

BFCN

Bodies Corporate News

KEEPING TRUSTEES AND OWNERS INFORMED

Issue 18 September 2006



Anniversary Issue

Debatable topics

Interactions and interdependence

by Bob Gauld

Don't cause a disturbance to other residents

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Help line

no longer Available to the General public

The editor of Bodies Corporate News is unfortunately forced to limit the amount of time spent on the Help line as it has reached the point where it seriously distracts from his prime function, i.e. the production of Bodies Corporate News.

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Debatable topics

Certain legislation contained in the Sectional Title Act can, and often is, interpreted in several different ways. **What are your views?**

DIRECTIVES OR LIMITATIONS IMPOSED ON TRUSTEES BY MEMBERS AT AN AGM (Section 39)

As we all know (or should know), the Sectional Title Act provides details of the various powers that are predetermined for trustees.

Trustees are elected by members (normally at an AGM) and during the AGM members are required to decide whether they want to **curb** the powers that are vested in trustees or, to use the correct terminology, we should say "place limitations, directives or restrictions on the trustees powers." It is not unusual for a member to ask that trustees expenditure on

individual items be limited to a predetermined figure, and it is also usual for a majority of owners to support any reasonable and well presented motion in that regard.

The question often asked is "**does the restriction last forever**, or is it only binding on existing trustees until the next AGM, when new elections for trustees take place.

THIS IS A DEBATABLE ISSUE

Let's consider a feasible conclusion: We are of the opinion that the restriction is only valid for the year of its imposition, and we give our viewpoints.

A A limitation placed on trustees powers is not recorded in the legal domain (*the deeds office*) It is only recorded in the minutes of the AGM.

B It is logical to assume that directives, or limitations placed on trustees powers will soon be forgotten, given that trustees, owners, and even managing agents change on a regular basis, and records are lost.

C Sometimes a few cunning owners try to circumvent the system by initiating and motivating

restrictions on trustees which, when adopted **by the majority**, become **a rule**, when in reality such rules would normally require a special or unanimous resolution.

D If a limitation is placed on an annually elected group of trustees, surely the limitations only apply for the duration that those trustees remain in office. Surely such restrictions were imposed by a particular group of owners in relation to the perceived activities of a particular group of trustees.

For example: Owners may elect a specific group of trustees, because prevailing circumstances at the time necessitated the need for a dynamic, and assertive core of trustees with maintenance skills, yet who may have needed to be curtailed in the arena of expenditure because of possible overindulgence.

The following year a new group of conservative trustees may have come forward for election as the previous trustees had completed their mission and chose not to stand for re-election. In the meantime 10% of the units had sold, and the body corporate was changing in that a new profile of owners was becoming evident. Should the new dynamic of owners, and the newly elected trustees be bound by the curbs placed on the previous years' trustees?

We are of the opinion that restrictions or limitations on trustees should fall away annually unless they are **re-enstated by members at the next AGM.**

E If limitations on trustees powers are "indefinite" then they are quite likely to accumulate over time. Who would want to stand as a trustee 20 years down the line when all powers have been limited or restricted?

SOMETIMES TRUSTEES ARE UNABLE TO FUNCTION BECAUSE A

QUORUM IS UNOBTAINABLE

Not an uncommon occurrence. Let's assume that for the purpose of this exercise, that there are five elected trustees, and only two arrive for meetings. A question is often asked: **Can the two trustees hold legal meetings even though a quorum of 50% is not present, or must they ask members to elect new trustees, or can they (the trustees) appoint new trustees to replace the three non-attenders, or can they co-opt / appoint alternate trustees?**

Management Rule 6

Save for the provisions of rule 4(2), the trustees shall be elected at the first annual general meeting and thereafter at each subsequent annual general meeting, and shall hold office until the next succeeding annual general meeting, but they shall be eligible for re-election, if so nominated.

Management Rule 8


The trustees may fill any vacancy in their number. Any trustee so appointed shall hold office until the next annual general meeting when he shall retire and be eligible for re-election as though he had been elected at the previous annual general meeting.

Management Rule 9

(1) *The trustees may appoint another person, whether or not he be the owner of a unit, to act as an alternate trustee during the absence or inability to act a trustee.*

(2) *An alternate trustee shall have the powers and be subject to the duties of trustee.*

(3) *An alternate trustee shall cease to hold office if the trustee whom he replaces, ceases to be a trustee, or if the alternate's appointment is revoked by the trustees.*



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Debatable topics

Certain legislation contained in the Sectional Title Act can, and often is, interpreted in several different ways. **What are your views?**

Management Rule 13

A trustee shall cease to hold offices as such-

(a) *if by notice in writing to the body corporate he resigns his office;*

(b) *if he is or becomes of unsound mind;*

(c) *if he surrenders his estate as insolvent, or his estate is sequestrated;*

(d) *if he is convicted of an offence which involves dishonesty;*

(e) *if by resolution of a general meeting of the body corporate, he is removed from his office, provided that the intention to vote upon the removal from office has been specified in the notice convening the meeting;*

(f) *if he is or becomes disqualified in terms of section 218 or 219 of the Companies Act, 1973, from being appointed or acting as a director of a company.*

who has ceased to hold office in terms of rule 13, for the unexpired part of the term of office of the trustee so replaced.

Management Rule 16

(1) *At a meeting of the trustees, 50 percent of the number of trustees but not less than two, shall form a quorum.*

(2) *If the number of trustees falls below the number necessary to form a quorum, the remaining trustee or trustees may continue to act, but only for the purpose of appointing or co-opting additional trustees to make up a quorum or for the purpose of convening a general meeting of owners.*

Management Rule 17

If at any meeting of trustees a quorum is not present within thirty minutes of the appointed time of the meeting, such meeting shall stand adjourned to the next business day at the same time, and the trustees then present, who shall not be less than two, shall form a quorum.

Management Rule 14

The body corporate may at a general meeting appoint another trustee in the place of any trustee

We are of the opinion that the two trustees can function quite legally, and hold meetings, provided that: Due notice (seven

days) was provided to **all five elected trustees** prior to the meeting dates provided that:

☞ Each meeting is postponed till the same time and venue on the next business day if a quorum is not present within 30 minutes of the appointed time.

☞ There are never less than two trustees present at a meeting.

☞ None of the three continually absent trustees have resigned or have become disqualified from holding office.

☞ Trustees have not appointed alternate trustees.

Trustees should not (in our opinion) confuse the above predicament with other provisions contained in the Act regarding co-opting, or appointing alternate trustees.

We believe that trustees can only co-opt new trustees when trustee's **resign** or are **disqualified** from serving in terms of management rule 13. Our view is that trustees cannot replace other trustees for non-attendance!

In our opinion the purpose

of an alternate trustee is to "stand in for a trustee" and serve on behalf of a trustee who, for one reason or another, will be unable to fulfill their obligations as a trustee, due to ill health or work commitments, etc, etc. An alternate trustee is not, in our view, appointed to replace a trustee who simply does not attend meetings, or is not disqualified from serving, or who has not resigned.

In other words, one can be a trustee and not attend meetings, unless the members (or bond holders with bonds over 25% of units) convene a meeting to vote on the removal of that trustee, and that two trustees can continue to function even if a quorum is three, provided that certain criteria is met, i.e. through the inconvenience of scheduling and postponing meetings. Though this predicament would normally be avoided by simply asking one of the "continually absent" trustees to resign and then co-opt another trustee.

Your views?

**E-mail the editor at
bcn@xsinet.co.za**



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INTERACTIONS & INTERDEPENDENCE

Every community has a degree of interdependence among its members. Nowhere is that truer than in Sectional Title communities. The member that contravenes the rules of the community or fails to pay his or her share of the communal costs does so at the inconvenience and expense of the other members.

As an example, noise is a by-product of a community. The more concentrated the community, the higher the probability of intrusive noise. A farmer driving home late at night is unlikely to disturb a neighbour. A flat or townhouse owner doing the same may disturb many people. Conversely, the sectional community offers its residents a much higher level of physical security than that enjoyed by rural residents. Owners who opt for this security pay the price of extra noise, it is an inescapable exchange.

A Sectional Title community is mostly self-supporting. It has to generate sufficient income to service the needs of the community and has to protect its members against the actions of other members. Owners who fail to meet their communal financial obligations are forcing other members to support and subsidise them, until the legal processes intervene to force compliance. It is a pity that so many sectional communities take so long to start the process!



Apart from the behavioural and financial aspects of interdependence, both the Sectional Titles Act and the prescribed rules refer to structural dependence. Section 28 imposes 'implied servitudes' over and in favour of each section for, among other things, support of adjacent sections and the passage of services through a section to another section.

Within many sectional schemes, pipes, wires and cables pass through sections on their way to other sections or common property. With the exception of pipes servicing the hot-water installation of another section, these are considered to be common property and the responsibility of the body corporate. Section 44(1)(a) of the Act makes special mention of the body corporate's rights to access any section to repair and inspect these items.

Prescribed management rule 68(1)(3) prohibits an owner from taking any action that will compromise the physical structure of the buildings. The ground-floor flat owner who removes a load-bearing dividing wall between a lounge and dining room may find an upstairs neighbour dropping-in unexpectedly!

A third type of interdependence involves the overall interests of the community. Section 44 of the Act and management rule 68 include the following:

- Owners may not do anything to injure the reputation of the scheme

- They may not use their sections for a purpose other than that for which it is intended except with the written consent of all the other owners.

- They may not do anything to their sections or exclusive use areas that will affect the harmonious appearance of the scheme

- Owners must not use their sections and the common property in such a manner as to cause a nuisance to other owners.

The interdependent

nature of the sectional community is interwoven throughout the Act and rules and has been discussed many times in various articles.



Bob Gauld was widely acknowledged as the doyen of Sectional Title in South Africa. He unselfishly dedicated his life to the upliftment of the Sectional Title Industry.

Sectional owners who take time to understand the hierarchy of sectional management and control will know that the Act and rules provide answers to all aspects of Sectional Title. From the establishment of control in a newly set-up scheme by section 36, to the resolution of disputes by arbitration as prescribed by management rule 71, every situation is covered.

Regrettably, many "sectionally-challenged" bodies corporate pay too little attention to the Act and rules, often with serious consequences. It amazes me how many bodies corporate do not have a copy of the Act, sets of rules for their scheme or a copy of the approved Sectional Title plan. It saddens me that so few have bothered to acquire any of Graham Paddock's, Tertius Maree or Marina Constas' excellent Sectional Title publications.

Could it be that having made up their minds, many owners do not want to be confused by facts? Or are they slaves to the third, unpublished set of rules known as Apathy Rules?

And finally, a warning to male beer-drinkers:

Recent research suggests that certain beers contain some female hormones. Researchers supplied 100 men eight cans of beer each within a period of an hour. This is what they observed. The men gained weight; talked excessively without making sense; became overly emotional; couldn't drive; failed to think rationally; argued over nothing and refused to apologise when obviously wrong. No further testing is considered necessary!

VOTING CAN GET COMPLICATED by Tertius Maree

One would think that the voting procedure at a general meeting would be the least of one's worries. Not so. Especially when one treads on the domain of special and unanimous resolutions an unprepared chairman may face serious difficulties.

At meetings the first uncertainty occurs in the determination of a quorum. The quorum requirements are contained in management rule 57 as per annexure 8 of the Sectional Titles Act. A quorum is determined by counting the number of owners' sections. It is not determined according to the participation quotas.

There are three kinds of resolutions:

1. Ordinary Resolution

Most of the voting is done by way of an ordinary resolution. This entails the owner (including proxies) of each section having one vote. Voting is done by a show of hands

unless an owner demands a poll. This is where it gets tricky and unless the chairman has come prepared with a participation quota schedule and laptop computer it can create uncertainty and delays which so often leads to disputes.

If an owner demands a poll the first step is to add up all the participation quotas of the sections of the owners and proxies present at the meeting. Then the owners' participation quotas, who have voted in favour of the resolution, must be added, then divided by the total participation quotas of the owners and proxies present and multiplied with a hundred to give the percentage vote in favour. A majority is a vote of more than 50%.

2. Special Resolution

A special resolution entails a vote of 75% of owners and proxies

present at the meeting. The normal quorum requirements as per management rule 57 apply. Importantly, the 75% must be reckoned in number (one section one vote) and value (participation quota). I recently attended a meeting where the participation quotas added up to more than 75% but the number of votes in favour was only 60%. The special resolution therefore failed.

3. Unanimous Resolution

When voting for a unanimous resolution at least 80% of the owners must be present at the

meeting. It is the only exception to the normal quorum requirements as per management rule 57. Once this unique quorum requirement has been met all of the owners present at the meeting must vote in favour.

As can be seen from the above the trustees, and specifically the chairman, should be well prepared. A participation quota schedule is a prerequisite and a laptop computer, with a capable person handling it, can eliminate unnecessary mistakes and save a lot of time.

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POWER MEASUREMENT

Residents' don't cause a nuisance to other occupiers of sections!

What is a nuisance? How do we define it? What action can trustees take? Section 44(1)(E) is not exactly a comprehensive piece of legislation, yet it is the reference regarding nuisance that is contained in the Act and the printed word is as follows:

An owner shall not use his section or exclusive use area, or permit it to be used, in such a manner or for such purpose as shall cause a nuisance to any occupier of a section.

The "nuisance factor" is one of the more common causes of conflict in close proximity life, but what exactly qualifies a nuisance? Nuisances are defined as being private or public. Our concern is mainly private. A private nuisance is an activity or condition that interferes with the use and enjoyment of neighbouring property, without, however, constituting an actual invasion of the property. Thus, excessive noise, noxious vapours, and disagreeable odours and vibrations may constitute a private nuisance to a neighbour's lifestyle, although there has been no physical trespass on their property. Because a private nuisance is based on interference with the use and enjoyment of property, it is actionable only by persons who have an interest in such property.

If the interference only makes the use and enjoyment less comfortable, without inflicting physical damage to the property, the courts will consider the character of the neighbourhood to determine whether the activity or condition is an unreasonable interference. The legal remedies available in the case of a private nuisance are actions to prohibit or restrain the continuance of the activity or condition, or to award monetary damages.

In a court of law nuisance is defined as the substantial interference with the plaintiff's use of his property by the unreasonable conduct of the defendant. Each of the qualifying words in the definition require judicial discretion. One may ask whether the harm caused by the defendant's activity is substantial.



A judgement is called for, aided, of course, by precedent, but is always unique to the given case. Hazards to health, offences to the sense of smell or hearing, and demonstrated economic loss are frequently found to be substantial harms.

The second stage in determining that a nuisance exists, requires a finding that the defendant's activity was unreasonable. Unreasonable conduct is a relative matter. The care with which the defendant conducts his activities is of relevance, but it is not decisive.

Once a nuisance is found, there still must be, in most jurisdictions, a "balancing of the equities" to determine whether the defendant will be prohibited or restrained from his activities, or whether the plaintiff will have to content himself with money damages. In recent cases, economic considerations have come to the fore in making this determination.

Now we know what a nuisance is, and how incidents are evaluated in the courts.

What action can trustees take? Firstly we must understand that an individual who feels that his interests and enjoyment are compromised by interferences from a neighbour, is the very individual who best should involve himself and undertake action to resolve the issue. In our opinion, the Body Corporate (via the actions of trustees) are only obliged to communicate with the conflicting parties when the parties themselves are unable to reach a compromise and have approached the trustees to try to resolve the issues by applying their conflict resolution skills, and through written communications highlighting section 44(1)(E). But when conflicting parties are still unmoved by the logical action taken by trustees, and court action or arbitration is contemplated, we would disagree that the Body Corporate (all owners) should fund the action if it is not in the interests of most members to do so. If two owners have issues regarding the volume of a T.V set, and other surrounding owners experience no problem, why then should all owners contribute to a court case initiated by trustees, if the trustees had already tried to intervene by quoting 44(1)(E), writing letters, and convening interpersonal meetings aimed at resolving the conflict. What trustees can do is amend their conduct rules in order to apply more specific criteria to the nuisance factor. **CONTINUED ON NEXT PAGE**

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CONTINUED FROM PREVIOUS PAGE

Unreasonable conduct is a relative issue and judgement is always based on judicial discretion which considers the matter on the basis of fairness, honesty and impartiality. Improved conduct rules can serve as a deterrent and provide a deeper insight into transgressions which can serve to resolve conflicts. We sight some examples which we have modified from by-laws and can be further adopted and incorporated into conduct rules.

No person shall cause or allow the disturbance of the ordinary comfort, convenience, peace or quiet of other people by the utilization or use of electrical appliances, machinery, malfunctioning air conditioning units or similar appliances or equipment used after 8pm.

No person may, at any time during the day or night, disturb the peace in any private place or premises by making unseemly noises or by shouting, insistent hooting, wrangling or quarreling, or by fighting or challenging to fight, or by any other riotous, violent or unseemly behaviour at any time of the day or night, or by loitering on the common property.

No person may, in or upon common property or premises, disturb the peace in the complex by making therein or thereon any unseemly noises, or by shouting, wrangling, quarreling and singing or by playing therein or thereon a musical instrument or use or permit to be used any musical instruments, radios, television sets or the like or any loudspeaker or other device for the reproduction or amplification of sound, in such a manner or at such a time or in such circumstances that the sound thereof is audible beyond the boundaries of a section and materially interfere with the ordinary comfort, convenience, peace or quiet of other residents.

Most South Africans need to realise that disputes should be resolved internally, as in reality there is little relief available via the judicial system given that the cost of litigation or arbitration can be very expensive, and unless one earns "a fat salary", the process of resolving disputes via legal avenues are not readily available to the average citizen (unless one has access to a reputable legal aid or agree to a mutually accepted arbitrator, not appointed by the court).

UNPAID LEVIES CAN CRIPPLE A BODY CORPORATE

What should trustees do

If owners don't pay their levies a complex will experience bankruptcy. It's a fact, and is not debatable. A body corporate is run like a business, and defaulters are in fact subsidised by owners who pay timeously.

A policy is needed to avoid dramatic consequences. A levy is due on the 31st or 1st of a month (not on the 7th of a month). If an owner does

not pay by the **7th of the month**, then a final notice / warning letter should be issued.

If payment is not forthcoming within a month then a summons should be issued, in the magistrate's court, against the defaulter by the **15th of the following month**. **Zero tolerance** needs to be exercised to avoid a perception of lenience.

Example of a Final Notice / Warning letter

VILLA VISTA BODY CORPORATE 07/04/06
ACCOUNT NUMBER: 0083651851
BALANCE: R 960
LEVY PER MONTH: R 480
AMOUNT OVERDUE: R 960

Miss JC Adams
66 Montague Crescent
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7460

FINAL NOTICE / WARNING

Dear Miss JC Adams

You are hereby given final notice of our intention to hand your account over to our debt collecting agency, i.e. "The First Security Corporation", for the recovery of the total outstanding balance.

In terms of the Debt Collectors Act of 1998, you will be liable for collection and legal costs, over and above late payment charges.

It is in your own interests to pay the outstanding amount immediately, as your body corporate is entitled to receive full levies on an attorney client scale as well as interest. If you have already paid the required amount, please disregard this letter.

Yours faithfully
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- M3 Owners and tenants - Duties and responsibilities
- M4 Common property and exclusive use areas
- M5 Trustees - Duties and responsibilities
- M6 The role of the Managing Agent
- M7 Levy collection and financial management
- M8 Contentious issues in Sectional Title - extensions, leaks, etc
- M9 Meetings, voting and proxies
- P1 Conduct Rules - how to amend and example of amendment
- P2 Management and Conduct rules with latest amendments
- P3 Complete Sectional Title Act - amended with Rules
- P4 All articles that appeared in BCN - Aug 04 - Aug 05
- P5 The AGM and 22 examples of documents used in Sectional Title
- P6 Occupational Health and Safety - Examples of a contract between Contractor and Body Corporate when work is undertaken

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Conduct Rules: A deeper insight

Motor Vehicles (Conduct Rule 3)

No individual is allowed to position a vehicle on the common property unless the parking area is specifically designated for that purpose, (i.e it is an area in which owners have been granted rights of occupation for the purpose of parking a vehicle).

Conduct Rule 3 allows trustees to have a vehicle towed away at the expense of an offending owner if it is parked, or is deserted on common property without the consent of trustees.

This clause empowers trustees, as it gives them a **legal right** to have vehicles removed.

In practice this right is not always practical, as few towing contractors understand / or take the Sectional Title Act seriously. Towing contractors are hesitant to undertake a task when there is **any doubt** in their mind regarding "swift payment for services rendered". (They prefer to lurk in the shadows like wolves, ready to pounce)

Wheel clamping is a viable alternative, and is easily administered provided that:

1. The standard conduct rules are amended and make provision for this alternate means of enforcing conduct rule no 3. (Amended rules require a 75% vote in favour, and must be lodged in the deeds office)
2. Warning signs must be visible at strategic locations in order to forewarn transgressors regarding the actions that may be taken against them! It can work if we try!

ASK THE EDITOR

Try to

Rob will answer your questions

Many requests for information are received. Regrettably, we are only able to answer several in this regular column.

QI have the Chair in a small complex of 10 units. We have a serious problem with Fruit Bats excrement on the front and side elevation of the complex. We have had it painted three times in the last 18 months due to this problem, all at considerable expense to us residents.

I am in negotiations with the South West Municipality for an answer to this problem. They seem reluctant to assist, giving the impression that this is a fault of nature!

We have six yellowwood trees close by, and at my request, our managing agent approached the Bodies Corporate Insurance with a view to claim. He was laughed at! What is your legal departments thoughts on this problem. If your readers have any answers to this dilemma, it would be appreciated. It's driving us batty!

A Man co-exists with nature. Both parties live and compete for habitat. Man

tries to control nature in close proximity to his residence, and incurs considerable expense.

Think of gardens, lawns, and the cost associated with maintaining them. Many complexes have problems associated with ants, pigeons, moles, and wood borers. These creatures can also cause considerable expense to owners, it's simply a natural occurrence.

One can try to control nature through chemicals and pesticides, but we are not qualified to give opinion on the use of such substances. If the bats live in the yellowwood trees that are positioned outside your grounds then I assume that there is nothing that you can do. If the trees are positioned inside your complex, you would need the support of owners before action can be contemplated. Have you considered using a paint that delivers a liquid plastic coating which is washable? I can't see a legal solution to your dilemma.

QOur Body Corporate has a trailer for removing garden refuse. A trustee used to tow it to

a dump site at a minimum charge. He has since left and someone else is prepared to continue this service but has no tow bar on his car.

R2,500.00 is the cost of fitting a tow bar which is a lot to expect a person to pay. How can we reach a fair and amicable agreement?

A If the savings and convenience justify the cost, and owners are happy that Body Corporate funds be used, then go ahead and reach an amicable agreement regarding the expense. If the owner of the car to which the tow bar has been fitted uses it at a later stage to tow his own property then the terms of the agreement need to be renegotiated.

QWe have a situation where we have thoroughly insured the sectional title building at its replacement value, which has been kept up to date and has recently been valued by an official valuer. Now we find that when a buyer purchases a unit in the scheme and applies for a bond, the bank granting the bond demands that the unit be insured for amounts much larger than the insured value of the unit. Usually a different amount and sometimes as much as double the insured value. Often the bank demand

insurance equal to the purchase price of the unit even though with today's prices this is far above the insured value. Naturally the insurer agrees to insure to the value of the banks demand and thus that unit is charged at a much higher premium than the other units.

Our question is who should pay the difference between the true insurance premium which is part of the levy and the actual required premium according to the bank. If it is included in the levy then every one in the scheme contributes to the payment. We believe that the individual who is purchasing the said unit should pay the difference himself. He is objecting! What is the legal position please?

A The act stipulates that the Body Corporate is required to insure buildings for their replacement value. Sometimes individuals purchase property which costs them much more than the cost of replacing that same property. The banks always require security, especially when large bonds are granted. The buyer is responsible to pay the difference. Why should all the other owners contribute to his expense?

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