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Paddocks PRESS

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WHEN IS AN ENCLOSURE OR IMPROVEMENT AN EXTENSION OF A SECTION?

By Greer Moore-Barnes

There appears to be widespread uncertainty on this issue, and many schemes unfortunately allow unauthorized enclosures / improvements (often incorrectly terming them "exclusive use") which result in precedents that create a controversial situation that can, and very likely will, be the cause of costly dispute and much unhappiness in the future.

"But it was always an enclosed courtyard", we often hear; "all I did was put a roof over it." Pop inside the roofed enclosed courtyard and one might find all sorts of surprises, from a full scale laundry to a cosy additional bedroom or some other form of living "add-on" – and guess what, ask to see the municipal plans – "what are they" – "was I supposed to have plans".

The Act / Management Rules are very clear – a section / exclusive use area may only be used for the purpose for which it is intended to be used. A section consists of living space, exclusive use is generally used for outdoor areas which are specifically identified; a courtyard is a courtyard, a patio is a patio, a garden is a garden, a carport is a carport - the list stretches into infinity; and they must remain as intended and cannot be "transformed" to suit the needs or whims of an owner, unless they have followed and fulfilled the procedures as prescribed.

Another prime example, that I know has been covered before, is the addition of loft rooms; here reference *...to page 2*

THE TAXMAN GIVETH

By Clint Riddin

You may recall from an earlier article that a body corporate, shareblock or home owners' association needs to be registered as a taxpayer, and is taxed in terms of SARS' practice note 8.

Against this background it appears that a gift from Trevor has been missed when analysing the 2008 budget speech. This is not the reduced corporate tax rate which is used to tax a body corporate, shareblock's and HOA; but rather that the first R50,000 of interest income earned on investments is now exempt from tax. This exemption does not extend to interest charged on late and arrear levy payments and other income such as rental income is still taxable.

This has the effect *...to page 2*

WHEN IS AN ENCLOSURE OR IMPROVEMENT AN EXTENSION OF A SECTION?...continued

from page 1... to Section 24 explains this very clearly – "If an owner of a section proposes to extend the boundaries or floor area of his or her section, he or she shall with the approval of the body corporate, authorized by a special resolution of its members, cause the land surveyor or architect concerned to submit a draft sectional plan of the extension to the Surveyor-General for approval." A new floor where before there was only air constitutes an extension of floor area – without any doubt!

The Trustees have an important duty to ensure that the owners comply with all requirements of the Act / Regulations; and in the case of extensions / improvements specifically with S.44 and PMR.68. They need to disregard the whispers, the glares, the threats and other profanities – and keep focused on the responsibility they undertook (sadly often without full knowledge of the implications) when they accepted nomination as a Trustee.

Remember – when in doubt consult someone who is qualified to give you constructive and correct advice. ▪

THE TAXMAN GIVETH ...continued

*from page 1...*that some bodies corporate, shareblock's and HOA's may not have to pay tax, but this does not mean that compliance in terms of filing the necessary returns can be stopped, this is still a requirement. This should also not persuade any unregistered body corporate from registering. It would seem that as long as there is a move towards compliance in all forms of taxpayers, benefits will accrue, even if there is a cost in terms of compliance, the tax savings eventually become beneficial. ▪

Upcoming Events in the Sectional Titles Industry

Date	May Events
12, 13 May	UCT Specialist Realtor Course Workshops—Cape Town
13 May	NAMA Seminar, Cape Town
14, 15 May	UCT Specialist Realtor Course Workshops—Durban
16, 17 May	UCT Specialist Realtor Course Workshops—Johannesburg

Date	June Events
2, 3 June	UCT Scheme Management Course Workshops—Cape Town
4, 5 June	UCT Scheme Management Course Workshops—Durban
6 June	Registrations close for June 2008 UCT Scheme Management Course
6, 7 June	UCT Scheme Management Course Workshops—Johannesburg
17 June	June 2008 UCT Scheme Management Course starts

THE FIRST UCT ADVANCED SCHEME MANAGEMENT COURSE

Staff Reporter

The first UCT Advanced Sectional Title Scheme Management Course was held during March and April 2008 and was completed by 50 students throughout the country. This course combined 5 weeks of self-study, during which students received reading material via the internet and participated in online discussions, and a 3-day intensive and interactive workshop held in both Johannesburg and Cape Town.

The majority of the students were managing agents and attorneys who were given the opportunity to share and discuss their various experiences in the 6 topics covered during the self study. There was wonderful interaction amongst students via the website and during the workshop and students thoroughly enjoyed the presentations, discussions and often "heated debates" held during the workshop!

Congratulations to the first class of UCT Advanced Sectional Title Scheme Management Students! ■

The next Advanced Course will start at the beginning of October.

"The support from the staff was fantastic!"

"The most important issues were dealt with and a lot of information and practical examples were given."

Left: Students who attended the Cape Town workshop

Back row: Frik van Wyk; Gavin Janssens; Chris Farley; Glen Smit; Graham Paddock; Roy Le Grove Smith
Middle: Franz Holm; Andy Cloete; Paul de Groot; Louis Hansmeyer; Jennifer Paddock; Judith van der Walt
Front: Theo Kleynhans; Shan Ramperstad; Chantelle Janse van Rensburg

Above: Students who attended the Gauteng Workshop

Back row: Dr. Gerhard Jooste; Steve Webb; Hennie Giani; George Muller; Gerhard Meyer; Shahiem Carr; Colin Grenfell; David Tucker; Carl van der Westhuizen; Alan Barr; Louis Lenhoff; Graham Paddock; John MacDougal; Duane Lawrence; Nico Janse van Rensburg
Middle row: Robert Meszarich; Muriel Riekert; Didi Steen Stenersen; Rhona Rakow; Santie De Bruyn; Tholsie Naidoo; Roark Baldeo; Retief van Wielligh
Seated: Blanche Pitchers; Ashleigh van Greunen; Lauren Wilson; Wendy MacLarty; June Hatton; Chrissie Haycock; Laetitia De Beer; Cherne Cullen; Dhivya Mothilal; Judith der Walt; Sanri Du Preez
Front: Jackie Matthew; Karien Coetzee; Ray Leitch

Absent: Nico Loubser

BACK TO BASICS

BY JUDITH VAN DER WALT

Registration of managing agents with the EAAB

Judith van der Walt

The recent application for the liquidation of a managing agency business in Cape Town has placed the registration of managing agents with the Estate Agency Affairs Board ("EAAB") under the spotlight. In terms of the Estate Agency Affairs Act ("EAAA"), every managing agent who collects or receives levies on behalf of a Body Corporate should be registered with the EAAB as an estate agent and be in possession of a valid Fidelity Fund Certificate ("FFC"). Unfortunately, a significant number of managing agents are not registered with the EAAB.

It is very important for managing agents to register with the EAAB because all amounts paid to the managing agent into its trust account is protected by the Estate Agent's Fidelity Fund. If the managing agent steals a Body Corporate's trust money, the Body Corporate will be able to submit a claim to the EAAB against the Fidelity Fund and recover its losses from the Fidelity Fund. The EAAA refers specifically to the theft of trust monies. In circumstances where it cannot be proven that the managing agent has actually stolen the money, the Body Corporate will not be entitled to claim from the Fidelity Fund.

Despite the failure by the managing agent to comply with the requirements of the EAAA, there is still a very real possibility that the Fidelity Fund will entertain and pay claims, even though the managing agent never registered with the EAAB and was not in possession of a FFC. It is likely that the Fund will require that the Body Corporate exhaust all avenues of recovery such as the liquidation of the managing agency business and the sequestration of the personal estate of any apparent thief.

All claims against the Estate Agent's Fidelity Fund must be submitted within three months of the claimant becoming aware of the theft. Failure to submit the claim within this time period may result in the claim being rejected. Therefore, even though recovery is not guaranteed, Bodies Corporate should submit their claim as soon as they become aware of trust monies being stolen.

Managing agents must apply to the EAAB on an annual basis for the renewal of their FFC's. If the managing agent fails to apply timeously, he will be fined by the EAAB and the FFC will not be issued until the managing agent has paid the fine and all other prescribed fees. Perhaps the most compelling reason for a managing agent to hold a valid FFC is that without such a certificate s/he is not entitled to be paid for any estate agency services! ▪

Letters to the Editor

We welcome reader contributions to the Editor. Please note that no questions will be answered here.

Dear Graham,

Co-existing with one's neighbours is never easy - especially when one lives beneath some nocturnal beast who stomps around in wooden clogs all night long. You may enjoy this though. I live in Hong Kong but I still own a flat in Cape Town, so keep sending the newsletters! The custom in Asian countries is to remove one's shoes before entering one's abode. The reasons are varied – everything from Fung Shui to easy housekeeping. Front entrance halls of every flat are lined with shoes and also soft towelling slippers for inside wear. This avoids many cases of homicide.

I not longer live in a flat but many years ago when I did, I had an upstairs neighbour – a "gweilo" (foreign white devil) who clunked around at night and drove me dilly. Instead of resorting to homicide or vehicular damage, I went out and bought a pair of toweling slippers and placed them on his doorstep. From then on I had peace and quiet at night. A few days after had I placed the slippers at his door and patted myself on the back for not killing him, I cleared my mailbox. In the mailbox was a note thanking me for the slippers and attached to the note was a pair of ear-plugs!

We became pally after that and all was harmonious.

Regards, Colleen

Please email editor@paddocks.co.za

Q & A WITH THE PROFESSOR

By Prof. Graham Paddock

Letting "adminstration fee"

Q1: At our recent annual general meeting it was decided that the trustees will charge an R80,00 administration fee each time a unit is let out. The motivation is that the trustees are put to a lot of trouble each time a new family moves into the block.

Is this charge valid and must I pay even if I use a letting agent?

A1: The body corporate has the right to raise levies on the basis of an approved budget. And trustees can raise special levies when necessary. But unless your rules, made by owners (not trustees) and filed at the Deeds Registry give the body corporate specific power to charge this "rental administration fee" it does not have the power to do so. And no simple decision taken at the annual general meeting or any other meeting can give it this power. It would have to be a properly made and effective rule.

And, in case there is any confusion, I mention that in terms of Prescribed Management Rule 10 the trustees are not entitled to take that or any other money for themselves to compensate them for their time spent acting in trustees unless the owners have approved these payments by way of special resolution.

Restrictions on short and holiday letting

Q2: Is there any part of the act or a law which gives a body corporate the right to dictate the duration of a lease entered into between an owner and tenant, even if the scheme's conduct rules stipulate a minimum lease period. In a similar vein, can owners be told how to rent out their unit, i.e. can the body corporate refuse permission to an owner who wants to let his unit as a "holiday flat" for example.

A2: No part of the Act or the prescribed rules deals specifically with this aspect, but both the Act and the prescribed rules make it very clear that no section can be used in a manner which creates a nuisance. Nor can a flat be used in contravention of any restriction shown or implied on the sectional plan or in the relevant zoning scheme regulations.

No person can use any part of a building for time-sharing activities without the consent of all owners, but in order to restrict the length of ordinary residential leases you need a title condition or a scheme rule. And in the case of rules, they must be reasonable in all the circumstances.

"Holiday letting" is not an ordinary residential usage; it is a "resort land use". So, in a normal residential block of flats where the community considers that such letting results in regular nuisances, it is reasonable to make a rule restricting "short lets" and prohibiting "holiday letting". The minimum period for a residential lease is often set at either three or six months.

Equal levies for security guard

Q3: At our annual general meeting it was agreed a security guard would be employed. The costs form part of the approved budget. The Trustees are not charging out the security guard costs as per the participation quotas.

I have referred them to the Sectional Titles Act but they choose to ignore me. What can I do?

A3: Only if there is a rule made under section 32(4) of the Act and filed at the Deeds Registry which authorises them to do so, can trustees collect any communal expense other than in accordance with the participation quota schedule. One can see that trustees may feel that all owners get equal benefit from the presence of the guard, but they are bound by the provisions of the Act.

Warn the trustees in writing that they are breaking the law. If that does not get them to straighten up and fly right - including refunding the overcharged levies - get some advice, e.g. from an independent managing agent, as to what your levies would be if they were correctly calculated. Then set off the amounts which you have been overcharged against your next payment and from now on pay only what is in fact due.

Ensure that your complaints are noted. Go to the next trustees meeting and ask that your objection be noted. Formally request the trustees to put the issue on the agenda of the next general meeting as "special business." *...to page 6*

Q & A WITH THE PROFESSOR ...continued

from page 5...

Noisy neighbours

Q4: I live in a small complex. We have four buildings of 4 flats each, 2 on the ground floor and 2 on the upper floor.

My new neighbors who live on the same floor with me have a habit of keeping their door open almost all hours of the day, since their door is opposite mine and very close to it I hear in my flat almost every word they speak, their television and radio as well as their noisy children. It feels like living with them in the same flat. On top of this there is no privacy at all – I'm being watched when I go and come, my visitors are greeted or "interviewed" by them - It is like having to walk through their lounge to get to my front door.

What can I do about it? There is nothing in the conduct rules about such situation. Is there anything that I can do to stop this disturbing behaviour?

A4: Your need for privacy is obviously far higher than that of the members of the neighbouring family.

One expects that people will keep their doors closed. I have never come across a rule which obliges people to do so, but if the community sees this as a reasonable provision it could be the subject of a rule. The trouble is that such rules are very hard, and perhaps expensive, to enforce.

The real issue seems to be the noise which is audible from within your flat even when your door is closed, which it normally would be. Unless the level of noise is really intolerable (in which case you could call the police) you probably have to see noisy neighbours as one of the risks of high-density housing and learn to live with it.

Basis of sale of exclusive use rights to owners

Q5: We have a serious shortage of garaging and parking in our complex. We converted a part of the garden for use as parking. These unsecured bays have been registered under section 27A of the Act. The body corporate intends selling the bays.

We think that preference should be given to those owners who are primary residents, without parking, and on an historic basis. Then we would consider absentee landlords. But we have already had a number of letters of objection from legal representatives of owners who are absentee landlords. How should we reply to them?

A5: You need to have the entire body corporate decide on how the rights to the bays will be sold. There are many ways to approach this issue. Some owners will argue that the highest-bidding owners should get the exclusive use rights because the primary objective is to raise money. Others will argue, as you do, that the bays should be applied to reduce existing inequities in the distribution of parking opportunities and that resident owners should get preference.

In the end the right answer will be the one that three quarters of the owners in number and value consider is fair and are willing to support by way of a special resolution.

Particularly as some of the owners have already instructed attorneys to protect their interests, the trustees must get some independent legal advice so as to reduce the likelihood of serious disputes. All the money that can be raised by selling exclusive use rights to the additional parking bays can easily be spent on losing an arbitration or court case.

Sale of a unit owned by the body corporate

Q6: Our body corporate owns a flat which used to be used for a caretaker. It is currently let out. Can the flat be sold to raise money for maintenance, upgrading the lift and other expenses? We would prefer not to impose special levies.

A6: This is the type of decision where I suggest the trustees should consult the owners, preferably at a general meeting, to allow them to give their opinions as to whether the unit should be sold or not. But the trustees are entitled to sell the flat where that is essential for the proper fulfillment of the body corporate's duties.

Bear in mind that body corporate money cannot be spent on improvements to the common property without following the processes set out in prescribed management rule 33. Assuming that the proposed upgrade to the lift is non-luxurious, the trustees would have to follow the owner consultation process set out in 33(2). ▪

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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 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 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 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.

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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.

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