Volume 3, Issue 12 December 2008

Paddocks PRESS

OVERVIEW OF THE NOVEMBER 2008 AMENDMENTS TO THE SECTIONAL TITLES REGULATIONS

By Prof. Graham Paddock

In terms of Notice R1264 in Government Gazette No. 31626 dated 28 November 2008, the Minister for Agriculture and Land Affairs amended the regulations promulgated under the Sectional Titles Act, 1986.

In the body of the regulations there were two technical amendments that do not impact scheme management:

- the wording of Regulation 16C was adjusted. This deals with the responsibilities of lawyers preparing conveyancing documents; and
- Regulation 44 was deleted. This was an interim provision in regard to scheme extension rights held by developers under the prior Sectional Titles Act, No. 66 of 1971.

The important change in the body of the Regulations was the substitution of Regulation 30(1) that details which rules a developer can amend on the opening of a scheme register. The effect of the change is that a developer can now change the provisions of PMR 31 that deals with owner liability for levies and body corporate judgment debts. I deal with this very significant amendment in a separate article.

Annexure 1 to the Regulations (the Forms) was amended by the substitution of Form V, the Notification by trustees to the Registrar of Deeds of the amendment, substitution, addition or withdrawal of a scheme management or conduct rule. Apart from a minor amendment to the heading of the form, the significant change is the addition of an endorsement at the end of the form in which the Registrar will confirm that the form has been filed at the Registry. This does not mean that the Registrar's staff will examine the content of the notice or its annexed schedule of rules, but will mean that the date and fact of filing will be easier to ascertain. The revised text of Form V is set out in a separate box.

There were four important changes to Annexure 8 to the Regulations (the Management rules):

1. Subrule 29(4) was inserted. This deals with liability for 'excess' or 'first amount' payments in terms of insurance policies. Judith deals with this new provision in a separate article.

2. Subrule 31(4A) was inserted. I cover this provision in my article on the developer's right to amend PMR 31.

3. Subrules 33(1) and (2) have been amended to cater also for the removal of luxurious and non-luxurious improvements.

4. Subrule 46(1) has been substituted to provide, as it did in the past, for the automatic renewal of managing agency contracts and also for the types of resolutions required to authorise the termination of such a contract. Jennifer deals with this in a separate article.

And finally there were corrections to Subrule 37(1) and rule 38 to correct a previously incorrect cross-reference. Both provisions now refer to rule 56(a).

You can download GN 31626 from www.info.gov.za under: Documents/Notices/2008/Nov. ■

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NOW THE DEVELOPER CAN AMEND PMR 31. WHAT DOES THIS MEAN?

By Prof. Graham Paddock

Prescribed management rule 31 is headed "Liability in terms of section 37 (1) and 47 of the Act", but its various subrules also deal with related issues.

Subrule 31(1) deals with the extent of each owner's liability to make contributions to body corporate expenses and judgment debts by summarising the provisions of the Act. Expenses must be collected from owners of sections in accordance with the participation quotas allocated to those sections unless a special rule has been made in terms of subsection 32(4) that varies this effect of the participation quotas.

Because subrule 31(1) is a summary of the effect of sections 32 and 35 of the Act, the prescribed provision could be omitted entirely without any effect on the operation of a scheme. But it could not be amended so as to provide for any determination alternative to the participation quota schedule that is not reasonable, applies equally to all sections put to the same purpose and incorporated in a rule made under section 32(4) read with section 35.

The developer's new ability to amend this provision in effect means that it is possible for the developer to incorporate the terms of a rule made under section 32(4) of the Act here, where it is most appropriate, rather than in an additional rule inserted in or tagged on to the end of the prescribed rules, as is currently common practice.

Subrule 31(2), read with PMRs 36 and 56, sets out the initial part of the "due process" for the raising of annual / ordinary levies under subsections 37(1)(c) and 37(2).

A developer cannot change the prescribed text of PMRs 36 and 56 which provide that a budget for the forthcoming financial year prepared by the trustees must be circulated with notice of the Annual General Meeting ("AGM") and that the owners must approve that budget at the AGM, with or without amendment. Any change to subrule 31(2) could therefore not amend the effect of the first phrase, i.e. "At every annual general meeting the body corporate shall approve, with or without amendment, the estimate of income and expenditure referred to in rule 36".

The balance of subrule 31(2) which reads "and shall determine the amount estimated to be required to be levied upon the owners during the ensuing financial year" is in any event problematic, because it incorrectly gives the impression that the act of approval of the budget by owners at the AGM sets the levies. Subsection 37(2) of the Act explicitly states that any contribution only becomes due and payable by owners when the trustees pass a resolution to that effect.

Because the terms of the Act and compulsory PMRs 36 and 56 deal with the process, there does not seem to be any room for the developer to introduce an alternative procedure for the raising of annual levies.

Subrule 31(3) requires trustees, within fourteen days after the AGM, to advise all owners in writing of "the amount payable by him or her in respect of the estimate referred to in subrule (2), whereupon such amount shall become payable in instalments, as determined by the trustees".

This prescribed subrule is misleading first because it implies that the legal act that triggers liability for the levies is the decision by owners at the AGM. More logically, the subrule should oblige the trustees to meet to take a resolution in terms of subsection 37(2) of the Act within a specified period after the AGM and thereafter to notify the owners in writing of the amounts due in terms of their resolution.

The second relatively minor criticism of this subrule is that it suggests that levies will always be the product of the budget approved by owners applied to the participation quota or any section 32(4) rule. This may be the case in some circumstances, but depending on how the budget has been constructed, trustees may need to make adjustments, such as factoring in exclusive use contributions due by owners in terms of the proviso to subsection 37(1)(b) of the Act, before finalising the amount due by each owner.

Subrule 31(4) deals with 'special levies', a concept which is not *...to page 3*

NOW THE DEVELOPER CAN AMEND PMR 31. WHAT DOES THIS MEAN? ...continued

from page 2...currently dealt with in the Act but which it is expected will be covered by forthcoming amendments. Currently this subrule provides the trustees with a procedure supplementary to that set out in subrule 31(1) to raise general levies. Provided that it is necessary, the trustees may raise special levies from owners in respect of body corporate expenses and judgment debts that are not included in the estimates approved at the AGM.

The question of whether or not an additional expense is "necessary" is often disputed, for obvious reasons. An amended rule could give some guidance as to what type of expenses will be considered necessary. The second test, that the underlying expense be not already included in the approved budget, could also be removed or more clearly stated. At present it is not clear whether the trustees have the power to raise a special levy for a particular necessary expense that was budgeted for, but where unforeseen circumstances have meant that the budgeted amount is substantially inadequate.

Overall, the flexibility to change this provision gives developers the opportunity to impose a more practical provision that makes it clear to trustees when they have the right to make unscheduled calls on owner's pockets and when they must wait to have the expense covered in the scheme's next annual budget.

Subrule 31(4A), newly inserted in the prescribed rules, can be amended by the developer. As prescribed, this provision reads:

"After the expiry of a financial year and until they become liable for contributions in respect of the ensuing financial year, owners are liable for contributions in the same amounts and payable in the same instalments as were due and payable by them during the expired financial year: provided that the trustees may, if they consider it necessary and by written notice to the owners, increase the contributions due by the owners by a maximum of 10 per cent to take account of the anticipated increased liabilities of the body corporate."

So levy instalments now continue to be payable after the end of the financial year and trustees may, if necessary, by written notice to owners increase the instalments by up to 10 percent until the next set of annual levies are raised.

A developer may consider changing the extent of the trustees' discretion to increase the levies, tying an automatic increase to a published annual inflation rate or providing that the levies shall not be increased in the interim period.

Subrule 31(5) deals with the recovery of costs from defaulting owners. When a body corporate takes steps to recover arrear amounts due by an owner or to enforce compliance with scheme rules, the relevant owner is liable for "all legal costs, including costs as between attorney and client, collection commission, expenses and charges incurred by the body corporate".

This rule can be criticised on the basis that it is not clear whether the term "legal costs" means that only amounts charged by lawyers, with the rest of the quoted phrase describing the extent and types of such charges, or whether a body corporate can also recover from a defaulting owner fees charged and disbursements incurred by others such as managing agents and levy financiers in terms of their contracts with the body corporate.

In practice many managing agents, collection lawyers and levy financiers contract with bodies corporate on the basis that they will recover their costs incurred in collecting debts and enforcing compliance with rules from amounts paid by the defaulting owners. It would make sense for a developer to amend this subrule to make this position clear, allowing a range of body corporate agents to charge 'contingency fees' that the body corporate can recover from owners. Contingency fees are generally charged at a higher rate than ordinary fees, so an amended rule might also address the level of fees, perhaps providing for the trustees to approve the amounts payable from time to time.

Subrule 31(6) gives the trustees the power to charge interest on arrear amounts "at such rate as they may from time to time determine".

If a developer omits this provision, the trustees will not have the power to raise interest on outstanding amounts, so levy-paying owners would effectively subsidise the cost of money unpaid by levy defaulters.

The rule can be criticised first on the basis that it does not provide a default interest rate, so ... *to page 4*

THE TEXT OF THE NEW FORM V

from page 3... that if trustees fail to take a resolution setting a particular rate, no interest will be recoverable.

A second criticism is that, given the requirement of the Act that all rules must be reasonable, the rule contains no guidance as to what is a reasonable rate of interest.

A developer could improve this rule by having the applicable rate of interest linked to some external published interest rate that is regularly reviewed and amended in line with changing economic circumstances. ▪

Registrar's number of Sectional Plan SS [Scheme Number].

Registrar of Deeds [Place].

NOTIFICATION UNDER SECTION 35(5) OF THE SECTIONAL TITLES ACT, 1986

We, [Trustee Name] and [Trustee Name] (only two trustees required to sign), the undersigned trustees of the body corporate of the scheme known as [Scheme Name] , No. SS [Scheme Number] situate at [State name of township/suburb and local authority] hereby give notice that on [Date] the body corporate made the following rules (set out in the Schedule) which have been initialled by the trustees for identification for the control and management of the buildings:

*(a) Management Rules (in substitution of, addition to, withdrawal of or in amendment of the existing rules [Omit what is inapplicable]).

*(b) Conduct Rules (in substitution of, addition to, withdrawal of or in amendment of the existing rules [Omit what is inapplicable]).

The rules referred to in paragraph (a) have been adopted by unanimous resolution of the members of the body corporate.

The rules referred to in paragraph (b) have been adopted by special resolution of the body corporate.

Address: ....

....

....

Trustee

....

Trustee

....

Date

Filed at the Office of the Registrar of Deeds at. .... on ....

Signed at .... on ....

Registrar of deeds: .... Date: ....

(Seal of Office)

FINANCIAL PLANNING IN TOUGH TIMES

By Clint Riddin

Whilst accurate financial planning and reporting should always be a cornerstone of any entity, in difficult financial times paying attention to accurate accounting and report monitoring on a monthly basis goes a long way to ensuring the financial well-being of the entity. This is no different in sectional title.

For many years sectional title accounting and financial reporting has not perhaps enjoyed the appropriate level of accounting needed to ensure a financially well-run body corporate. The number of special levies that are raised bear testimony to this. Too often the only financial reports that get looked at are the budget and annual financial statements and in a number of instances the passage of time has resulted in over-spends not being addressed, leading to high levy increases or further special levies.

Perhaps this is because monthly management reporting does not exist in some schemes, or the expertise to more fully prepare these reports is lacking. Whilst the principles involved are not complex, the needs of the users of the reports are different to a financial report that may be needed in a business and the accounting treatment of some expenditure items needs to be disclosed differently.

Statutory aspects such as taxation are also misunderstood from time to time or simply ignored. Again the principles at play are not complex, but should be allowed for in the financial decisions taken by both trustees and the members of the scheme.

Accurate budget preparation within an inclusive frame-work also gives rise to a levy determination which adequately allows for the day to day operations as well as allowing a healthy reserve to be built up. The actual spend must then be plotted against this budget to ensure that the management of a scheme's finances is within this budget and that timely corrective action is taken where necessary.

Again the reports are not involved, but should be detailed enough to accurately reflect the financial position and should be prepared on an accounting basis that meets the needs of the users, being both trustees and the members. Members of bodies corporate should not wait for the annual financial statements, they should be calling for monthly management reports to better understand the position of the body corporate and play an over-sight role in monitoring that the finances are managed with in the approved budget.

Mr. Clint Riddin, in conjunction with Paddocks, will be presenting the **Sectional Title Bookkeeping Course** in 2009.

Overview of the course:

- two-day intensive workshop held in Cape Town and Johannesburg
- covers the legal, financial and administrative aspects of sectional title bookkeeping
- will equip students with the necessary skills to be highly effective as competent bookkeepers of sectional title schemes
- Students will receive a Certificate of Attendance issued by Paddocks

Cape Town Course Dates:
2nd and 3rd of March 2009

Gauteng Course Dates:
9th and 10th of March 2009

Please contact Christina on 021 674 7818 or christina@paddocks.co.za for more information. Alternatively, please visit www.paddocks.co.za. ▪

CLINT RIDDIN & ASSOCIATES

AMENDMENT TO PRESCRIBED MANAGEMENT RULE 29

By Judith van der Walt

It is probably safe to say that very few buildings are not insured against risks such as fire and flood. The owners of properties who have decided against insuring their properties are most likely aware of the huge risk that they are taking; the potential loss that can be incurred if a property is seriously damaged can be financially crippling. If a developed property is subject to a mortgage bond, the lender bank will certainly make it a condition of the mortgage bond that the property should be insured, at least against serious risks such as fire and flood.

The insurance position as far as sectional title units are concerned is slightly different. The Sectional Titles Act of 1986 ("the Act") compels the Body Corporate to insure the buildings comprising the scheme "to the replacement value thereof against fire and such other risks as may be prescribed" (Section 37(1)(f) of the Act). While section 45 of the Act does allow an owner to take out insurance for his section, an owner will not normally take out separate insurance in the same way as s/he will insure the contents of the section, because the Body Corporate is compelled by statute to put in place the necessary insurance cover in respect of the buildings.

The minimum requirement for such insurance is cover against fire. The reference to "such other risks as may be prescribed" is a reference to Prescribed Management Rule ("PMR") 29(1)(i)-(x) which lists a host of other perils against which the body corporate must insure the buildings.

The body corporate's obligation to insure the scheme's buildings is not likely to give rise to many disputes in the scheme; the issue that has more often caused dissent is the question of who is liable to pay the excess usually associated with an insurance claim.

The term "excess" refers to the "first amount payable" prior to the insurance company making payment towards any claim. Put differently, in terms of the insurance contract the insurer is only liable to pay an agreed percentage of the claim; the balance of the claim is funded by the insured. In certain circumstances, depending on the exact terms of the policy of insurance, the insurance company may waive payment of this amount. But more often than not, the insurance payment will be subject to the insured's liability for the excess amount associated with each insurance claim.

It is important to note that the insured is, in any policy of insurance, liable for the payment of this excess amount, irrespective of how the claim arose or who is responsible for the damage which gave rise to the claim. Sometimes, the insurance company can recover this excess on behalf of the insured, or the insured can itself recover the excess from the wrongdoer, but that does not change the fact that the insured is liable for the excess.

From a sectional title point of view, the insured is the body corporate and the body corporate is therefore liable for the payment of the excess, except in one exceptional circumstance dealt with below. Therefore, if an owner's section was gutted by fire or flooded by rain after a strong wind blew off the roof of the building, all owners of sections have to make payment of the excess in accordance with their participation quota or another determination made by the members of the body corporate in terms of section 32(4) of the Act.

In circumstances where only one owner stands to benefit from an insurance claim, it seems inequitable that all the owners should be burdened with the payment of the excess. Even though the body corporate is the insured party, it seems as if only one owner is actually interested in the claim and s/he should therefore be liable for the payment of the excess. This situation has now been clearly dealt with in terms of the prescribed rules.

The liability for the payment of an excess amount has been dealt with in the recent amendment to PMR 29, which is effective from 28 November 2008. This amendment takes the form of the addition of sub-rule 4 to PMR 29, which sub-rule reads as follows:

...to page 7

AMENDMENT TO PRESCRIBED MANAGEMENT RULE 29...continued

*from page 6 ...****The owner of a section is responsible for any excess payment in respect of his or her section payable in terms of a contract of insurance entered into by the body corporate: provided that owners may by special resolution determine that the body corporate is responsible for excess payments in respect of specified damage.***

This sub-rule deals with the position where the body corporate is the insured under a policy of insurance and in terms of its statutory obligation under section 37(1)((f) places the necessary insurance cover in respect of the scheme's buildings. The impact of this sub-rule is that when an insurance claim is made in respect of damage to a section, as opposed to damage to any common property, the body corporate does not have to pay the excess amount from its funds collected from all owners. The owner of the section, whose losses necessitated the insurance claim, is now liable for the full excess. This position is in my opinion equitable, taking into account that section 44(1)(c) of the Act places the primary responsibility for the maintenance and repair of a section on its owner and it is only the owner who has suffered the losses and will benefit from the insurance pay-out.

A proviso to new sub-rule 4 provides an exception to the position described above. The members of the body corporate are entitled, by special resolution, to determine that the body corporate will be liable for the payment of the excess associated with an insurance claim in relation to specified damages. The term "specified damages" could be applied narrowly to the damages to a particular section that are the subject of an insurance claim made, or it could be applied generally to any future damages to a class or type of material within sections covered by the body corporate's insurance policy. In the first case, the special resolution could confirm that the body corporate will be responsible for the excess payment applicable to replacement of Mrs. Jones' fitted carpets. In the second case the special resolution could provide that the body corporate will be liable for excess payments in regard to any claim for damage to ceilings and wooden floors within sections.

Prior to the amendment to PMR 29 the converse possibility was discussed, namely that sub-rule 4 should provide that the body corporate would be responsible for the payment of all insurance excess payments under its policy, unless the members of the body corporate decided by special resolution that the owners who suffer a particular type of damages within their sections should be liable for the payment of such excess. Because the taking of a special resolution can be quite an onerous process and that it is never guaranteed that the owners will vote in favour, such a proposed amended would not necessarily have lifted the burden of owners having to subsidise each other's insurance excess liabilities.

But some people will criticise the proviso to the new sub-rule 4 on the basis that very few schemes will take a special resolution effectively making all owners responsible to make a contribution to the insurance excess payment for damage within a section. My view is that the amendment has a positive effect, ensuring that in most cases people who are responsible to maintain an area bear the uninsured cost of repairs when that area is damaged.

The exception in regard to liability for an insurance excess payment that existed prior to the amendment to PMR 29 dealt with above relates to hot water installations, often informally referred to as geysers. PMR 68(1)(vii) deals with the maintenance of geysers and reads as follows:

An owner shall maintain the hot water installation which serves his section, or, where such installation serves more than one section, the owners concerned shall maintain such installation pro-rata, notwithstanding that such appliance is situated in part of the common property and is insured in terms of the policy taken out by the body corporate.

This provision imposes on the owners whose sections are served by a common property hot water installation the obligation to carry out all necessary maintenance and repairs. This provision has been interpreted as requiring the owners concerned to pay the insurance premium applicable to an insurance claim in respect of such an installation.

The new sub-rule 29(4) does not specifically mention hot water installations, but in my view an excess payment applicable to a claim for damage to a common property installation that only supplies one section will be "an excess payment in respect of that section" for the purposes of that rule and will be payable by the owner concerned. ▪

THE EFFECT OF THE AMENDMENT TO PMR 46(1)

By Jennifer Paddock

What has changed?

The prescribed subrule 46(1) has been divided into two parts lettered (a) and (b). Subrule 46(1)(a) starts with the same text as before, namely ***"Notwithstanding anything to the contrary contained in rule 28, and subject to the provisions of section 39 (1) of the Act, the trustees may from time to time, and shall if required by a registered mortgagee of 25 per cent of the units or by the members of the body corporate in general meeting, appoint in terms of a written contract a managing agent to control, manage and administer the common property and the obligations to any public or local authority by the body corporate on behalf of the unit owners, and to exercise such powers and duties as may be entrusted to the managing agent, including the power to collect levies and to appoint a supervisor or caretaker".***

But the proviso which used to read ***"Provided that a managing agent shall be appointed for an initial period of one year and thereafter upon one month's written notice by either party."*** has been removed.

Subrule 46(1)(b) now deals with the period of appointment of a managing agent and, in addition, specifies the level of consensus necessary to terminate that appointment. It reads:

"A managing agent is appointed for an initial period of one year and thereafter such appointment shall automatically be renewed from year to year unless the body corporate notifies the managing agent to the contrary: provided that notice of termination of the contract may be given by the trustees in accordance with a resolution taken at a trustee meeting or an ordinary resolution taken at a general meeting."

What does the amendment mean?

There is no change to the provision that a managing agent must be appointed for an initial period of one year. Presumably the reason behind a minimum appointment period of one year is that the process of taking on a new scheme, getting all the required documentation, setting up its administrative systems and establishing working relationships with trustees and service providers is a time-consuming process with no associated income. The one year initial appointment period gives the managing agent a chance to recover initial setup costs and to start making a profit from the contract.

From 18 November 2005 to 28 November 2008, PMR 46(1) allowed either party (being the trustees of the body corporate or the managing agent) to give the other one month's written notice of the termination of the contract. After the one month notice period had lapsed, the contract would terminate.

The position that applied before 18 November 2005 and now applies again in terms of the first sentence of subrule (b) is that if, by the end of the initial or any subsequent one year period, the body corporate has not notified the managing agent that its contract will be terminated, the contract is automatically renewed for another year. By way of an example, if the trustees enter into a contract with a managing agent on 31 December 2008, that contract will run to 30 December 2009. If during 2009 the trustees do not notify the managing agent that the contract will terminate, for whatever reason, the contract will automatically continue until 30 December 2010.

The one month minimum notice period previously provided for has been done away with and now there is no stipulated minimum notice period which must be given. But remember that PMR 46(2)(a) provides that the contract must include a term which allows the contract to terminate the managing agent's contract at any time without any notice if the managing agent is guilty of conduct which in terms of the common law would justify the termination of a contract between master and servant.

The proviso to subrule 46(1)(b) deals with the authority for termination of the managing agency contract. Some managing agents have, in the past, included in their contracts a provision that in the absence of breach by the managing agents the trustees can *...to page 9*

THE EFFECT OF THE AMENDMENT TO PMR 46(1)...continued

*from page 8...*only give them notice if this is authorised by a special resolution of the body corporate. The proviso makes it clear that either the trustees or the owners, by ordinary resolution, can authorise notice of termination of a managing agency contract. In the event of a conflict between the trustees and the owners on the question of whether notice should be given, the owners could by ordinary resolution settle the matter by giving the trustees a directive in terms of section 39(1) of the Act.

The terms of the proviso to PMR 46(1)(b) go beyond those of PMR 46(2)(b) which allow any owner who is willing to indemnify the body corporate against costs incurred as a result of the cancellation to require the trustees to cancel the managing agent's contract where the managing agent has breached the terms of the contract. In terms of this new provision if the majority of owners wish to have the managing agent's contract cancelled, whether there is breach of contract or not, they can take a resolution that the contract will be cancelled and instruct the trustees to do so on whatever notice period applies. There is no requirement for any indemnity against potential loss caused as a result of the cancellation.

It is interesting to note that, unlike the previous provision, the proviso to PMR 46(1)(b) does not deal with the situation where the managing agent gives notice to the body corporate. This aspect would however normally be dealt with in the contract between the managing agent and the trustees.

Let us use the Happy Families Scheme as an example to show how the proviso to PMR 46(1)(b) applies in practice.

The trustees of Happy Families appoint a managing agent on 01 Jan 2009 for an initial period of one year. During the year the owners and trustees are unhappy with the managing agent's service and at a general meeting the owners resolve that the trustees will give the managing agent six weeks notice of termination of the contract. If the trustees give the managing agent the notice exactly six weeks prior to the end of the year the contract will terminate on 01 Jan 2010. However if the trustees give the managing agent notice one week before the end of the year the contract would terminate five weeks into 2010. If the trustees forget to give the managing agent the notice before the end of 2009, the managing agent's contract is renewed until 01 Jan 2011 and even if the trustees give the managing agent six weeks notice on 02 Jan 2010, then contract will only have run its course on 01 Jan 2011.

The relationship between the trustees and a managing agent is primary governed by PMR 46 but it is also governed by the terms of the contract entered into between the parties. The contract cannot conflict with the provisions of PMR 46. For example, the contract could not provide that if the trustees have not given the managing agent notice its contract will be renewed for two years instead of the prescribed one year. The contract could however set a minimum notice period as PMR 46 does not prescribe this aspect and then the trustees would have to comply with the minimum notice period stipulated in the contract as well as the provisions of PMR 46.

<u>To whom does the amendment apply?</u>

The amendment became effective on its publication in the Government Gazette on 18 November 2008 and there is no indication that it is intended to have retrospective effect. This means that contracts of managing agency validly entered into before 18 November 2008 will be bound by PMR 46 as it stood at the date the contract was entered into as well as the terms of the contract, to the extent that they do not conflict with the prescribed rule in its previous form. Any contracts of managing agency entered into after 18 November 2008 will be governed by the terms of PMR 46(1) as described in this article. ▪

UCT Residential Property Letting Workshop

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Mr. Salim Patel, Chairperson of the Western Cape Rental Housing Tribunal, and Prof. Graham Paddock are the workshop presenters.

For further information please contact Candice on 021 683 3633 or candice@getsmarter.co.za.

BUILDING MAINTENANCE

BY ROB PADDOCK (Rob the Builder)

The Benefits of Maintenance Planning in Sectional Title Schemes

By Rob Paddock

There are many good reasons for implementing a well-planned maintenance schedule for a sectional title scheme. I feel that the most important is that it gives members of the body corporate a clear and predictable levy payment schedule for the future, resulting in owners being able to budget appropriately, and making it easier for them to make their payments on time.

In the current tight economic climate, most people do not have access to extra cash for unforeseen expenses. Regular and planned building maintenance will help avoid the nightmare of raising special levies for "emergency maintenance" work necessary to address urgent problems caused by neglected parts of the buildings.

Another key reason for keeping the scheme well-maintained is that most insurance companies will only cover damage that results from a sudden and unforeseen malfunction of the materials, and will not cover damage as a result of wear and tear, gradual deterioration or the insured's failure to take reasonable steps to ensure the timely maintenance and safety of the insured property. Therefore if a tree is growing close to a wall and over time a crack starts to appear in the wall and eventually the wall topples over, most insurance companies will view this as a "failure to take reasonable precautions" and will not cover the resultant damages.

Building maintenance can be classified into three main categories:

1. **Corrective maintenance/repairs:** Work necessary to bring a building to an acceptable standard (such as treatment for rising damp).

2. **Planned/Preventative maintenance:** Work to prevent failure which recurs predictably within the life of a building (such as cleaning gutters or painting).

3. **Emergency corrective maintenance:** Work that must be suddenly initiated for health, safety and security reasons (such as roof repairs after storm damage or burst water pipes resulting in a flooded apartment.)

Many schemes are inclined to deal with maintenance issues only as they present themselves as problems. While this approach may work well in the short term, in the long run it is bound to be less cost-effective than planning for and implementing preventative maintenance before Mrs. Jones on the 5th floor starts calling you three times a day demanding that you sort out the mushrooms growing on her ceiling.

There is no hard and fast rule on how to draw up a maintenance plan for a scheme. The variable factors include the size of the scheme, the age of the building, the standard of the finishes and so on. Effective maintenance planning may require specialist knowledge outside the scope of the expertise of trustees or managing agents. If this is the case you may consider employing the services of a professional property inspector or engineering firm to give you an accurate assessment of the current state of the building and its services. They will then also need to draw up a maintenance plan for the scheme over at least a 7 year period (based on their knowledge of the life cycle of relevant building materials, and the present state of the building).

At least two levels of maintenance planning should be included:

1. **Long term maintenance:** This should include the periodic painting, waterproofing, servicing of lifts, beetle/termite and electrical inspections.

2. **Annual maintenance:** Here a schedule can be compiled based on the initial inspection report. If a maintenance log book has been kept in the past, this will assist in establishing an achievable maintenance schedule. Usually the cost of all required works in any one year will exceed the budget owners are prepared to approve. The trustees/managing agents then have to decide what is necessary this year, prioritising the most important work to fit within the funds available, and decide what must be carried forward to the following year.

Having drawn up a maintenance plan, a maintenance log book should be kept to record all *...to page 11*

The Benefits of Maintenance Planning in Sectional Title Schemes ...continued

from page 10 ...maintenance work carried out on an ongoing basis, including a description of the work, date of completion, estimated and actual cost, contractor details, customer service comments and warranties. A cross-reference system should enable details of treatments such as fungicides, paint types and colours to be readily accessible in the future. As the log book includes the actual price for work done, it is a valuable source of information for future budgeting.

Preparing a budget

Annual budgeted expenditure on maintenance can be of three kinds:

1. **Committed expenditure**, which includes tasks that occur every year as part of planned maintenance, such as maintenance contracts;

2 **Variable expenditure**, which includes regular tasks within an overall program of planned maintenance that may not occur every year. The trustees, with input from the managing agent, will exercise some discretion and decide on priorities for these tasks;

3 **Managed expenditure**, which relates to unplanned maintenance works carried out entirely at the trustees discretion should it be necessary – primarily emergency corrective maintenance.

The aim of a maintenance budget is to reduce managed expenditure over time as far as possible and replace it with variable expenditure. Regular inspections can help by identifying how components are performing and when they might fail. Budgets need to include costs for inspections, replacement of materials or finishes, cleaning and any unforeseen breakdowns or repairs. Budgeting for these items will become more accurate over time if detailed records of maintenance expenditure are kept. Budgets need a simple control system, with regular and frequent reports on actual and committed expenditure. ▪

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Q & A WITH THE PROFESSOR

By Prof. Paddock

Developer not completing common property properly

Q. A block of luxury flats was built and a specific feature was used as a positive marketing tool. This feature has never functioned efficiently and now the developer has offered a financial "contribution" to the body corporate which is adequate but does not fully compensate for the full amount the BC will have to spend to remedy the defect in the feature.

The trustees would like to know if they are empowered to accept this offer by the developer on behalf of owners as cracks also need to be attended to which some owners have repaired at their own expense. It has taken much negotiation to get to this point and the trustees feel that the offer is the best they will get, as they are reluctant to involve the BC in litigation which will take time and money without any guarantee of a favourable result.

A. Acceptance of this offer seems to imply that owners will have to pay in, perhaps by way of special levy, to obtain what the developer promised them - or at least to get that feature in working order. I do not think that this is a decision that trustees can or should make on their own.

I suggest that the trustees should:

(a) get independent legal advice on the offer and its impact on the rights of individual owners, and

(b) call a meeting, table the advice and get owners to give them a specific direction under section 39(1).

The offer, or a summary of its terms, should be sent out to owners as soon as possible and with notice of the meeting, so all owners have the opportunity to take their own independent advice and intervene if they feel their individual rights against the developer could be prejudiced.

While the body corporate has statutory obligations to maintain and repair the common property, each owner who purchased from the developer has a contractual right to insist that the developer complete the common property properly.

The trustees are right to be concerned about the risk of legal costs, but they need to allow owners to decide whether or not to take that risk.

When is it over?

Q. I am the chairlady of a complex of 16 units. We recently had a few problems which really took a lot of effort and energy to solve, some of which are still pending.

Our managing agent unfortunately does not always do what we request and it sometimes takes up to 2 years to get them to attend to certain matters, resulting in frustration and anger. One of the matters was a R17 000.00 mistake which was made on our fees, to which we have had no joy. Because we are persistent in getting this matter and others solved, we have now received a letter from them in which they state that they are ending our contract with them. A lot of matters are still pending, such as the one I mentioned and I want to know if they can do this in the light of the unsolved matters?

A. It makes absolutely no sense to try to continue a trust relationship with a firm that no longer wants to work with your scheme. Accept that the relationship is over and make sure that you get all your books and records back as well as control of the scheme's money.

As far as 'pending matters' are concerned, leave them for the moment. Once you have a new managing agent you can get someone to look into any of these issues which the trustees consider unresolved and worth chasing. If you think you might have a claim for R17 000,00 or any other *...to page 13*

Q & A WITH THE PROFESSOR ...continued

*from page 12...*substantial amount against the firm, just make sure that in dissolving your relationship you do not sign anything that indicates you have no further claim against them. If things get sticky, go and get some independent legal advice.

Over-crowding

Q. Our scheme has two bedroomed units. Is it possible to register a rule that no more than four occupants are allowed to occupy a section? One section has been occupied by no less than seven occupants since the weekend.

A. A restraint on the number of people that can occupy a section is a substantial restriction on the rights of a section owner. I suggest that you ask the trustees to consider whether it is actually the number of people that is causing a problem. Usually it is not purely a 'number of people' issue but is rather a combination of factors people logically connect with 'overcrowding'.

While the rules of a scheme are not the right place for substantial restrictions on ownership rights, they are the logical place to expand on the Act's principle that sections may not be used to create a nuisance for other owners and occupiers. I suggest you look at making rules that address the particular behaviours that you consider a nuisance, such as noise, parking, over-use of facilities et cetera, rather than seeking to restrict numbers of occupants.

And it makes sense for you to get an attorney to settle the wording of the rules. Whoever owns the unit in question is certainly going to object to such a rule, so you need to make sure that it is a response to actual nuisance experienced and is therefore 'reasonable' in the scheme. The wording needs to be very clear so that when you come to enforce the rules there is no room for argument as to their meaning.

Owner liability for HOA Levies

Q. I own a property in a sectional title complex. We pay levies to a Homeowners Association for the upkeep of the gardens and security of the areas outside our complex. We pay for upkeep of the gardens in the complex on a PQ basis in our normal levies. The HOA charges are on a "per unit" basis. This charge is paid by our managing agent who charges us on a PQ basis. Is this correct? Should the charge not be recovered from owners on a per unit basis as this expense has nothing to do with the sectional title complex.

A. You need to read the articles of associaton of the HOA (or the constitution if the HOA is not a S21 company but an association).

Look to see if each owner of a unit is a member of the HOA (in which case the liability to pay levies is probably individual and could be on a 'per unit' basis) or if the body corporate is the member (in which case the HOA levy will be a scheme expense recoverable from unit owners like any other, probably according to PQ).

If once you get the documentation the situation is not clear, ask the trustees to get legal advice on the issue so that they can be sure they are charging owners properly.

Constitution of a body corporate

Q. Please advise whether sectional title body corporates do have a constitution. An owner in our complex insists that there is a constitution which body corporates are governed by. Is he referring to the Sectional Titles Act perhaps?

A. Every sectional title scheme has management and conduct rules, and parts of the Sectional Titles Act do govern their management. Taken together, these could be referred to as the 'constitution' of the body corporate. But there is no formal document called a constitution for a sectional title body corporate.

Homeowners Associations may have a constitution (if they are common law associations) and they may also have a memorandum and articles (if they are 'not for profit' companies). ▪

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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.

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