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Paddocks Press

SECTIONAL TITLE NEWS FOR EVERYONE

Judith van der Walt — Attorney, Notary and Conveyancer at Paddocks

SEPARATE RATING OF SECTIONAL TITLE UNITS

With the introduction of individual rating of sectional title units in the Cape Town metropole from 1 June 2007, owners of units expected to receive an amended (and decreased) levy statement from that date. And rightly so, because the municipal rates component of the levies is now not paid by the Body Corporate, but by the owners individually and directly to the City of Cape Town. However, from reports in the press and discussions with managing agents and owners, it seems that a number of Bodies Corporate are still collecting from each owner an amount which used to be the "rates component" of their levies.

Confusion reigns as to the correct legal position. Are Bodies Corporate still entitled to recover levies on account of municipal rates from owners when they are no longer responsible for these amounts? Can trustees insist that the owners pay "double rates"? Must the owners call a special general meeting to give the trustees specific instructions to remove the rates component from the existing levies? Should the "rates component" still be collected, perhaps in order to increase ... *to page 2*

WHAT IS PADDOCKS PRESS?

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

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INSIDE THIS ISSUE:

"MY GARDEN IS WALLED SO IT'S MINE ... AND I'LL BUILD ANYTHING I WANT ON IT!"

Karen Bleijs—Director of Thomson Wilks

Often declared by bellicose men (and women) behind garden walls in sectional title schemes on Sunday afternoons over braaivleis fires – beers in hand, boerewors sizzling, braai -tongs held aloft in vainglorious gesture!

But when it comes to a garden in a sectional title scheme, how untrue this statement really is!

Gardens in a sectional title scheme, whether they are walled or un-walled, are either always common property and usually subject to exclusive use rights. Gardens, being open, can never ever form part of a section and thus can never ever be taken into account in the calculation of the participation quota attaching to a section and the levy payable by the owner of a section.

Ah, but how do you know if your garden is an exclusive use area ("eua")? There are essentially only two ways to find out:

1. First and foremost you must consult the sectional plan for the scheme that you live in. If it delineates, in other words shows, the garden area then it definitely is an "eua". An example would be marked "G1" (G denoting "garden");

2. If the plans don't delineate any eua's at all, your next step would be to consult the Rules applicable to your particular scheme. If your Body Corporate was registered prior to 1 June 1988, the document to look for is called "the Schedule 1 Rules" and ... *to page 3*

. . . SEPARATE RATING OF SECTIONAL TITLE UNITS

from page 1 ... the maintenance reserves of the scheme? Who must take the decision that the levies be "reduced" so as to avoid a double burden on owners?

Some managing agents simply amended the levy statements they issued from 1 July 2007 by removing the rates component, in some cases without any discussion with the trustees of the scheme. Some schemes have not dealt with the matter at all but continue to collect the same amounts they did before 1 July 2007.

The Sectional Titles Act of 1986 and the prescribed Management Rules are silent on how to deal with this situation. They do not provide for this very unusual situation in which a body corporate expense ceases to be applicable during the course of a financial year. Nor is there any provision which would support the allocation of amounts collected for one anticipated expense to another expense category or to a reserve fund. The only indirectly applicable provision is Prescribed Management Rule 45 which states that owners are not entitled to be refunded contributions which were lawfully levied upon them and duly paid by them.

The budgeting process requires the trustees to estimate future income and expenses of the Body Corporate, and the budget is approved by owners during their annual general meeting. In the past, budgeted expenses included provision for the municipal rates on an ongoing basis.

In an ideal world, a budget for the financial year ending 29 February 2008 would only have made provision for the levying of municipal rates from 1 March 2007 until 30 June 2007, but we know that in most cases the approved budgets did not cater for removal of the rates component from 1 July 2007. And there was a degree of uncertainty as to whether the City of Cape Town would in fact be able to implement separate billing of units from that date. But now all trustees know that as from 1 July 2007 the Body Corporate is no longer responsible for rates and that these must be paid directly by owners.

The body corporate should not recover from owners levies in respect of a substantial body corporate expense once that expense is no longer payable by the body corporate. Trustees should have reduced levies from 1 July 2007, crediting each owner with the "rates portion" of their levies for July 2007 and subsequent months.

There is no need for the owners to get involved in this process. But if the trustees fail or refuse to reduce levies with effect from 1 July 2007, then owners entitled to exercise 25% of the total participation quotas can request the trustees in writing to call a special general meeting. If the trustees fail to call the meeting within 14 days of the request, those owners can themselves call it. At the meeting the owners can by ordinary resolution instruct the trustees to reduce the levies and repay any amounts over-collected.

Trustees who have instructed the managing agents to keep on collecting the municipal rates in an attempt to increase the maintenance reserves, have acted irregularly, effectively raising an additional levy from owners without authority. Bodies corporate which have continued to collect from owners the "rates component" after 1 July 2007 should immediately repay such amounts unless they are able to obtain the consent of all owners in the scheme to continue these unnecessary payments.

Another issue which has caused confusion is the discrepancy between the amount of municipal rates, payable directly by owners to the City of Cape Town and the amount by which an owner's levies were decreased when the "rates component" was removed. There are two reasons. Before 1 July 2007, the City of Cape Town announced that all rates would increase from that date. Secondly, the basis of rates calculation has changed completely for sectional title properties. Previously the City rated all the land and buildings in a scheme and the total of the rates was recovered from owners according to their participation quotas (based on floor areas) or a special scheme rule. Now each unit is rated directly on its own market value which bears no direct relationship to floor area and includes consideration of issues such as the quality of the view and the standard of finishes in a section.

The body corporate should not recover from owners levies in respect of a substantial body corporate expense once that expense is no longer payable by the body corporate.

Owners should also bear in mind that in schemes where each section has not been fitted with its own official water meter, the Body Corporate will still receive an account from the City for the water consumption of the entire scheme and the amounts due, as for sewerage and other services, will be payable by the body corporate and recovered from owners. ■

. . . "My garden is walled so it's mine ... and I'll build anything I want on it!"

from page 1 ...there will almost certainly be an amended set of rules lodged. Look at the most recent set.

If your Body Corporate came into being after 1 June 1988 , check both the Management and Conduct Rules pertaining to the scheme, since section 27A of the Act (the Sectional Titles Act 95 of 1986) allows eua's to be created in terms of either set of Rules.

Now things get a little bit complicated, but fortunately not too complicated.

Firstly, remember that as the name implies an exclusive use area will always remain as "common property" – you never actually own it as you do your section, but just have the sole right to use it. That is why, irrespective of what type of eua you have rights to, you have to ask the Trustees' permission before you can place any kind of structure on it, whether it is a fountain, a built in braai or a lapa. You also have to keep your eua neat and clean at all times. And the trustees' power to give permission is now limited—they cannot approve any building which is actually an extension of the floor area of a section or an entirely new section.

As George Orwell said in his novel Animal Farm: "All animals are equal but some animals are more equal than others". Well, believe it or not, some eua's are more equal than others in that they are more valuable than others.

Eua's created in terms of section 27 of the Act are held by an owner of a unit in terms of what is known as a Notarial Deed of Cession. This is similar to, but not the same as, a Deed of Transfer. This type of eua can even be bonded or mortgaged whereas the other rule -created eua's cannot. Whilst you certainly won't consider selling your garden, if you held a carport that was an eua created in this way, you could sell it to another member of the Body Corporate if you wanted to.

The strange thing is that the Act makes provision for eua's created in terms of the old Act (being those created in terms of the old Schedule 1 Rules) to be converted to section 27 eua's, with all the advantages attaching to them. However few owners know about this and there is a little catch – if they want to convert their old eua's there is a conveyancing cost attached!

Who would have thought that a small green patch under an endless blue sky could cause so much confusion?

You can contact Karen Bleijs at karen@thomsonwilks.co.za. ■

Highly Qualified Sectional Title Practitioners

Congratulations to the following people who have completed both the UCT Sectional Title Scheme Management Course and the UCT Sectional Title Specialist Realtor course:

Charles Baker	Cleon Steyl
Dee Crowther	Santie de Bruyn
Wendy Dicks	Lisa Du Plessis
Sanri du Preez	Joan Egan
Giel Engelbrecht	Caryn Foddering
Quintus Joubert	Laurie Knight
Samantha Marsden	Andrew Moholoagae
Graham Rose	Dawn Savopoulos

At the end of 2005 Paddocks and the University of Cape Town launched the first Sectional Title Scheme Management course. This focuses on the management of sectional title schemes. Over 300 people completed the course during 2006 and Paddocks Learning found that 20% of these students were Estate Agents wanting to learn more about the sale of sectional title. In the 2nd quarter of 2007 Paddocks and the University of Cape Town launched the Sectional Title Specialist Realtor course.

Congratulations to these highly qualified sectional title practitioners. ■

WHAT IS "FRACTIONAL OWNERSHIP" AND HOW DOES IT APPLY IN SECTIONAL TITLE SCHEMES?

By Prof. Graham Paddock

The Concept

Fractional means *"being a part / fraction of a whole "*. So ***"fractional ownership"*** should mean *"part ownership"* and, in the context of real property, *"part ownership of the property"*.

Where a group of three friends buy and take transfer of undivided one-third shares in one conventional or sectional property, for example a holiday home they intend to use and share, they can each be said to have *"fractional ownership"* of that property. In these circumstances one presumes that they will work out what they now consider to be a fair system for sharing the use of the property, for example taking it in turns to use the holiday home at each year-end and during school holidays, and agree that they will share the expenses of and income derived from the property according to a particular arrangement.

But this type of arrangement needs to be flexible enough to allow participants to exit and enter the arrangement without upsetting its operation. So rather than taking transfer of undivided shares in the property individually, one expects that the friends will arrange for a company, close corporation or the trustees of a trust to take transfer of the whole property. When the first of the friends wants to realise his or her investment, s/he will sell shares, a member's interest or beneficial rights to a new participant; the property will remain fully vested in the *"holding entity"*. First this will drive down the legal and revenue costs associated with trades of participants' interests. Secondly it will ensure that new entrants are bound by the sharing and contribution arrangements which would normally be set out in detail in the founding statement, articles of association or trust deed. Another difficulty in any arrangement where each of the participants takes registered ownership of a one-third undivided share is that banks will only lend money if they can get all the shares in the property mortgaged to secure the debt and available for sale in execution if the borrowers default. So it is not practically possible for individual participants to make separate mortgage finance arrangements.

The most frequent marketing use of the term "fractional ownership" is for arrangements such as are described above, where the real property is registered in the name of a holding entity rather than in the names of the participants. Strictly speaking it is not the ownership rights in the property which are *"fractionalised"* but the members' interests, the shares or the rights of beneficiaries. Registered ownership is not usually held in fractions or undivided shares.

An unlimited variety of arrangements may be marketed under the banner of *"fractional ownership"*. The property may be developed or may yet to be developed with the funds to be raised by sale of the interests. The only feature common to all of these developments is that the promoters plan to have many people purchase a direct or indirect use right in the property, often via shareblock companies and with or without timesharing and rental pool arrangements.

Applications of "fractional ownership" in Sectional Title Schemes

Fractional ownership, in its proper sense, is fundamental to sectional title. But the concept is usually limited to the *"common property"*, which includes all parts of the land and buildings other than the *"sections"*. All the common property is owned in undivided shares by the owners of sections, so each owner has *"fractional ownership"* rights in all the common property in the scheme.

The Sectional Titles Act also provides that a joint owner of a sectional title unit may take out a separate title to his or her *"fraction"* of the unit. So our three friends described above could apply their arrangement to a unit in a seaside block and each be issued their own title deed to their *"fractional ownership"* rights to the unit. But, of course, they would be hamstrung by the difficulties described above.

The third and most interesting application of shared rights in a sectional title scheme is the relatively new concept known as ***"fractionalised future development rights"***. The Sectional Titles Act allows a developer who has reserved the right to extend the scheme by the addition of further sections at a later stage to alienate a portion of that right. In practice this means that where a developer has, for example, reserved the right to build a further ten double-storey houses on the ... *to page 5*

SECTIONAL TITLES ONLINE

from page 4 ... common property s/he can sell and transfer the rights to build each one of those houses to a different person. And each of the buyers can mortgage their fractionalised development rights before the relevant building is started. In effect, the ability to fractionalise a future development right has given rise to a new development methodology.

There are two obvious possibilities for the developer. S/he can sell the fractionised future development rights in terms of agreements that provide either (a) that s/he will erect the additional buildings at the purchasers' cost, or (b) that the purchasers will be entitled to take over and build the additional sections using architects and/or builders specified by the developer. Both options allow the developer to access the ***"land value"*** of the future development right on or at any time after opening the register for the first phase of the development. The first option also gives the developer the ability to obtain ***"progress payments"*** from the purchasers' bankers as the construction of the sections progresses, make further profits from the building operations and pass on to the purchasers the cost of the mortgage finance required.

The concept of fractionalised future development rights is dealt with in detail in the University of Cape Town's **Specialist Sectional Title Realtor Certificate Course** run by Paddocks. ■

Willem van Zyl—
STO Software Developer

Thank you to our 2600 Registered Users!

We're happy to report that Sectional Titles Online (www.sto.co.za) recently passed the 2600 registered users mark, averaging 10 new users per day.

What is Sectional Titles Online?

STO is a rapidly growing free online service that lists details for 36736 Schemes and 15058 Sectional Plans, and we now have 4363 Forum Postings and 959 Library Articles on topics as diverse as The Act, Regulations, Cases, Financial and Administrative Management, Dispute Resolution, Insurance, etc.

Thank you to all our users for your support and contributions. Our constant aim is to improve your experience on the site,

"My compliments, and my thanks, on an excellent site and excellent quality content."

"I find your site very useful, both as a practitioner and as a resident in a scheme."

"Thanks for your open generosity of spirit in sharing your knowledge in this way. It's a deep breath of fresh air!"

and we greatly appreciate the feedback we've been receiving!

Who uses Sectional Titles Online?

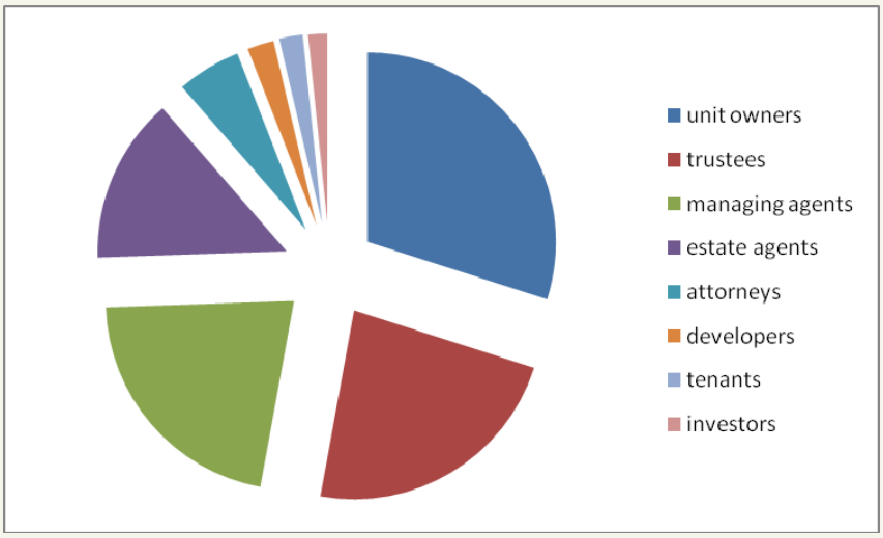
Sectional Titles Online has proven to be a popular resource for various players in the industry. As of July 2007, STO boasted 2 500 users and this number increases daily.

A few interesting statistics:

Average unique visits per day: **120**

Average new signups per day: **10**

The larger user groups are detailed in the diagram below: ■



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Q & A with the Professor

Prof. Graham Paddock is a sectional title specialist attorney, author and lecturer. He is also an adjunct Professor at the University of Cape Town.

Hi Graham, I would value your opinion on three questions about trustee meetings:

Q1. Can Proxy forms not be used at trustees meeting? I only find proxy forms that can be used in owners meeting (PMR 67) but not for trustees meetings.

A1. While the prescribed management rules do cater for the appointment of an 'alternate' trustee – who serves in place of his/her principal during a period of absence or inability – this requires a resolution of the trustees. The prescribed rules do not allow an individual trustee, in that capacity, to appoint another person as proxy. The right of a trustee to be present at a trustee meeting must therefore be exercised personally.

Q2. If a trustee is absent from a meeting and offers his apology, my understanding is that he is not present and therefore cannot count towards quorum purposes, or can s/he be counted towards quorum requirements?

A2. The fact that a trustee might inform other trustees in advance that s/he cannot attend a meeting of trustees and offer an apology or explanation for his/her absence does not affect the quorum requirement. If the trustee is absent, s/he is not counted in the number required to be present before the meeting can proceed to business.

Q3. Let's say, hypothetically, there are 5 trustees in a body corporate. 2 are present, 1 offered their apology and nominated the chairperson to vote on his behalf and the other 2 are absent. Can the meeting continue; can these two make any decisions at all?

A3. In the circumstances you describe there is no quorum present because the apology does not affect the quorum calculation and there are less than 50 percent of the number of trustees present. The nomination by the absent trustee of the chairperson to vote on his behalf is, like a trustee's appointment of a proxy dealt with earlier, invalid because the prescribed rules do not authorise such action.

At the original time and place specified for the meeting it cannot proceed if only 2 trustees are present because the quorum requirement has not been met. So the two trustees present can at that time make no decisions at all. But as you know the prescribed management rules cater for an automatic adjournment in such circumstances so that the original meeting is automatically adjourned to the same time and place the next business day. At the adjourned meeting the quorum requirement is reduced to 2, so if those same trustees are again present, they can proceed to deal with the business of the meeting. ■

Trustee Training

The University of Cape Town, in conjunction with Paddocks Learning and accredited Facilitators throughout the country is now offering a course leading to the UCT Sectional Title Trustee Certificate.

For more information or to book a place on the next Trustee Certificate course, please contact one of the accredited facilitators below:

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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 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.

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

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