

# Paddocks

## PRESS

### MEETINGS IN SECTIONAL TITLE SCHEMES

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By Prof. Graham Paddock



*There is a lot of truth in the saying “from the AGM to your wallet”, but owners are still notoriously reluctant to attend official meetings of their body corporate. Graham Paddock examines the different kinds of meetings and why they are important.*

‘Oh look, honey! Here’s a notice of our scheme’s annual general meeting. Thankfully, we have a month’s notice, so we will have lots of time to read through this interesting bundle of paperwork. We had such a good time at the meeting last year; please make sure we are free on the 23rd of next month!’

*This article was first published in Personal Finance magazine, a publication of Independent Newspapers.*

Not a typical scene in a sectional title owner’s home, is it?

The fact is that sectional title owner meetings are very poorly attended. And this can be a real problem. Some owners who are not prepared to attend will give proxies, often held by just one or two owners who have gone out of their way to secure the voting power of others so as to push their own agendas.

But some owners will not even bother to give proxies, so it is not at all unusual for meetings to be adjourned because there are not enough owners present or represented to form a quorum.

Some owners feel that their scheme is being run “well enough” without their active participation. Investor owners, for example, may feel that, in the same way they do not personally attend the annual shareholders’ meetings of the all the companies in which they own shares, they do not need to go to the annual general meeting (AGM) of a scheme in which they own only one or a few units. They will go if they are particularly concerned about some issue on the agenda, but not otherwise. These owners, who

are by no means limited to investors or those who don’t live in the scheme, don’t go to meetings because they are not prepared to give time and expend effort when they see no potential reward.

Other sectional owners reject the community aspect of sectional title. They don’t like to be in the same room with Mr Jones, or they don’t really get on with any other owners, and they certainly don’t feel that they have enough in common with the other owners to warrant spending an evening communicating with them and participating in the management of the scheme.

Some owners bring to sectional title a strong sense of independence, which implies that they don’t want to be told what to do in or about their property, and are not prepared to accept that a majority of other owners can make a binding decision that they do not support. If they can’t control proceedings, they don’t want to participate. They don’t go to meetings because these gatherings represent the aspects of ...to page 2

## M E E T I N G S I N S E C T I O N A L T I T L E S C H E M E . . . c o n t i n u e d

from page 1...sectional ownership they find unacceptable.

Ironically, the same owners who don't attend general meetings are often the first to complain that they have not been consulted when faced with the financial and operational results of decisions made in their absence. "This cannot be valid," they cry. "It negatively affects my proprietary/constitutional rights."

This article explains the various types of sectional title general meetings and, hopefully, why it is important for owners to attend them.

### **Nature and purpose**

The general meeting is one of two "organs of government" in a sectional title scheme, and it is the most important. The trustees, meeting as a group, make day-to-day management decisions, meet regularly and usually liaise with a managing agent, whereas the owners make all the important policy decisions in the general meeting.

And the owners can impose restrictions on the trustees and give them specific directions. One could say that it is the general meeting that sets policy, and the trustees carry out that policy. The owners, normally in the context of a general meeting, have the final say in any disagreement with the trustees. It is at this level that the trustees are "the servants of the body corporate" while the owners, collectively, are the "masters".

The Sectional Titles Act, No 95 of 1986

and the prescribed management rules made under the Act set general principles. No scheme can change the provisions of the Act, but the owners of each scheme can, by making rules and taking resolutions, give their scheme particular qualities and address its unique requirements. The community inherent in every sectional title scheme determines its own character and advances its own social and economic interests in the context of general meetings.

The general meeting operates on democratic principles laid down in the Act and in the scheme's rules. It is the forum in which owners are entitled to express their views. In general, the majority rules, although certain important decisions require owner approval by way of a "special" or "unanimous" resolution.

There is no formal protection for a group of sectional owners who find themselves in the minority in regard to a particular issue. An individual owner's protection is in the right to lobby other owners for or against a proposal, to attend a general meeting and to speak and vote for or against it. In certain circumstances, an owner's individual consent is required for a body corporate decision. Examples are when:

- A proposed unanimous resolution negatively affects an owner's proprietary rights;
- An owner is adversely affected by a resolution to make a rule affecting the value of his or her vote or the extent of his or her liability for contributions to common expenses; and
- An owner seeks permission to change the use of a section as shown on the

sectional plan.

### **Types of general meeting**

In terms of the sectional titles Act and the management rules, there is a distinction between the first general meeting, the AGM and special general meetings (SGMs).

The first general meeting is the very first meeting of the owners after the body corporate is formed. An AGM must be held every year within four months of the end of the financial year. All other general meetings are SGMs.

### **First general meeting**

The Act provides that the scheme's developer must call the first general meeting of owners within 60 days after the body corporate is formed, which occurs when the first transfer of a unit from the developer is registered at the Deeds Registry.

At this meeting the owners elect trustees, appoint an auditor, approve a budget (on the basis of which levies can be raised), check the scheme's insurance cover and carry out other initial business vital to the handover of the scheme from the developer to the body corporate and the establishment of an operating management body for the scheme

The developer must:

1. Produce a rates clearance certificate from the local authority, so that the body corporate does not take over any rates debt incurred before its formation;
2. Provide proof of income and expenditure in regard to the management of the scheme from the date a ...to page 3

## M E E T I N G S I N S E C T I O N A L T I T L E S C H E M E . . . c o n t i n u e d

from page 2...unit is first occupied until the date of formation of the body corporate and pay over to it any excess. From the date the body corporate is formed, the developer manages the scheme as a caretaker who must account for any profits;

3. Table financial statements for the management of the scheme from the date the body corporate was formed until and including the date of notice of the meeting. These are the body corporate's first set of financial statements; and

4. Table any building management, service and supplier contracts that the body corporate must consider approving. Usually these will be existing contracts (such as for lift maintenance) and contracts the developer has arranged on the basis that they will be taken over by the body corporate (such as managing agency contracts).

In theory, the body corporate is not bound to any contract entered into by the developer, but in practice purchasers often bind themselves to vote for acceptance of the contracts the developer has arranged.

Although the Act provides that the developer's failure to convene the first general meeting within the 60-day period is a criminal offence, it is not unusual for developers not to call this meeting at all. Nor is it unusual for developers not to produce the documents and accounts required.

If you purchase a unit from the developer, you need to make sure that the developer does call the first meeting and that the required handover proce-

dures are properly followed. Until this meeting is held, the developer continues to run the scheme finances. It is in every owner's interest to make sure that this responsibility is handed over to the body corporate's elected trustees as soon as possible.

The budget approved at this meeting will determine the levies that you pay. If you are not at the meeting, the other owners will be able to amend the proposals sent out with notice of the meeting, and you will be bound by the result.

If the developer fails or refuses to call the first meeting, despite request, any one of the registered owners can call a meeting of trustees (at this stage all the owners are trustees) by giving notice to the developer and all other owners. Hopefully the developer will attend and can be persuaded to call the meeting and produce the necessary paperwork. But if the developer does not cooperate, the trustees should decide to call a general meeting to approve a budget, elect trustees, appoint an auditor and do whatever else is necessary to get the body corporate operating properly.

### **Annual general meetings**

After the first general meeting has been held, AGMs must be arranged and held once each year, within four months after the end of the financial year, which is usually the last day of February. The trustees are responsible for making sure that the necessary documentation (including insurance schedules, a budget, audited financial statements and a trustee report) is assembled and sent out with notice of the AGM.

At the AGM, the trustees give owners an audited financial accounting and an operational report on the affairs of the body corporate for the previous financial year. Looking forward, they propose a budget and insurance values for the subsequent financial year.

The owners decide how many trustees they need and then elect the new trustees. The owners appoint an auditor or, for smaller schemes, an accounting officer and the owners confirm or amend the scheme's official address. The owners may deal with other general or special business and they may also give the trustees specific directions or place restrictions on their actions.

The importance of this annual meeting is summed up in the saying "from the AGM to your wallet". As at the first general meeting, the approval of a budget – which can be drastically amended at the meeting – directly influences the amount each owner pays in levies.

Attending the AGM and reading the paperwork enables you to hold the trustees to account and to control who will manage your investment and supervise the spending of the body corporate's money.

### **Special general meetings**

All general meetings other than the AGM are called SGMs, irrespective of when they are convened or the content of the agenda.

The trustees can call an SGM at any time and must do so if asked in writing by owners entitled to ...to page 4

## MEETINGS IN SECTIONAL TITLE SCHEMES . . . continued

from page 3...25 percent or more of the participation quotas all sections or by a bondholder of at least 25 percent of the number of all units. Owners can check what participation quotas are allocated to their sections by looking at the schedule which is the last page of the sectional plan for the scheme.

The request must clearly state the agenda of the required SGM. If the trustees do not call an SGM within 14 days after receiving such a request, the owners or bondholder concerned can do so.

This 25-percent minimum requirement means that the trustees can be com-

pelled to call an SGM only if people with a substantial interest in the scheme see the issues as important and urgent.

A group of owners whose units are allocated less than 25 percent of the participation quotas of all units cannot require trustees to call an SGM. They can either wait until the next AGM to have an issue discussed or obtain the support of enough other owners to satisfy the 25-percent requirement.

An SGM allows owners to participate in the management of the scheme on an ad hoc basis, particularly where issues arise that fall outside the competence

of trustees. When called at the request of owners, these meetings may deal with issues that affect only some owners, such as an SGM called to approve an extension of a section. But there are very few decisions taken in a sectional title scheme that do not affect other owners in some manner.

In a nutshell:

- \* Participate in your community.
- \* Protect your investment and your pocket.
- \* Attend general meetings. ■

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## SPECIAL LEVIES IN SECTIONAL TITLE SCHEMES



**By Jennifer Paddock**

People do not like to be hit with unexpected expenses. We are diligent, we budget and we know how much we have in the kitty – so when special levies are raised, they often hit us like an unexpected ton of bricks. We have not budgeted for this expense, often we can't see any immediate personal benefit and therefore it hurts to pay it. Let's look at the legalities surrounding special levies and the procedure for how and when they can and should be raised.

The Sectional Titles Act 95 of 1986 ("the Act") does not mention special levies at all. Prescribed management rule ("PMR") 31(4) found in the annexures to the Act's Regulations, is the rule dealing with these levies. It provides that the trustees may raise special levies from time to time if a necessary expense arises for which the body corporate has not budgeted. There are three important points arising from PMR 31(4):

1. Special levies are raised by the trustees alone. This occurs when the trustees resolve by majority vote at a validly constituted trustees' meeting to raise a special levy. The trustees may choose to consult the owners before they make their decision as to whether a special levy should be raised or not. The

owners may even direct the trustees to do so in terms of an owner directive under section 39(1) of the Act. But ultimately only the trustees are empowered to make the final decision.

2. Special levies can only be raised if the expense is necessary. This is a subjective concept and trustees must ensure that they are not raising special levies to fund improvements to the common property without following the procedures set out in the PMRs to authorize improvements.

3. The expense for which the special levy is raised must not have been budgeted for in the body corporate's last annual budget. Therefore the expense is generally one that was unforeseen or for which the owners deliberately chose not to include in the annual budget used to establish the ordinary levies.

Once a special levy is raised by the trustees the persons who were owners at the time the trustees resolved to raise the special levy are liable to pay it. The total special levy must be allocated amongst owners in accordance with their participation quotas (a calculation based on the measured floor area of the sections in the scheme) unless the developer or body corporate has made and lodged at the Deeds Registry a special rule providing for some other calculation or determination.

If you believe that the trustees have irregularly raised a special levy, for example because the expense was budgeted

for or for an expense you do not think is necessary, your remedy is not to withhold payment of the special levy. Withholding payment will only result in you incurring more expenses in the form of interest, collection commission and other legal costs. Rather pay the money whilst specifically and in writing reserving your rights to reclaim it; then use the dispute mechanism provided for in PMR 71, which is to declare a dispute with the trustees and take the matter to arbitration.

If the arbitrator agrees with you that the special levy was irregularly raised you will be entitled to a refund of the monies you paid in respect of the purported special levy. But remember, if you are entitled to be repaid, so are all other owners. So it is seldom worth declaring a dispute on the basis of some technical issue, because the trustees can then simply admit their mistake, credit all owners' accounts and repeat the process properly. Where you think the trustees have overstepped their powers to raise special levies, get at least a few other owners who agree with you and get professional advice! ■

*Jennifer is a specialist sectional title consultant at Paddocks. Her hourly rate is R1,000 per hour and she can be contacted at 021 674 7818.*

## BUILDING MAINTENANCE

BY ROB PADDOCK (Rob the Builder)

### Dealing with Spalling Concrete



A friend of mine was recently looking to buy a sectional title unit on the Atlantic Seaboard in Cape Town. After many Sundays of viewing apartments and searching on the internet, he found a “pimping pad” within his budget that he was certain would result in gorgeous women queuing down the road just waiting to be his lucky girlfriend. But before he got too excited about this heavenly realm he was about to enter, I advised him to phone the scheme’s managing agent and find out more about the scheme. As it turns out, the scheme had a severe spalling problem and a massive special levy was likely to be raised in the next two years. So, like the concrete falling off the walls of the scheme, his dreams of beautiful women were shattered in an instant.

Concrete reinforced structures use steel reinforcing bars to strengthen the structure. Spalling concrete is largely due to a natural deterioration process called carbonation, in which the reinforcing steel rods embedded in the concrete slab corrode and expand, causing the concrete cover to crack and bulge. The rate of the advance of spalling will depend on a number of factors, including the humidity of the atmosphere, the CO<sub>2</sub> content of the air and the quality of the concrete used.

An important fact to know about spalling is that it takes place below the surface and you generally won't even know that it's there until the symptoms appear. The

early stages of spalling concrete will probably not affect the safety of the building. However, you must repair the spalling before the steel rods corrode further and damage larger areas of the ceiling or pillars.

If the spalling is relatively minor, you can repair it yourself according to the process set out below. However, I would not recommend this in a sectional title scheme, as more often than not, the spalling will appear in an area of common property. Repairs by individuals to areas of common property tend to result in fights down the line. It is far better for the body corporate to use an experienced and registered contractor to do the repairs for the scheme.

#### Step by step repairs of minor spalling:

- 1: Remove the spalled concrete at the cracked areas to expose the steel rods.
- 2: Scale and clean the corroded steel rods.
3. Apply rust inhibitor to the steel rods, carefully following the manufacturer's instructions.
4. Apply a bonding agent to the affected surfaces before patching to ensure proper bonding.
5. Patch the exposed area using polymer modified cement mortar or epoxy mortar.
6. Paint the area to protect it from the elements.

#### Preventing and containing spalling

1. Do not delay repairing spalling concrete as the affected area will become larger over time.
2. Paint regularly
3. Check pillars and concrete ceilings regularly. If there are holes that are no longer in use, they should be filled and sealed immediately to prevent moisture and oxygen entering the concrete. Cracks on the ceiling should likewise be filled and sealed as soon as they become apparent.
4. A humid environment speeds up the carbonation process. Ensure that areas which could retain heat and moisture are properly vented.

Once the spalling process has started it will continue to weaken the structure over time. It is important to realise that these failures are aggressive in nature and should not be left to eventually undermine the structural integrity of the building. A specialist should be contracted to remedy these failures, as normal plaster repairs will not suffice. Consult a specialist to determine the exact cause and extent of spalling in your scheme and to recommend a suitable reinstatement strategy. Once the cause and specification has been established, competitive quotes can be obtained from specialist contractors to perform the necessary repairs and maintenance. Due to the porous nature of concrete and the fact that this process is promoted by external factors, the general maintenance of your “building envelope” is your most effective prevention against spalling. ■

NEW SECTIONAL TITLE BOOKKEEPING COURSE

The first Sectional Title Bookkeeping Course was presented by Paddocks and Mr. Clint Riddin in Cape Town and Johannesburg during March 2009. The student group comprised sectional title bookkeepers, accountants, managing agents as well as unit owners and trustees. A total of 34 delegates attended the course in Cape Town and 56 attended in Johannesburg.

The next Sectional Title Bookkeeping Course will be presented towards the end of 2009. Please contact Christina at christina@paddocks.co.za or 021 674 7818 for further information.



Above: Cape Town student group. Below: Johannesburg student group.

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## Q & A WITH THE PROFESSOR



By Prof. Paddock

### Liability for Repair Costs

**Q1.** In our complex, there are cracks developing above window arches. A crack extends from the exterior of the building (common property) through to the interior (owner's section). Who is liable for payment of the repairs?

Taking into consideration Section 5(4) of the Sectional Titles Act, which says that the boundaries of a section are the median lines between a section and common property, the cost of repairs should logically be shared equally between the body corporate and the owner of a section. However the trustees consider that the repairs are for the account of the body corporate. What will be the correct legal view of this situation?

**A1.** In terms of the Act, the responsibility to carry out and pay for maintenance and repairs of common property is imposed on the body corporate, while owners must repair and maintain their sections at their own expense. The situation can get more complex in a situation such as you describe when adjoining parts of a section and common property both need repair due to a defect that affects both areas.

The first question to be asked is

whether it is possible to identify the cause of the defect, in this case the crack. If so, one can establish who is responsible to maintain the part of the building that is causing the defect. So, for example, if it is clear that a movement in the common property foundation of the building is the cause of the crack in both the section and the common property, then the body corporate is obliged at its expense to carry out the repairs, perhaps underpinning the foundation so as to prevent further movement and cracks. And although the section owner is responsible to repair his cracked section, he has a claim against the body corporate for all the costs involved because it is clear that its failure to repair the foundation was the cause of the crack. So in this case it would make sense for the body corporate to carry out and pay for the repairs to the foundation as well as the crack in both the section and the common property.

But if the crack is not clearly the fault of the body corporate or any other owner, who should logically undertake and pay for all repairs, the second issue is whether it would make commercial sense to have the repairs to both section and common property carried out by one contractor. In this case, where there are cracks above a number of window arches, it may well make sense for the body corporate to get one contractor to repair all the common property and sections involved. This allows the trustees or managing agent to control the whole project and facilitates any claims against the contractor for defective workmanship or materials. And the contractor should be required to allo-

cate his contract price to the various areas of section and common property involved in the repair work, so as to facilitate the recovery from owners of any amounts for which they are responsible.

### Disqualification of a Trustee

**Q2.** The prescribed management rules make provision for the disqualification of a trustee "if he is convicted of an offence which involves dishonesty". The operative word being "is". In the Afrikaans version it is "word". The way I see it is that this rule applies if a person is convicted during his tenure in office as a trustee.

Some years ago, a person who is a potential trustee for our body corporate was charged under the old Usury Act, and subsequently paid an admission of guilt fine. We would very much like to appoint her as a trustee, as she could bring outstanding qualities to the table. Is she precluded from being appointed a trustee?

**A2.** In my opinion the disqualification in the prescribed management rules does not prevent a person, such as you describe, who has in the past been convicted of an offence involving dishonesty from being elected a trustee. It provides that if a serving trustee is convicted of such an offence that person automatically ceases to be a trustee.

*To page 9...*



## Q & A WITH THE PROFESSOR ...continued

*From page 8...*

### Loss of a Quorum

**Q3.** There are five trustees and although a quorum of three is required, all five are present. During the course of the meeting, three trustees decide to leave the meeting, leaving only two trustees present, one of whom is the chairperson. May these remaining two trustees then carry on with the business of the meeting, and if so, will any decisions taken by them be valid, for there would have been no quorum at that stage?

**A3.** A meeting may not continue to do business after the number of persons present has reduced to a number less than is required to form a quorum.

When the three trustees left, the chairperson should have closed the meeting, if it had completed the business on the agenda, or adjourned the meeting if its business was not completed. The continuation of the adjourned meeting could have been set at a date and time agreed by the meeting before the three trustees left or it could have been left undecided, in which case a fresh notice would be required to re-convene the adjourned meeting to complete the business on the agenda.

### Dissatisfaction with Managing Agent's Performance

**Q4.** I am the body corporate chairman of a complex that comprises 17 units. The complex is about 20 years old and needs some expensive maintenance.

We started this maintenance three years ago and have been doing it in stages as we have had cash, although we did need to raise special levies to do a lot of the work.

Our managing agent is a local firm of accountants and we (the four trustees) are a bit fed up with the managing agent's performance over the last year. Is there anything set out in the Sectional Title Act about the functions of a managing agent?

Our particular concern is that a number of owners are seriously in arrears with levies and the managing agent has made little effort to try to recover these. It has been up to me to get them to move at all. The result is that we have had a serious cash flow problem for over a year. Is there any sanction against the managing agent for failing to chase up these defaulters?

**A4.** The Sectional Titles Act does not deal with managing agency at all. The prescribed management rules deal with a managing agent's contract, but do not detail their functions or set out any list of services. The trustees delegate administrative functions to the managing agent knowing that s/he may use service providers to execute part of the mandate. Difficult levy collections are usually handed over to attorneys.

Try to work out your problems with your existing managing agent. The costs and inconvenience involved in a change can be substantial. I suggest that you ask the

person managing your scheme's administration to bring the attorney attending to the scheme's collection work to the next meeting of trustees and they can give you a report on each matter. This should allow you to establish whether the delays are a normal part of the debt recovery process or if they are excessive, and to understand the reasons.

Ultimately you and the other trustees must decide whether this firm is capable of fulfilling the scheme's administration needs over the next few years. If not, you should terminate the contract. ■

### Amendments to the Sectional Titles Act

The January 2009 Paddocks Press detailed the recent amendments to the Sectional Titles Act. Should you have any comments in this regard, or suggested changes to the Act or prescribed rules, please submit them to the Sectional Title Regulations Board. Contact persons and details are given below:

**Contacts:** Antoinette Reynolds and/or George Tsotetsi

**Department:** Legal Support, Office of the Chief Registrar of Deeds, Land Affairs Department

**Tel:** (012) 338-7236

**Cell:** 082 370 5485

**Fax:** (012) 338-7383

**Email:** asreynolds@dla.gov.za and GDTsotetsi@dla.gov.za.

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Andrew Mutendi is a qualified Sectional Title administrator with more than ten years experience in the industry and is looking for a position as a Portfolio Manager. He has passed the UCT Sectional Title Scheme Management Course and attended the UCT Advanced Sectional Title Scheme Management course.

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## ABOUT PADDOCKS

Paddocks is a specialist sectional title firm providing a range of products and services through its **Learning, Consulting, Development, Publishing,** and **Software** divisions.

Prof. Graham Paddock is the head of Paddocks, an authority on Sectional Title law and practice and an adjunct Professor at the University of Cape Town. He is the Project Manager and one of the lead consultants to the Department of Housing in the restructuring of the Sectional Titles Act and the establishment of an Ombud Service.

### Learning

Together with the Universities

of Cape Town and Stellenbosch as well as the National Association of Managing Agents and other professional organisations, Paddocks Learning offers several sectional title certificate courses, seminars and conferences.

### Consulting

Graham Paddock leads the consulting division and is assisted by Judith van der Walt and Jennifer Paddock. Paddocks Consulting deliver consulting, drafting and representation services, primarily to sectional title bodies corporate, but also to developers, owners and others involved in schemes. They consult to vari-

ous levels of central and local government and act as mediators and arbitrators of sectional titles disputes. The consulting team also offers conveyancing services.

### Development

Paddocks Development leverages the firm's sectional title expertise to complete niche sectional title property developments in the Western Cape.

### Publishing

Since 1983, Graham Paddock has written sectional title books, pamphlets and training manuals for trustees and managing agents. Paddocks Publishing sets, prints and pub-

lishes a range of electronic and 'hard copy' sectional title publications by Graham and other authors which make Sectional Title expertise easily accessible to the South African population at large.

### Software

Paddocks Software designs and manages the production and distribution of a variety of software tools which provide substantial efficiency gains to those involved in sectional title management and consulting.

Please see

[www.paddocks.co.za](http://www.paddocks.co.za) for more information ■