

Developers, the property practitioners authority & the 31 October due date

Earlier this year, role players in the real estate industry were caught by surprise when it became apparent that the Property Practitioners Act, which became operational on 1 February 2022, goes further than (only) regulating estate agents' practice, as the repealed Estate Agency Affairs Act had done. In fact, the Act brings developers, mortgage originators, managing agents and business brokers, amongst others, under its auspices too.

If a business or practitioner falls within the definition of a "property practitioner", various provisions of the Act must be complied with. One such obligation, and due by 31 October this year, is the requirement to apply to the Property Practitioners Regulatory Authority ("the PPRA") for a Fidelity Fund Certificate ("FFC"). It is therefore very important for developers to make sure if they do need to apply for FFCs.

In the below note, we explain in which instances a developer will fall within the definition of a "property practitioner" and would be required to obtain a FFC.

WHEN IS A DEVELOPER A "PROPERTY PRACTITIONER"?

There are many technical and nuanced provisions in the Act and below is only a rudimentary summary; for more detailed advice, please contact us for assistance.

There are three different subsections in the definition that *may* impact on developers. These are, summarised:

- Where the developer (i) holds itself out as a business that, (ii) for gain and (iii) on the instruction of or on behalf of another, sells, purchases or markets property.**

(It excludes a developer that employs an estate agent to perform these tasks for it.) If the developer falls within this category, then:

- The entity/business must obtain a FFC;
- Its directors/members/trustees (in the case of a developer company/close corporation or trust) must each obtain a FFC. Non-executive directors or directors who have other expertise, e.g. finance, or directors who are not directly concerned with the management or oversight of individual property practitioners within the business, are exempted from the requirement that they should hold a FFC;
- The business' manager, supervisor, or person in control the day-to-day business operations must have a FFC; and
- Employees of the developer who perform these functions must hold FFCs. For example, any sales agents who are employed, mandated, or appointed by the developer to market and sell the units in a development, are property practitioners and must have FFCs. However, an employee who does not directly carry out to any material degree any activity or function of a property practitioner need not hold a FFC.

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T: 021 943 3800
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T: 010 001 2632

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Many developer entities will fall outside this category of property practitioner, as they do not act on behalf of another when selling and marketing their own property for sale.

2. Where the developer sells or markets a part, unit or section in a property development.

If the developer falls within this definition of a property practitioner, then:

- Employees who perform functions of property practitioners described in 1 above, must obtain FFCs. Any sales agents who are employed, mandated, or appointed by the developer to market and sell the units in a development are property practitioners and must hold FFCs. An employee who does not directly carry out to any material degree any activity or function of a property practitioner need not register with the Authority or hold a FFC.
- A manager, supervisor, or person in control the day-to-day business operations of the developer who falls within this definition, must have a FFC.
- Directors/members/trustees of the developer (as company, close corporation or trust) are not required to hold FFCs; however, it appears that they will have to apply for an exemption to this effect.

3. When a developer manages property

A developer will further be considered to act as a property practitioner if it manages property (i) on behalf of another and (ii) for gain.

Accordingly, the developer that acts as property manager - if performed on behalf of a third party for gain - as well as the staff that perform these functions, must comply with the Act.

APPLICATION FOR A FIDELITY FUND CERTIFICATE

The developer that falls within the definition as described above (and directors/members/trustees and staff, as may be applicable) must, every 3 years, apply to the Authority for a FFC and make payment of the prescribed fees. Such certificate will be valid until 31 December of the year to which it relates.

All property practitioners must, upon request from any relevant party, produce a FFC or certified copy thereof. The fact of holding such certificate must also be notes on letterheads, agreements and marketing material.

Each property practitioner shall be obliged to hold a separate FFC in respect of each different industry in which the property practitioner operates. For example, if an employee works within the estate agency industry as well as within the property management industry, a separate FFC in respect of each industry must be obtained.

The business making application for a FFC need to be in possession of a valid tax clearance

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certificates, and need to have a valid BEE certificate.

PROHIBITION ON RENDERING OF SERVICES WITHOUT A FIDELITY FUND CERTIFICATE

A business or person that falls within the definition of a property practitioner, may not act as such if he/she/it has not been issued with a FFC, and/or if he/she/it employs a property practitioner and that person has not been issued with a FFC. Any person who contravenes this provision is guilty of an offence and, on receipt of a written request from any relevant party, must repay any amount received in respect of any property transaction. In addition, the failure to comply with such a request constitutes an offence. Any person convicted of any offence in terms of the Act shall be liable for a fine or imprisonment for a period not exceeding 10 (ten) years.

Contact us for assistance at info@stbb.co.za

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