

Paddocks Press

SECTIONAL TITLE NEWS FOR EVERYONE

WHAT IS PADDOCKS PRESS?

An ad-hoc **free** digital newsletter published to educate and update the sectional title community.

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GOVERNANCE OF SECTIONAL TITLE SCHEMES COMPARED WITH FREEHOLD AND GATED VILLAGES

By Prof. Graham Paddock

Historically, land in South Africa was made available for urban residents in the form of freehold properties in townships. The term 'township' has in South Africa come to be associated with high-density low-cost housing developments, but the term actually applies to all 'major subdivisions' in which a large piece of land is divided up into many separate pieces. Each township included many separate freehold residential properties, as well as roads and whatever public open space and utility sites were required by the local authority that approved the plan for the township.

The township establishment conditions imposed by the approving authority obliged the

developer to install services and infrastructure, including roads, pavements and street lights, as well as water, sewerage and electricity systems.

These conditions included restrictions on the buildings that could be erected on each erf, stand or plot. Typically there would be a limitation on the area of each residential plot that could be covered by buildings, the number of residences that could be erected on each plot and the distances that buildings had to be set back from the boundaries of each plot.

These local authority restrictions, together with any others imposed by the developer, were imposed as conditions of title on transfer of the plots.

When the infrastructure was

completed to the satisfaction of the local authority, the developer was free to transfer the residential plots to purchasers. The township infrastructure automatically became the property of the local authority. The result was the creation of separate plots which could each be owned separately, and infrastructure which was owned and maintained by the local authority.

In these developments, the local authority recovers the costs of service delivery in the township by billing individual owners, but the cost of maintaining the roads and other infrastructure is not allocated to those owners in particular. Instead, the costs are recovered in the form of rates paid by all property owners in the local authority ...to page 2

UNDERSTANDING THE FUNCTIONS OF SECTIONAL TITLE PROPERTY MANAGERS

A quick look at the weekend property advertisements confirms that a lot of new developments are offered as sectional title schemes. It is not hard to

see why sectional title is so popular. This form of title offers increased security, convenience, private communities and shared maintenance obli-

gations.

A high percentage of all South African homeowners are now living in ... to page 6



Tertius & Rosie Maree & Graham at the recent Maree/Paddock games see page 7...

GOVERNANCE OF SECTIONAL TITLE SCHEMES COMPARED WITH FREEHOLD AND GATED VILLAGES

from page 1 ...area. Conventional township developments result in urban infrastructure owned, operated and maintained by local authorities at the expense of all ratepayers. The owner of each plot in a township has a direct relationship with the local authority as a ratepayer and as a consumer of services, such as water, electricity and refuse removal. There is no formal legal relationship between the owners of plots in the township. Each property owner manages his or her own plot, subject to local bylaws.

Communal Living

Gated villages and group housing are denser developments in which the community takes responsibility for maintaining the township infrastructure.

The concepts of "group" and "cluster" housing developments – often marketed as "gated villages" – involve the local authority relaxing its normal building restrictions, particularly setback distances and coverage limitations, and allowing smaller freehold residential properties in the context of a planned and managed residential environment. The concept was originally designed to allow higher-density residential developments associated with common facilities such as a communal clubhouse, tennis court and/or swimming pool.

In terms of the township establishment conditions in such a development, ownership of all the roads and all other infrastructure is transferred to a homeowners' association, which recovers the costs of insurance, rates, services, maintenance and repairs relevant to the infrastructure from the owners of the residential plots by way of levies.

Some of these developments include

shared facilities, such as clubhouses, tennis courts and open recreational areas. But in others, only the township infrastructure is owned by the homeowners' association and maintained at the expense of the owners of residential plots in the development.

The very large percentage of new freehold property developments which involve homeowners associations indicates that buyers prefer the 'gated village' concept and are prepared to pay more in the form of levies and become involved in the governance of their townships in order to obtain exclusivity.

All properties in the jurisdiction of a homeowners' association are subject to a registered title condition that compels owners to be members of the association and restricts registration of transfer of residential plots until the association has issued a clearance certificate. In this way, the association is assured of collecting the levies and other amounts due to it.

Homeowners' associations are primarily designed to control and manage the use and maintenance of the township infrastructure and any additional facilities available to residents. The association's constitution and rules set out in detail the rights and obligations of plot owners and the manner in which the association is managed. The rules are normally approved by the local authority which approves the township development proposal, but the set of rules for each homeowners association may be different to any other. Each local authority will usually keep a copy of the constitutions and rules it has approved. Some homeowners associations are created as 'not for profit' companies, and in

these cases copies of the company memorandum and articles are available from the Companies and Intellectual Property Registration Office.

The constitutions and rules of some associations cater for additional controls on buildings on the residential plots. For example, rules may regulate the architectural features and the colours that may be used. There may also be control of and restrictions on other aspects of use of the plots in the development, such as a prohibition on public auctions without the permission of the association. Local authority bylaws also apply within a gated village.

Owners manage and maintain their own plots subject to local authority bylaws and the constitution of the association. Owners pay rates and service charges directly to the local authority. The association pays rates and service charges in regard to the infrastructure and facilities, and the costs of maintaining the infrastructure and facilities.

In practice this means that the owners in a homeowners association are jointly responsible for the full costs of maintaining the infrastructure and any facilities owned by their homeowners association and, via their payment of rates to the local authority, they are also contributing to the costs of maintaining the infrastructure of plots in all other townships within their local authority. On the other hand, as a community the owners of plots in the township are able to control access to their gated village. The fact that there is continued demand for plots in gated villages indicates that South Africans are prepared to bear the ... to page 3

GOVERNANCE OF SECTIONAL TITLE SCHEMES COMPARED WITH FREEHOLD AND GATED VILLAGES

from page 2 ... financial burden of subsidising other areas in order to obtain a substantial degree of control over their own area. It may be argued that owners within the jurisdiction of homeowners associations should not have to contribute to that portion of the local authority's budget which is to be spent on maintaining roads and infrastructure in other townships. As things stand there is a degree of cross-subsidisation which not only benefits those in low-cost housing developments but those in any property development which is not run by a homeowners association.

Homeowners' associations are run by trustees or directors, who deal with the day-to-day issues; the residential plot owners make major decisions in general meetings.

Often, the association is managed with the assistance of a professional 'managing agent' who performs most or all of the executive duties. Managing agents assist in the preparation of budgets, advise the executive committee in the making of decisions, supervise the carrying out of repair and maintenance work and liaise directly with all the owners. The charges for the services of managing agents are recovered from all owners via their levies.

The owner of each residential plot has a direct relationship with the local authority as a ratepayer and a service consumer, and with the association as a member entitled to participate in its administration and obliged to pay its levies.

The owners in this type of "community scheme" are formally bound together as a group by the obligation to be members of the association.

Sectional Title

Sectional title caters for separate ownership of sections in a community where members automatically share ownership of the infrastructure .

Townships result in the creation of conventional or "freehold title" properties; pieces of land measured in length and breadth, but not in height. In sectional title, which is the modern urban title originally designed for apartment ownership, the emphasis moves from land to buildings.

For example, it is possible to own a part of a building, such as an apartment or office, on the fifth floor of a building without owning the apartments or offices beneath. While the concept of sectional title was originally designed for multi-storey blocks of apartments or offices, it is flexible enough to be applied to developments that include semi-detached or entirely separate homes.

Each area that can be exclusively owned is called a "section". The common areas that serve more than one section – such as the land, foyers, lifts, foundations and roofs – are classified as common property.

Common property also includes all the internal services and infrastructure, the roads, pavements and street lights, as well as the water, sewerage and electricity systems. The infrastructure that would have been owned by the local authority in a conventional township or by the homeowners' association in a gated village forms part of the scheme's common property and is owned in undivided shares by the owners of sections.

Each sectional title scheme is managed by a body corporate, usually with

the assistance of a professional managing agent. All the owners of sections are members of the body corporate.

Owners pay levies, which currently cover local authority rates and service charges, as well as the costs of building insurance, maintenance and repairs to common property and management expenses.

No sectional unit can be transferred without a levy clearance certificate from the body corporate.

Historically, the owners of property in a sectional title scheme have had no direct relationship with the local authority. The local authority has treated the whole scheme as one entity managed by the body corporate and only dealt with the trustees or the managing agent. But local authorities are now obliged to value and collect rates from each sectional title unit individually. This process started some time ago and is expected to be completed throughout the country by mid-2008. This will mean that each owner has a direct relationship with the local authority as a ratepayer.

Service charges will, where practical, also be individually recovered. However, this may prove more difficult because in many schemes the services, such as water supplies, are not delivered to each section through just one pipe on which consumption can be measured. In some cases the cost of installing separate metering devices will be very high.

The management responsibilities of a sectional title body corporate are wider than those of a homeowners' association because the body corporate manages and controls all the common property.

The body corporate must ... to page 4

BACK TO BASICS

by Judith van der Walt

When can an owner not vote—Management Rule 64?



Judith van der Walt

In terms of prescribed Management Rule 64 made under the Sectional Titles Act No. 95 of 1986, an owner is not entitled to

vote at any body corporate meeting if his levy contributions are in arrears or if he has persistently breached a conduct rule and he has been warned by the trustees in writing to refrain from breaching the relevant rule. This restriction on an owner's voting rights only applies to ordinary resolutions and not in instances where decisions have to be made by special or unanimous resolution.

The rule specifically provides that no owner "shall be entitled" to vote, which is an absolute prohibition on owners whose levies are in arrears taking part in voting on ordinary resolutions. This prohibition could have unfair consequences, especially in circumstances where the amount which is in arrears is insubstantial.

The other question which arises where an owner is prohibited from voting is "what happens if the outstanding levies have been incorrectly calculated or if a number of owners believe that a special levy has been invalidly raised and they refuse to pay the special levy, leaving their contributions in arrears if the special levy is valid but not other-

wise?". Can an owner still be prohibited from voting if there are such unresolved disputes? If such disputes are not resolved or capable of being resolved at the meeting, the only remedy available to such an owner who has been denied the right to vote is to approach the High Court for an order declaring that his levy contribution was not in arrears at the time the meeting took place and that he could therefore not have been validly prohibited from voting. The court will, in all probability, take into account whether this owner's vote would have made any difference to the results of the voting and whether he suffered prejudice by being precluded from voting.

The members are not entitled to resolve at the meeting that an owner who is in arrears will be entitled to vote for an ordinary resolution, as that would be in direct conflict with the provisions of prescribed Management rule 64.

In circumstances where the trustees rely on the breach of a conduct rule by the relevant owner to prohibit him from voting, they will have to produce the written warning sent to the defaulting owner at the meeting if there is any dispute as to whether the owner was entitled to vote or not.

Where an owner is in arrears with his levy contributions or in breach of a conduct rule, the holder of a bond over his unit is entitled to vote at the

meeting on behalf of such an owner, irrespective of whether the bondholder has received notice of the meeting or not. The bondholder acts as the owner's proxy and the owner may still be in a position to influence the outcome of the decisions made.

Judith van der Walt is an attorney at Paddocks and specialises in sectional title consulting and conveyancing. Judith is available for consultation from R900 per hour plus VAT. ■

from Page 3... insure all the buildings in the scheme and manage all aspects of life in the scheme, including the behaviour of section owners when this negatively affects other owners' interests. The operations of a sectional title body corporate are governed by the Sectional Titles Act, 95 of 1986, and by the management and conduct rules, which bind all owners, tenants and other occupiers of sections.

Each owner of a section manages that section subject to local authority by-laws, the terms of the Sectional Titles Act and the management and conduct rules of that scheme. ■

Advertise on Sectional Titles Online

Contact Robyn on 021 674 7818 or robyn@paddocks.co.za

www.sfo.co.za

Q & A WITH THE PROFESSOR



Prof Graham Paddock

Q1: Can trustees obstruct autonomous body corporate meetings?

A1: Trustees are normally owners and as such members of the body corporate. The chairman elected by the trustees also chairs meetings of the owners unless the meeting decides otherwise.

When they participate in a general meeting of owners, trustees have no special powers. They may know more about the day-to-day running of the scheme because they are more involved, and they may have a lot to say, but they cannot 'obstruct' the meeting.

At any stage the owners in general meeting can give trustees specific directions or impose restrictions on them in regard to the way they must exercise the functions and powers of the body corporate. So the general meeting of owners is - as long as the owners are aware of their group power - the most important and authoritative body in any scheme.

Q2: Are there any qualifications for one to become a trustee?

A2: There are no educational qualifications required to become a trustee,

nor any requirement for appropriate experience. Most trustees are ordinary people who volunteer their services.

The majority of the trustees in any scheme must be either owners or the spouses of owners and a managing agent cannot be a trustee unless s/he is also an owner.

Q3: How does one prevent a managing agent and set of trustees acting like a cabal?

A3: The trustees employ the managing agent to carry out some of their functions. This usually results in a close relationship between the trustees and the managing agent which, in the normal course, is a healthy feature of scheme management.

But if other owners feel that they are being excluded or discriminated against, there are two strategies which may assist. First, stand for election as a trustee. Secondly, go to all trustee meetings. These suggestions both mean that the owners who feel excluded have to get involved to some extent to overcome their concerns.

Q4: What legal action can a body corporate member take if one is dissatisfied with the action of trustees?

A4: As long as notice is given of the intended resolution, at any general meeting of owners a trustee can be removed from office by majority vote.

The forced removal of an owner/trustee is an action likely to do permanent damage to relationships amongst owners, so this is very much a last resort when less aggressive initiatives have failed.

Q5: Can managing agents be replaced at a lesser cost to body corporate members, with a reduction in their levies?

A5: If there is no managing agent, the trustees must do the administration of the scheme themselves. Costs may be reduced, but then the scheme finances and operation is in the hands of volunteers.

It can work well when there are lots of competent people with time on their hands and a willingness to work without reward. But there is a limit to what you can expect from unpaid volunteers.

Particularly in larger schemes and those which have a high percentage of non-owner occupants, managing agents are not a luxury but a necessity. Even in smaller schemes, just a few difficult owners can wipe out the enthusiasm and goodwill that drives volunteer trustees to work without professional assistance.

Q6: What happens to the Managing Agents duties with local authorities starting to collect rates directly? How does this reduce their importance?

The collection and payment of rates and the querying of accounts is normally a very small part of a managing agent's workload. Levies will reduce when these expenses are removed from the monies paid monthly by owners to the body corporate and paid over to the local authority.

I do not expect individual billing of rates to unit owners to have any significant impact on managing agency workloads or fees, particularly whilst the body corporate is still charged for services.to page 6

UNDERSTANDING THE FUNCTIONS OF SECTIONAL TITLE PROPERTY MANAGERS

from page 1 ... sectional title schemes. As the popularity of this form of title grows, it becomes increasingly important for them to have access to trained professionals who are able to manage their schemes and to be able to ensure that those who tender for their management business have the knowledge and skills to carry out their responsibilities effectively.

Prof. Graham Paddock confirms that the sectional title property management function requires familiarity with basic legal and real estate principles as well as a good working knowledge of the Sectional Titles Act, 1986, and the prescribed Management and Conduct rules. One of the challenges in this regard, says Prof Paddock, is that much of this material is not presented in user-friendly terminology. But he concedes that some aspects are complex and that students often struggle to come to grips with concepts such as "unanimous resolutions" which do not

actually need to be unanimous!

He says that once students understand the specialised concepts involved, the best way to unpack the detail in the Act and the prescribed rules is to divide issues by subject type. So in UCT's Sectional Title Scheme Management Certificate Course the students deal with specific management issues under the categories Financial, Administrative and Physical, irrespective of where the individual provisions are to be found in the Act, rules and regulations.

Managing agents handle a wide variety of tasks for their clients requiring a diverse set of skills. A successful manager plans, counsels, advises, organises, delegates and negotiates. Some of these functions require the manager to act as an independent expert, for example, where the manager also acts as an insurance broker or debt collector. Paddock says: "There can be very few professions which

require such a wide range of skill sets."

Paddocks has delivered the University of Cape Town's "Sectional Title Scheme Management Course" to more than 600 managing agents with over an overall 92% pass rate. "This course has helped hundreds of sectional title property managers throughout the country by giving them legal training they need to carry out their work competently and efficiently" says Paddocks' Marketing Manager, Robyn Allan.

This certificate course is delivered over a 6-month period via distance learning and is open to anyone with an internet-connection living in South Africa. Scholarships for previously disadvantaged students are also available. For more information please contact Robyn at 021 674 7818 or on e-mail at robyn@paddocks.co.za. ■

. . . Q & A C O N T I N U E D

from page 5... Certainly it will not significantly reduce the importance of managing agents or their services.

Each sectional owner will have to do the work necessary to manage his or her rates and account with the City. The benefit is that when owners do not pay their levies, other owners in the scheme will not have to subsidise their rates and service payments.

Q7: Just what are managing agent's duties?

A7: There is no prescribed list of duties, but usually the managing agent will deal with all the administrative and financial

duties of the trustees, attend their meetings and advise them on the legal and practical aspects of managing the scheme.

Sometimes a managing agent acts as an employee, e.g. sending out notices of meetings once the trustees have decided that it must be held. In other cases the managing agent may act as an independent agent, e.g. when placing insurance and taking a commission as a broker.

Q8: How do sectional title bodies corporate function in other countries?

A8: In Israel and Germany, each scheme must be managed by a professional man-

aging agent who plays a leading role in making decisions.

Our system is modelled on that in New South Wales, Australia where professional managing agency is optional and the managing agent takes instructions from the trustees.

The major difference between managing agency in Australia and South Africa is that in all the states of Australia managing agents have to be certified as competent before they are allowed to practice. There is no obligation on a South African managing agent to be certified competent by UCT/Paddocks or any other body. ■

MAREE / PADDOCKS GAMES

Paddocks together with Tertius Maree and Associates held the second round of their regular inter-office games.

Graham Paddock and Tertius Maree have specialized in sectional titles legal services for many years. Both are considered to be experts in their field and have enjoyed a long standing relationship.

The first round of games was held at the Somerset Mall Bowling Alley. Paddocks took home the trophy on the first occasion.

The second round was held at the Moullie Point putt-putt course, and the trophy was subsequently returned to the Maree boardroom after a brilliant performance by Tertius and Rosie Maree.

See the pictures at right and below:



Tertius Maree and Graham Paddock

THANKS FOR SHARING YOUR THOUGHTS

In our last edition of Paddocks Press we asked our readers to complete a two minute online survey and share their thoughts on our Paddocks brand.

The response was wonderful!

Thank you to the 152 people who responded to our survey.

We are comfortable in the knowledge that our clients see our brand as we do. ■

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Published by **Paddocks Press**

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WHAT IS 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 and is 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 in the Department of Housing in the restructuring of the Sectional Titles Act and the establishment of an Ombuds 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. 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 various levels of central and local govern-

ment and act as mediators and arbitrators of sectional titles disputes. The consulting team also offers conveying 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 publishes 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** for more information