unit. This is often called "mortgagee insurance"—a separate policy for the amount secured by mortgages over the owner's lot. If the unit is damaged, the policy proceeds (being the lowest of the amount stated in the policy, or the amount of the loss, or the amount needed to discharge mortgages) are paid to the mortgagee, and the insurer effectively acquires the mortgagee's rights against the owner for the amount paid. The purpose is to stimulate mortgage lending on condominium properties, by guaranteeing repayment to the mortgagee if the building is damaged or destroyed by fire. We understand that in Uganda financiers already in fact insist on mortgage insurance. There is such a provision in the *Model Rules* (Rule 38(4)), but we doubt its validity. We recommend that a provision be inserted into the *Condominium Property Act* specifically authorising the practice.

***Recommendation 4:***

- *the Act should require the corporation to insure the building under a replacement policy;*
- *the Act should be amended to allow owners to take out mortgagee insurance.*

### *5 Suing the builder or developer for building defects*

In a number of jurisdictions, problems have arisen over who is entitled to sue a builder or developer for building defects that have come to light after completion of the building. In particular, questions have arisen whether the corporation can represent unit owners, or whether unit owners must sue in their own names. The *Condominium Property Act* is silent on this matter.

There is also an issue, in our view, in relation to work done on the common property. While it would be convenient for the corporation to be the plaintiff in proceedings for defective work, it is doubtful that it can take proceedings on behalf of owners, because (unlike under some other condominium legislation) the *Condominium Property Act* vests the common property directly in the unit owners as tenants in common, rather than vesting it in the corporation as agent for the unit owners. We consider that the Act should enable the corporation to take proceedings in these circumstances.

***Recommendation 5:*** *that the Act be amended so that, in proceedings to recover damages for defective work, or to compel rectification works, the corporation is the appropriate plaintiff where the work was done on common property; and that where the work was done in relation to one or more units, the owners of those units may authorise the corporation to take proceedings on their behalf.*

### *6 Phased condominium plans*

The *Condominium Property Act* allows "phased" development—that is, development in stages (section 3(4)). In such a case, the developer must lodge with the condominium documents for registration "a timetable for the development of the various phases" (section 3(5)). However, nowhere does the Act require the developer to provide detailed information about the projected

stages of development; and nowhere does the Act give purchasers or unit owners recourse if the developer fails to complete the stages, or completes them out of time, or completes them in a different manner or order than stated in the timetable.

As the complexity of condominium development increases in Uganda, we anticipate that phased developments will become more important. Accordingly, we recommend that the Act be amended to: (1) require developers to provide more information about the planned "phases", and (2) give unit owners and purchasers rights to complain if developers fail to keep to the timetable and details in relation to the phases. We envisage a system that would require developers to lodge with the Registrar a "master plan" showing the proposed phases in reasonable (but not excessive) detail; that would entitle developers reasonable access rights to other parts of the condominium property to carry out the development; that would enable developers some (reasonable) flexibility to vary the phases; and that would allow the corporation, unit owners and other interested persons to seek a court order enforcing the developer's obligations under the master plan.

***Recommendation 6:*** *that the provisions of the Act be expanded in relation to staged condominiums to:*

- *require developers to lodge a master plan of the proposed phases;*
- *give developers reasonable access rights to other parts of the condominium plan to carry out the phases of the development;*
- *give developers reasonable flexibility to vary the phases; and*
- *entitle the corporation, unit owners and other interested persons to seek a court order enforcing the developer's obligations under the master plan.*

## *7 Dispute resolution*

The *Condominium Property Act* is almost devoid of provisions for dispute resolution.[3] We see the lack of effective dispute resolution provisions as a major deficiency. Disputes often arise in condominium properties—sometimes between unit owners and the corporation, and sometimes between unit owners themselves. Occasionally these disputes involve large sums of money; but more often they involve relatively insignificant sums. Occasionally they involve matters of great legal significance, such as the proper role of the corporation or the board; but more often they involve neighbours duelling over minor infractions of the condominium rules. But whether large or small, under the *Condominium Property Act* the disputes can only be resolved by court action. There is no other dispute-resolution mechanism.

Uganda is not unique in having a *Condominium Property Act* with no detailed provisions for dispute resolution. Most jurisdictions, in their early condominium or strata legislation, lacked such provisions. But the universal experience has been, as more and more condominium plans are registered and developments become more complex, that legislatures have recognised the need for "alternative dispute resolution" and procedures that are quicker, cheaper and more accessible than court proceedings. We consider that Uganda should now take this step.

However, many other jurisdictions also require disputants in condominium disputes first to attempt to settle disputes by mediation, before being allowed access to the procedures under the legislation. This helps resolve disputes before parties become intractably opposed, and also helps reduce the strain on

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[3] Under section 21(6), the board of the corporation "shall hear complaints from aggrieved [unit owners]", but this hardly seems to be a power to make orders to resolve disputes.

the resources of the bodies set up under the legislation. In our view, this approach would make sense in Uganda.

Accordingly, in our view, the *Condominium Property Act* should be amended to: (1) require the parties first to mediate before taking any formal proceedings; and (2) provide a cheap, efficient and relatively informal procedure for resolving disputes.

In most jurisdictions, this informal procedure is by way of a board, which handles the case with a minimum of legal technicality. We would recommend the same for Uganda. The board could be comprised of specially appointed members, in the nature of an administrative tribunal; or it could be established as a division of the magistracy. In either case, we would see its functions, jurisdictions and procedures spelled out in the Act. We would envisage an appeal to the High Court on matters of law.

***Recommendation 7:*** *that the Condominium Property Act be amended to provide for efficient, inexpensive and accessible dispute resolution of disputes between the corporation and unit owners, and between unit owners inter se. Recourse would be to a specially constituted tribunal, which would hear matters with a minimum of legal technicality. Appeals would lie on matters of law to the High Court. No proceedings could be started until the parties had attempted mediation.*

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