



Home Owners' Associations

How do they differ from bodies corporate?

Tertius Maree

The development of new housing in the gated group housing format has recently escalated dramatically in proportion to the building of new houses which are unattached to a governing body. There are various reasons for this, but one reason is of course the need for greater security.

There are signs that this trend may be seen by government as undesirable. Again, there may be many reasons for this view, including–

- large tracts of land increasingly being occupied by such schemes against a background of a diminishing supply of development land and the dire need for housing for the previously disadvantaged;
- failure of government to keep up with the dynamic demand for housing for the previously disadvantaged;
- the exclusivity of gated group housing schemes;
- the increasing role of group housing schemes, which to some extent usurps the functions and powers of municipalities, and the mounting potential bargaining powers of organized housing communities in respect of matters such as taxation.

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Whatever the reasons, home seekers in the advantaged economic classes are as keenly pursuing the group housing format as government seems intent upon applying the brakes. This is evident from various emerging issues, including the intention of the Department of Housing to enforce a 20% affordable housing component in all new developments.

There is a perception that a race against time may be in progress to complete new group housing schemes before government intervention becomes a reality.

Against this background a national debate on the issues is overdue. This article, alas, focuses on a more mundane, but equally important and often neglected aspect of group housing, namely the provision of suitable administrative frameworks for such schemes. The importance of an effective and equitable constitution for each scheme cannot be over-emphasised. Whilst not as obvious and direct as in the case of sectional title schemes, value ultimately depends upon the quality of management, based on a sound constitution.

Why is so little information found in literature and articles about the constitutions, administration and management of home owners' associations (HOA's), compared to sectional title schemes?

The reason is mainly that, whilst sectional title schemes are governed by an Act of Parliament, no such legislation exists in respect of group housing schemes, each of which is principally governed by the provisions of its own unique constitution. These constitutions differ to a large extent, furthermore with varying practices having developed in the different provinces. The result is an absence of uniformity and whenever an issue must be decided regarding membership or management of an HOA, the provisions of its unique constitution must first be studied and assessed.

The role of municipalities are sometimes misunderstood regarding the constitution of an HOA. The reason why constitutions must usually be submitted to the municipality for approval, relates only to the protection of the position of the municipality as service provider and tax collector. Therefore it seeks to ensure that there will be a body (the HOA) which is answerable in respect of the payment of rates and service charges. It has no interest in further provisions of a constitution. The responsibility for its contents settles in the developer, in the first instance, and later becomes the function of the members of the HOA.

In spite of the divergence in the style, contents, and adequacy of different HOA's, there are nevertheless some essential aspects which should be covered in all constitutions, although in diverse ways. An inventory of such features would be as follows:

LEGAL STATUS

In terms of section 29 of the Land Use Planning Ordinance (Cape) No 15 of 1985, (LUPO) legal personality for HOA's arises automatically. Nevertheless a constitution should deal with its status in greater detail, including related matters such as its location, formal name and *domicilium citandi*. [It should be noted that LUPO applies in the area of the former Cape of Good Hope Province only, with unregulated but similar practices in the other provinces, differing in minor respects and the choice of management vehicle].

OBJECTIVES

The objectives of the HOA must be defined as clearly as possible, because its functions and power are interpreted within the context of its objectives.

FUNCTIONS AND POWERS

Because the constitution defines the legal parameters within which an HOA operates, it is essential that the provisions relating to its functions and powers be drafted carefully, as broadly as may be desirable yet as precisely as possible.

MEMBERSHIP

Membership also arises automatically in terms of LUPO, yet it should be dealt with in the constitution for the sake of clarity and precision. In other provinces, where no legislation endows an HOA with legal status, it is essential that membership be made obligatory by means of a suitably worded condition of title in each deed of transfer. Such condition of title also serves as a control mechanism for the collection of levies, ensuring that no transfers take place without levy clearance by the HOA.

ADMINISTRATIVE STRUCTURE

An adequate administrative and management structure must be provided, with recognition of the nature of the scheme. More complex group housing schemes, consisting of various elements, such as residential, commercial, sectional title, or with substantial facilities require an administrative framework which represents and balances the interests of the various elements in an equitable yet practical manner.

Management is usually performed by an elected committee of members, (sometimes called trustees or directors), which acts according to the provisions of the constitution and with such powers as are described therein.

The members, acting only through the general meeting, remains the superior body and retains ultimate control over the functioning of the committee, not only by election and dismissal of committee members, but to a greater or lesser extent by instructing trustees via members' resolutions.

PRACTICE NOTE:

To determine the necessary quorum, a garage that is registered as a section must also be calculated. For instance if there are 8 residential sections and 4 garages registered as units, there are 12 sections and a quorum of 35% is needed.

Louisa de Lange

FUNCTIONS AND POWERS OF TRUSTEES

The functions and powers of the executive committee should be clearly specified, retaining a balance between efficacy and accountability.

FINANCIAL STRUCTURE AND DETERMINATION OF LEVIES

From the point of view of owners (members) it is understandable that financial administration and levies may be the most controversial aspects in a HOA. The most simple method of determining levies, is to assign equal levies in respect of all erven. Such a dispensation would only be equitable in homogeneous schemes, if the housing units are comparable in size, value, and intended usage. If material differences exist in these characteristics, an equal assignment of levies would not be suitable and the challenge then would be to arrive at a formula which is both equitable and practical.

GENERAL MEETINGS, VOTING RIGHTS AND PROCEDURES

Determination of voting rights is another sensitive issue to be dealt with. Especially in complex schemes with divergent elements the assignment of votes may become complicated and arriving at a workable and fair solution is never easy.

OWNERS' ENTITLEMENTS AND DUTIES

The opinions of people in respect of matters such as aesthetics and general conduct within the boundaries of a scheme will always differ. This makes it important to determine parameters in order to minimize and regulate disputes, and to endow management with suitable powers of intervention.

GENERAL

The underlying objective of any proper constitution is to achieve an acceptable balance between divergent interests. The relevant interest groups are-

- the developer;
- the local authority
- home owners as a group, or groups; and
- the home owner as an individual vis-à-vis the association.

The key individual in the process of establishing a sound constitution, is the developer. He has the opportunity and the means to determine the contents of the constitution to which the later owners will be bound, and which they will only be able to amend with considerable difficulty.

Initially, the developer's legitimate interests must be properly protected. However, it is also his responsibility to ensure that, upon termination of the development period, the owners are left with a fair and practicable administrative dispensation.

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DIE IMPLIKASIE VAN VERBOUINGS OP UITSLUITLIKE GEBRUIKSGBIEDE

Louisa de Lange

In 'n onlangse geval is tuine as uitsluitlike gebruiksgbiede geskep in die Gedragsreëls. Kort daarna het die eienaars begin om die tuine of gedeeltes daarvan toe te bou. Die vraag is kan hulle en indien wel, wat is die implikasie van 'n verbouing op 'n gebruiksgbied?

Standaard Bestuursreël 68(1)(vi) maak voorsiening daarvoor dat trustees skriftelik kan toestem tot die oprig van 'n struktuur of enige bouverbetering op 'n gebruiksgebied. Die trustees moet ook toesien dat die bepalings van artikel 24 en 25 van die Wet nagekom word.

In terme van artikel 24 van die Wet op Deeltitels, 95 van 1985, is dit vir 'n eienaar van 'n deel moontlik om sy deel uit te brei deur die grense of vloeroppervlakte te vergroot. Die voorgestelde uitbreiding moet deur middel van 'n spesiale besluit van die eienaars goedgekeur word.

Die effek van SBR 68(1)(vi) se bewoording op die toepassing van artikel 24, is dat indien 'n voorgestelde bou verbetering of struktuur tot gevolg het dat die vloeroppervlakte van 'n deel vergroot word of die grense van die deel verskuif word, die vereistes deur artikel 24 neergelê, nagekom moet word. Waar toegang tot die betrokke aanbouing uit die deel self verkry word, kan dit 'n goeie aanduiding wees dat die aanbouing wel op uitbreiding van 'n deel neerkom. 'n Verdere aanduiding is as die aanbouing tot gevolg het dat 'n permanente vertrek geskep word, wat volledig ommuur is. Dus sal die blote oprigting van 'n afdak in 'n tuin nie neerkom 'n uitbreiding nie, maar waar 'n gedeelte van die tuin toegebou word om bv 'n sonkamer te skep, kan dit beskou word as 'n uitbreiding.

Indien dit wel 'n uitbreiding is, verval die bepalings van SBR 68 en skop die strenger bepalings van artikel 24 in werking. Dit is egter nodig om eers die gebruiksgebied te kanselleer of te wysig voordat 'n uitbreiding daarop mag plaasvind.

PRACTICE NOTE:

In terms of section 38(d) of the Act the trustees may establish and maintain recreation facilities on the common property. These would not be considered improvements in terms of management rule 33. In order to distinguish between recreation facilities and improvements one has to look at the type of structures involved, the costs thereof and the added value to the scheme as a whole. The erection of a common braai structure could be seen as a recreation facility whilst the building of a swimming pool or squash courts will be an improvement.

Jacques Maree

Indien die nodige spesiale besluit verkry en verbouings uitgevoer is, moet die eienaar aan die volgende vereistes voldoen:

- Die voltooiing van die fisiese konstruksie moet in ooreenstemming wees met die vereistes van die plaaslike munisipaliteit en enige voorwaardes deur die regspersoon daargestel as deel van die spesiale besluit.

- 'n Konsepdeelplan van die uitbreiding moet deur 'n landmeter of argitek voorberei word. Hierdie plan sal 'n skedule bevat wat die gewysigde deelnemingskwota van elke deel aandui.
- Die konsepdeelplan moet aan die Landmeter-Generaal voorgelê word vir goedkeuring.
- Opdrag moet aan 'n prokureur gegee word om toe te sien dat die deelplan van uitbreiding geregistreer word in die Aktekantoor. Wanneer die registrasie proses voltooi is, word die eienaar se titelakte gewysig deur 'n aantekening van die uitbreiding aan te toon en die deelnemingskwota word geag gewysig te wees volgens die nuwe skedule.

Dit is ook goeie praktyk om die eienaar van die betrokke deel in terme van die spesiale besluit verantwoordelik te hou vir die kostes verbonde aan bogenoemde prosedure.

'n Belangrike implikasie wat die uitbreiding van 'n deel inhou, is die verandering in deelnemingskwota van alle dele. Indien daar 'n afwyking van meer as 10% aan die deelnemingskwota van enige deel is as gevolg van die uitbreiding, moet die toestemming van elke verbandhouer van 'n deel in die skema verkry word, vir die registrasie van die deelplan van uitbreiding van 'n deel.

In die geval van 'n blote verbetering op 'n gebruiksgebied is 'n verdere faktor om in gedagte te hou dat ingevolge artikel 44(1)(c) 'n eienaar se enigste verpligting ten opsigte van sy gebruiksgebied is om dit in 'n skoon en netjiese toestand te hou. Dit bly steeds die regspersoon se plig om die gebruiksgebied in stand te hou, te bestuur en administrasie ten opsigte daarvan uit te voer. As 'n eienaar dus daarop bou, hou dit implikasie vir die regspersoon se onderhoudsplig in. In terme van artikel 37(1)(b) word trustees egter verplig om addisionele heffings ten opsigte van die koste van instandhouding, herstel, belasting en versekering van gebruiksgebiede te vorder. Die regspersoon kan dus die addisionele koste verbonde aan die eienaar se verbouing op sy gebruiksgebied van die eienaar verhaal.

Trustees moet dus baie versigtig en noukeurig wees in die uitoefening van hul bevoegdheid in terme van SBR 68(1)(vi) en artikel 24.

* * *

ASK THE EDITOR:

Dear Editor

I am an owner in a relatively up-market sectional title scheme consisting of free-standing units. The doors and windows all open to the outside and the view of the trustees is that only the frames and the portions opening to the outside are to be maintained by the Body Corporate. The result is that doors and windows are not being painted inside. I am aware of the boundary line between a section and common property but feel that the matter could be arranged in a more practical manner by agreement with the owners in respect of recovery of expenses.

What are your views?

Regards

A du Rand

Dear A du Rand,

You state that you are aware of the boundary line but do not specify what you mean by this. My view has always been that the median line diverts to the median line of any feature of a wall such as a window or door, resulting in the external half of the feature always being common property. In view of this my advice to trustees is that the maintenance of windows and doors, which should be performed inside and outside at the same time, should be shared on a 50 - 50 basis between each individual owner and the Body Corporate. I agree that it makes little practical sense to paint or varnish windows on the outside only when maintenance is performed.

Editor

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