



# Retirement Fund Solutions



## The Flexible Land Tenure Act, 2012

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With ever increasing house prices and the problematic registration of person's right to land in informal settlements, this act creates two alternative forms of land title that are simpler and cheaper to administer and provide security of title for persons living in informal settlements and who are provided with low income housing.

The two types of forms of land title that are created are: a starter land title and a land hold title.

The Act is not clear about what exactly the differences between the two new titles to lands are. The Act stipulates that a starter title scheme to land can be upgraded to a land hold title scheme, if at least 75% of holders of rights in a starter title scheme have consented thereto. The holders of starter titles who do not agree to the upgrading of the scheme, must be granted starter title rights in a similar scheme by the relevant authority. The Act is silent on what is meant by "upgrading". This will probably be dealt with in regulations to the Act.

The Act further provides that a starter title scheme or land hold title scheme may be upgraded to full ownership provided the scheme is situated within the area of an approved township. This upgrading can only be done when all holders of rights in a scheme concerned have agreed in writing to the upgrading. If 75% of the holders in the scheme agree with the upgrading, the relevant authority may pay fair compensation to the holders of rights that do not agree with the upgrading. As the holder of a land hold title has all the common law rights an owner of immovable property has, it is not clear what the difference between a land hold title and full ownership is.

From the Act it is clear that owners of a starter title right and land hold title have different rights to the property. A holder of a **starter title right** has the following rights:

He may erect a dwelling of a specified size and nature at the specified location allocated to him, occupy the dwelling, on his death bequeath the dwelling to his/her heirs and to lease it to another person, transfer his/her rights to any other person based on a transaction recognized by law.

There is a duty on the Registrar to register any transfer of rights of which he/she has been informed or of which he /she has become aware, if he or she is satisfied that the transaction occurred.

A holder of **land hold title rights** has, subject to the provision of the Act all rights in the plot concerned that an owner has in respect of his/her plot under the common law and he/she may perform all juristic acts in relation to the plot that an owner may perform under the common law.

Section 10(5) of the Act requires that the following transactions may only be performed by registration in the **land hold title register**: the transfer of the rights to another holder, the creation or cancellation of a mortgage or any other form of security for a debt executable on the plot concerned, creating or cancelling a right of way in favour of the owner of the land or creating or cancelling servitudes regarding water, electricity or similar services.

These two new types of property have a lot in common with sectional title schemes.

1. Like sectional title schemes, land hold title schemes have “common property” being that part of a block concerned, that does not form part of any plot;
2. Starter land title and land holder title schemes have associations, owners have a right to be members of. These associations are similar to body corporates in sectional title schemes.

In the case of associations of a starter title, the association also has the right to represent the holders of the rights in negotiations with relevant authorities and to mediate disputes between members of the scheme.

Two of the major differences between the two new types of title to land and sectional titles are:

1. Units of sectional title schemes can be registered in the name of a legal person like a company or close corporation while this cannot be done in the case of starter title and land hold title.
2. As with sectional titles, the Registrar of Deeds must establish a land hold title register and a starter title register, in which information regarding acquisition and transfer of ownership is recorded. In the case of those two new types of title to land, separate land rights offices may be established. The duties of a Registrar of Land Rights so appointed, include inter alia to ensure that regular inspections of land hold title and starter title schemes are conducted to determine whether the information recorded in the registers has been recorded accurately and to assist persons who intend to transfer starter title or land hold title rights. The Registrar of Land rights has wide powers to hold enquiries, conduct interviews and even formal hearings in matters concerning disputes over starter title and land hold title property and to make entries into the register if in his opinion the information in the register is incomplete or incorrect.

It is important to note that except for persons married in community of property, a starter title right may not be held jointly by more than one person, no juristic persons like close corporations, and companies may hold a starter title right. Furthermore, no natural person may hold more than one starter title right and no person may acquire such a right if he/she is the owner of any immovable property or land hold title in Namibia.

### **Do members of a fund qualify for direct or indirect housing loans if they would like to acquire starter title rights or land hold rights?**

Section 19(5) of the Pension Funds Act reads as follows:

“(5)(a) A registered fund may, if its rules so permit, grant a loan to a member by way of investment of its funds to enable the member-

- (i) to redeem a loan granted to the member by a person other than the fund, against security of immovable property which belongs to the member or his or her spouse and on which a dwelling has been or 'will be erected which is occupied or, as the case may be, will be occupied by the member or a dependant of the member;
- (ii) to purchase a dwelling, or to purchase land and erect a dwelling on it, for occupation by the member or a dependant of the member; or
- (iii) to make additions or alterations to or to maintain or repair a dwelling which belongs to the member or his or her spouse and which is occupied or will be occupied by the member or a dependant of the member.

Both, starter title rights as well as land hold rights seem to comply with the requirements of section 19(5) (a) of the Pension Funds Act in that the holders of such rights have the right to use the property for occupational purposes of the purchaser thereof.

The Pension Funds Act does not define “belongs”. This means the word should carry its ordinary meaning. The Oxford Reference Dictionary defines “belong” as “(with to) to be the property of; to be rightly assigned to as a duty, right, part etc”.

It seems that the holders of **starter title rights** will probably not be allowed to register a bond over their property. Section 9(1)(e) of the Flexible Land Tenure Act stipulates that the holder of a starter title right has the right to transfer his or her rights to any person, (whether that person is the heir of the holder of those rights or whether the transfer is another transaction by law). The holder of such rights does not become the owner of the starter title, he only acquires certain rights.

In the case of **land hold title rights**, section 10(5) of the Act stipulates that certain transactions may only be performed by registration in the land hold title register. These include: the transfer of land hold title rights to another and creating or cancelling a mortgage or any other form of security for a debt executable on the plot concerned. Therefore I am of the opinion that only holders of land hold title rights and owners with full ownership will qualify for direct or indirect housing loans in terms of the Pension Funds Act.

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