

TWO-TIER GOVERNANCE FOR MIXED-USE AND LARGE-SCALE SECTIONAL TITLE SCHEMES

C G VAN DER MERWE*

Research Professor, Department of Private Law and Roman Law, University of Stellenbosch; Emeritus Professor of Civil Law, University of Aberdeen

GRAHAM PADDOCK†

Adjunct Professor, Department of Construction Economics and Management, University of Cape Town

I INTRODUCTION

In specialized mixed-use and larger-scale sectional title schemes consisting of more than one building, there is an increasing need to be able to separate the various components of the scheme according to use and/or location and to administer certain aspects of each component separately. In a scheme that comprises mixed uses, such as a commercial component and a residential component in one or more buildings, there is, for instance, no reason why all the members of the scheme should be responsible for the maintenance of and repairs to those lifts, internal staircases and basements which serve only a particular component. However, body corporate costs for maintenance of and repairs to parts of the scheme are paid from the common fund to which all sectional owners have to contribute in proportion to their quotas,¹ without taking account of the use made by a particular owner or group of owners of the particular facility. Thus, if the lift serving only the residential owners on the higher floors of a mixed-use building needs repair, the body corporate has to pay for the repair out of the levies collected from all the owners. Similarly, if the owners of the commercial component want to make conduct rules applying only to common washrooms used by their clients, they would require a special resolution of all the owners in the scheme, although the residential owners have no interest in the toilets located on the floors dedicated to the commercial component. When sectional owners decide on the budget for the following year, the various interest groups will normally vote by class and the class with the majority of votes will try to advance its own financial interest as far as possible. Such a clash of interests

* BA LLB (UOFS) BA (Hons) BCL (Oxon) LLD (Unisa).

† BA LLB (Cape Town).

¹ Section 32(3)(c) of the Sectional Titles Act 95 of 1986.

often results in conflict within the community of sectional owners, some of whom will not take an enthusiastic interest in the management and affairs of the scheme primarily because they do not have the voting power to protect their interests.

Mixed-use developments containing commercial and residential space in the same project are recognized as the most viable utilization of high-density urban space. Mixed-use development prevents a non-residential city centre that is densely inhabited during working hours from becoming a desolate place after the evening rush-hour. By encouraging commercial and residential use in the same development, a harmonious balance of uses is achieved which, in turn, produces an attractive and diverse inner city, full of life during the day and pleasant in the evenings and over the weekends. At the same time, the application of a mixed-use zoning concept in sectional title schemes consisting of a more intensified community of owners often gives rise to problems. The regulation of the conflicting interests of the various user groups in a sectional title scheme which controls its own limited space in a more congested environment requires extraordinary patience and great wisdom — and it is clear that the varied interests of a multiplicity of user groups in a mixed-use or large sectional title scheme cannot easily be accommodated by the conventional provisions of the Sectional Titles Act 95 of 1986 with its uniform regulation of both mixed-use and single use schemes.² The present statutory governance structure for sectional title allows only one body corporate to be formed for each sectional title scheme. However, in a mixed-use development, for example a mixed development providing shops, offices and residential accommodation, the interests and the priorities of the various user groups are likely to be different. Each user group will normally be more concerned about the management and maintenance of those parts of the common property which its members use and where the management decisions directly impact on them. The body corporate may have difficulty in implementing improvements to certain parts of the common property as the benefits may be perceived to accrue more to a certain group than to others.³

In view of the problems highlighted above, the question can be asked whether the best solution for this dilemma is not to designate the common property within defined components of mixed-use or larger sectional title schemes which accommodate various interest groups or separate buildings as *limited common property* to be used, maintained and governed primarily by the owners whose sections form part of that component. In what follows we will

² See also Mark G Baker *Condominium Law in Ontario: A Practical Guide* (1991) 61; John B Lundquist 'Mixed use condominiums under the Minnesota Condominium Act' (1984) 10 *William Mitchell LR* 97 at 98–9 and 101–4.

³ See the speech of the Singapore Minister of National Development on the second reading of the Building Maintenance and Management Bill para 10: http://www.mnd.gov.sg/newsroom/speeches/speeches_nd2004_010904.htm (last accessed on 5 December 2008).

examine how current practice tries to cope with this problem. Then we will show what methods have been devised in the condominium or apartment ownership statutes of other countries to attempt to alleviate this problem. Our ultimate aim is to explore whether the Sectional Titles Act ('the Act') can be amended to include a framework for an extended governance structure designed to cope with the management problems encountered in mixed-use and other complex sectional title schemes.

II METHODS USED IN CURRENT PRACTICE

An obvious method to achieve a more equitable distribution of expenses amongst sectional owners in a mixed scheme is to arrange for class liability for, and voting on the question of, expenses pertaining to a particular component of the scheme. The rules would then be changed so as to allow, for example, only the representatives of owners of commercial units to vote on the budget for repairs and maintenance of common property situated in their component and to provide that only the commercial owners will be liable for levies raised on the basis of this budget.⁴ Apart from the difficulty in formulating such a rule, this is only a partial solution that does not address all the problems in complicated sectional title schemes.

Another practical mechanism is to utilize the provisions on exclusive use areas in the Sectional Titles Act to create an exclusive use right to the common property located in each of the various components of a scheme (for example, the common areas in each building which forms part of a multi-building sectional title scheme) and then to assign this right in undivided shares to the owners of each section located in that component.⁵ Consequently, the exclusive use right to the common property in that particular component is shared by the multiple sectional owners within that component and the expenses related to that component are divided amongst those owners in accordance with s 37(1)(b) of the Act.⁶

It is not practical to use the provisions of s 27 of the Act to create 'genuine' exclusive-use rights for this purpose, first because of the high transaction

⁴ See also *Written Representations on the Building Maintenance and Strata Management Bill* (Paper 28) in the Singapore Report of the Select Committee on the Building Maintenance and Management Bill (Bill No 6/2004) App III B1-161.

⁵ This is apparently allowed in terms of s 27(1)(a) and (b). This provision allows a developer to delineate a '*part or parts of the common property*' for a specific purpose on the sectional plan and to confer exclusive use rights upon the owners of one or more of the sections. By virtue of para (b) he may then cede the rights to the exclusive use of such part or parts to the owner or owners of units in the scheme. The body corporate is given the same powers of creating exclusive-use rights under s 27(3). Under s 27(7)(a) persons holding undivided shares with regard to exclusive use areas by one title deed are allowed to obtain a separate title deed with regard to such share.

⁶ By virtue of s 37(1)(b) the body corporate shall require the owner or owners of a section or sections entitled to the right to the exclusive use of a part or parts of the common property, whether or not such right is registered or conferred by rules made under the Sectional Titles Act 66 of 1971, to make such additional contribution to the fund as is estimated necessary to defray the costs of rates and taxes, insurance and

costs associated with the cession of an undivided share in the exclusive-use rights that would be required each time a unit in the component is transferred. Secondly, if the unit is sold without the undivided share in the exclusive-use right, this share of the exclusive-use right will vest in the body corporate.⁷ This creates an unacceptable situation. The body corporate, instead of the new owner, becomes entitled to a share in the use of the earmarked common-property component and is now presumably saddled with paying the original holder's share of the expenses pertaining to the earmarked common property. The new owner is left suspended with no apparent right to use the common areas in that particular component of the scheme. The matter can only be corrected if the body corporate sells and transfers the undivided share in the earmarked common property to the new owner of the unit. The provisions of s 27A (creating 'minor' exclusive-use rights) are more suitable for this purpose because the applicable rule can be drafted so as to confer an undivided share in the exclusive-use rights on the owner 'from time to time' of the sections in the particular component. But irrespective of how this arrangement is achieved, it is very awkward in itself. It creates problems in identifying the function for which the common areas earmarked for exclusive use in a particular component are reserved. Moreover, most owners do not really understand the nature and consequences of this arrangement. Finally, the arrangement can only be adapted to changed circumstances by way of a unanimous or special resolution of the entire body corporate, and therefore the owners who are directly affected by it must rely on the cooperation of other owners to vary it.

A third mechanism is to utilize the provisions of reg 30(2) made under the Act.⁸ This regulation allows a developer on the opening of a sectional title register to insert a condition in the schedule referred to in s 11(3)(b) of the Act restricting transfer of a unit without the consent of an association whose constitution stipulates that all members of the body corporate of the scheme shall be members of that association and that the functions and powers of that association shall be assigned to that association. In such a case, reg 30(2) allows the developer, when submitting an application for the opening of a sectional title register, to substitute any management rule contained in Annexure 8. This freedom is then utilized to introduce a two-tier governance structure for the scheme. Most commonly, an 'umbrella management body' is created which may be a s 21 company or a property owners' association formed in terms of planning legislation or under the common law. This umbrella body typically manages a number of separate entities, for example a group-housing development and one or more

maintenance in respect of any such part or parts, including the provision of electricity and water, unless in terms of the rules the owners concerned are responsible for such costs.

⁷ Section 27(4).

⁸ The regulations are contained in GN R664 GG 11245 of 8 April 1988 as amended.

sectional-title schemes. The absence of a statutory framework for two-tier management structures allows developers who choose to follow this route the freedom to create any form of management structure, and the result is that diverse models have been applied.

The most prevalent mechanism used for achieving two-tier scheme governance structures is for the attorneys and land surveyors assisting developers to manipulate the management and conduct rules of mixed-use and larger schemes when submitting their applications for the registration of the sectional plan and the opening of a sectional title register. New rules are somewhat haphazardly inserted in an attempt to accommodate the special governance requirements of the different components within these mixed-use and/or multi-building schemes.

This has proved to be unsatisfactory and indeed unsuccessful. First of all, it may be questioned whether such a procedure is legal. No management rule is allowed to conflict with the provisions of the Act.⁹ It is questionable whether the current single-tier management structure of the Act can be changed in the prescribed management rules to accommodate two-tier bodies corporate. But even if that is legally possible, the management of these schemes has become even more complicated and unwieldy. Developers and their advisers, although doubtless genuinely intending to create a sound governance structure, have in many cases not succeeded in providing a mixed-scheme system that operates efficiently, effectively and without practical problems. The main problem seems to be that there is a lack of expertise to ensure that the rules are skillfully altered to ensure a workable and effective governance structure. Often original intentions to include appropriate management arrangements in the rules are abandoned or ignored under the pressure to obtain swift registration of sectional plans and transfer of units. It is also not unusual to encounter complex mixed-use schemes that have the standard management and conduct rules as prescribed under the Act. A related problem is that attorneys usually obtain their financial reward for opening a sectional-title register in the form of instructions to transfer units in the scheme after the register has been opened. They are seldom paid for their expertise in altering the prescribed management rules to provide for efficient governance. Consequently, they tend to use whatever precedents they can lay their hands on to accommodate developers' instructions without really paying attention to the suitability of their proposed rules to the particular project with which they are dealing. In practice there is a proliferation of sets of special rules that provide for the governance of multi-use schemes.

⁹ This is implied by s 35 of the Act, which states that a scheme must be controlled and managed by rules subject to the statutory provisions regarding the control and management of the scheme. See C G van der Merwe *Sectional Titles, Share Blocks and Time-sharing* vol I *Sectional Titles* (2007) 13–8(1).

III COMPARATIVE SOLUTIONS

Comparative research has revealed that certain overseas statutes have employed the concept of 'limited common property' as opposed to 'general common property' to overcome the unfairness of making all the owners pay for certain repairs, for instance to a lift, roof or staircase that serves only a distinct part of the scheme. The concept is employed primarily to achieve a more equitable division of the cost of maintaining a particular limited common property area by restricting payment of that expense to the actual users thereof.¹⁰ Most of the Anglo-American statutes somewhat confusedly apply the term 'limited common property' to those common areas and facilities reserved for the use of one or more sectional owners as opposed to general common property which is open for use by *all* the sectional owners.¹¹ American examples of limited common property are special corridors, stairways, elevators, sanitary services common to apartments of a particular storey, parking spaces, laundry rooms, porches, patios, balconies and stairways contiguous to and serving only one or more owners exclusively.¹² Canadian literature mentions the following examples of limited common elements or exclusive-use common elements: balconies, patios, parking lots and roof gardens allocated for the exclusive use of one owner; a high-speed elevator to the penthouse of a high-rise building; a swimming pool limited to the owners of one building in a multi-building scheme; and garages and storage lockers in the basement allocated to single apartments.¹³

At this stage it is worth noting that the South African statute does not employ the concept of 'limited common property' but has created the concept of 'exclusive use areas' to cover the situation where a specific part of the common property is reserved for the particular use of one sectional owner.¹⁴ As indicated above, this concept is not readily usable in the situation where part of a particular common area is reserved for the use of more than one sectional owner but not for all of them.

Some jurisdictions apply the concept of limited common property in a more constructive way by applying it only to those parts of the scheme earmarked for use by more than one, but not by all, the sectional owners.

¹⁰ See in general C G van der Merwe 'Apartment ownership' in *International Encyclopaedia of Comparative Law* vol VI; Athanassios N Yiannopoulos (ed) *Property and Trust* (1994) ss 130–7 at 53–5; James A Rosenstein 'Inadequacies of current condominium legislation — A critical look at the Pennsylvania Unit Property Act' (1974) 47 *Temple LR* 655.

¹¹ For the United States, see Uniform Common Interest Ownership Act s 1–103(16); for Canada, see s 3(1)(f) of the Ontario Condominium Act of 1980.

¹² Patrick J Rohan & Melvin A Reskin *Condominium Law and Practice: Forms* (looseleaf, first published 1980) no 6–01(5).

¹³ Anne Warner la Forest *Anger & Honsberger Law of Real Property* 2 ed (1959) no 3907.4; Alvin Rosenberg *Condominium in Canada* (looseleaf, first published 1969) nos 602 and 702.

¹⁴ See ss 27 and 27A of the Sectional Titles Act of 1986.

The cost of maintaining that limited common property or facility is then distributed amongst the actual users thereof. Thus the Cuban statute provides that elements destined to serve a limited number of apartments such as special stairs and elevators, private entrances and bathrooms shared by all apartments on one floor, shall be considered limited common elements if all the owners so agree.¹⁵ The Israeli Law of 1969 goes even further and provides the following: where a sectional title scheme consists of several buildings or wings, each of which has a separate entrance or separate common installations, the apartment owners may stipulate in the rules that the common property or part thereof situated in each structure or wing shall only be linked to the apartments situated therein.¹⁶ The main aim of this provision is to place the responsibility for maintenance of each building or wing on the owners concerned.

The most innovative and far-reaching approach to solving the problems of the maintenance and governance of schemes consisting of various user groups is the recent Singapore Building Maintenance and Strata Management Act of 2004,¹⁷ which deals with these matters in strata-title schemes in Singapore.¹⁸ To facilitate the management of mixed-use developments and certain other large strata-title schemes,¹⁹ this Act introduced the option of a two-tier management corporation system in the place of the existing single-management corporation. Under the two-tier system the developer is allowed to set up a main-management corporation and one or more subsidiary management corporations. This Act employs the concept of limited common property to identify the parts of the common property used by specific user groups²⁰ and provides for different (subsidiary) management bodies for each limited common-property component.²¹ Upon an order

¹⁵ Article 12 of the Ley de la Propiedad Horizontal of 1952. See also art 8 of the Venezuelan Ley de Propiedad Horizontal of 1983 and art 4 of the Japanese Law on Comparted Ownership of Buildings of 1962.

¹⁶ Section 59(a) of the Land Law of 1969.

¹⁷ Act 47 of 2004. A two-tier management structure was proposed by Lundquist op cit note 2 at 97 and 104–6 who conceded (at 104n33) that such a structure was not expressly authorized in the Minnesota Uniform Condominium Act. See also Donald E Theriot 'Louisiana Condominium Act of 1974' (1975) 35 *Louisiana LR* 1203 at 1218–19.

¹⁸ Until 2004, strata titles in Singapore were regulated by the Land Titles (Strata) Act of 1988 (revised 1999). In that year the legislator, in the interests of good governance of strata title schemes, decided to separate the provisions on maintenance and management from the Land Titles (Strata) Act and to insert these in the Building Maintenance and Strata Management Act 47 of 2004, and to leave matters pertaining to land (strata) registration in the updated Land Titles (Strata) Act of 1988 (revised 1999).

¹⁹ The types of schemes allowed are discussed at IV(4) below. Under s 76(2)–(4) of the Building Maintenance and Strata Management Act 47 of 2004 the Minister is allowed to approve further types.

²⁰ Sections 2 and 78 of the Building Maintenance and Strata Management Act of 2004.

²¹ Section 77.

issued by the Minister, and subject to a comprehensive resolution²² of the management corporation filed with the Chief Surveyor, existing strata schemes can also apply to identify limited common-property components and set up subsidiary management corporations.²³

The two-tier management structure consists of a main management corporation to take care of the general common property used by all the owners in the scheme, for instance a common driveway and car park for a single high-rise building, and a subsidiary body corporate for every limited common-property component marked out for use by the owners of a certain interest or user group.²⁴ The rationale is that such a structure will facilitate the management of mixed-use and large strata developments by allowing the formation of layered management components, with each component being managed by a subsidiary management corporation representing the interests of a specific user group.

The subsidiary management corporations have the same functions and duties as the main management corporation in respect of matters which relate solely to the limited property component concerned²⁵ (with the exception of powers pertaining to certain general matters such as disposition, additions to and improvements of the common property, and certain aspects of insurance and proceedings against sectional owners).²⁶ The Singapore Act specifically prohibits a subsidiary management corporation from granting an owner permission to effect an improvement to his or her section that affects the appearance or structural integrity of the building or buildings.²⁷ The subsidiary management corporation for a particular user group will be responsible for managing the limited common property intended for the exclusive use of that user group (for example, the swimming pool allocated as limited common property to the residential group). The subsidiary manage-

²² Under s 2(6) of the Act 'a motion is decided by comprehensive resolution if (a) the motion is considered at a duly convened general meeting of such corporation of which at least 21 days' notice specifying the motion has been given; and (b) at the end of a period of 12 weeks after the general meeting in paragraph (a) is convened, on a poll, the total share value of the lots for which valid votes are counted for the motion is at least 90% of the aggregate share value of the lots of all the subsidiary proprietors who, at the end of the period, constitute the management or subsidiary management corporation, as the case may be'.

²³ Section 78(1)(b)

²⁴ Section 79(1).

²⁵ See s 79(4).

²⁶ Section 79(3). According to Singapore Building and Construction Authority *Strata Living in Singapore — A General Guide* (2005) 35, the exceptions include executing a transfer of part of the common property; accepting a grant or transfer of any land or section; amalgamating or making additions to the common property; executing, accepting or surrendering a grant of easement or restrictive condition; allowing improvements or additions to sections which may impair the appearance or structural integrity of the building or buildings; maintaining the strata roll and insuring every building in the scheme; and taking care of structural defects in the scheme.

²⁷ Section 79(3).

ment corporation will have the power to establish its own management and sinking fund for administrative expenses; levy contributions for the maintenance of and improvement to the common property; enforce by-laws relating to its limited common property; and otherwise have the control, management and administration of its limited common property.²⁸ This is intended to result in more equitable sharing of maintenance contributions in mixed-use schemes. It is also aimed at solving the problem where one group of sectional owners may block any proposed upgrading works that will primarily serve another user group of sectional owners in the same scheme.

The Singapore Act further provides for the subsidiary management corporations to elect an executive committee and to hold general meetings and pass resolutions in the same way as the main management corporation.²⁹ It requires that at least two members of the executive committee of each subsidiary corporation shall be members of the main management executive committee.³⁰ It further provides a formula for the allocation of the expenses of the subsidiary management corporation amongst its members³¹ and empowers the subsidiary management corporation to make binding by-laws relating to its limited common property.³² Judgments against the management corporation that relate solely to units controlled by the subsidiary management corporation are effective against only the owners of those units.³³ Originally the provisions applied solely to new developments, but it is envisaged that older schemes will be allowed to convert to this new system once experience is gained (and if it is authorized by the Minister and a comprehensive resolution³⁴ of the management corporation).³⁵

The purpose of and motivation for the introduction of a two-tier governance structure in Singapore are summarized in the following words of the Minister in his speech on the second reading of the Bill:³⁶

²⁸ Section 79(4)

²⁹ Section 80(1)–(3).

³⁰ Section 80(4).

³¹ Section 81.

³² Section 82(2) and (3).

³³ Section 83.

³⁴ Under s 2(6) a motion is decided by ‘comprehensive resolution’ if the motion is considered at a general meeting of which at least 21 days’ notice has been given and approved twelve weeks after the general meeting on a vote by poll of 90 per cent of the value of the votes of the members of the body corporate.

³⁵ See the Minister’s speech op cit note 3 para 15. Paragraph 6.4.5 of the paper cited above in note 4 urges the Minister to set a period of one or two years after implementation for such conversions by the management corporation. See on this Act in general *Building Maintenance and Strata Management Bill* (issued by the firm Alban Tay Mahtani & de Silva LLP) available at http://64.233.183.104/search?q=cache:BOG2PSxEIF8J:www.atmdlaw.com.sg/mediacentre/pdfs/0205_bldgmaint.pdf+Building+Maintenance+and+strata+Management+Bill&hl=en&ct=clnk&cd=59&gl=za (last accessed on 5 December 2008); Singapore Building and Construction Authority op cit note 26 at 33–5. See also the publication cited in note 4 (Paper 26 paras 6.2–6.4).

³⁶ Minister’s speech op cit note 3 para 14.

‘Sir, the intention is neither to create segregations within a community nor to encourage the proliferation of MCs. The spirit behind this provision is to allow for flexible management of strata developments, with clear differentiation in the interests of various user groups, and clear physical delineation of common properties.’

IV APPLICATION OF THE SINGAPORE TWO-TIER MANAGEMENT STRUCTURE TO SOUTH AFRICA

1. *Introduction*

One reason for using the Singapore two-tier management structure as a model for introducing a new governance structure into the South African Sectional Titles Act is that the parentage of both the South African and Singapore statutes is the same: in both instances the statutes that preceded them had been modelled on the more sophisticated New South Wales Conveyancing (Strata Titles) Act of 1961.³⁷ If one allows for the unique use of terminology in the two statutes, many of their provisions are identical. However, before considering which provisions can be transplanted, a few preliminary questions must be answered.

2. *Why make provision in the Act and not in regulations or the management rules?*

The most important preliminary question is whether a new governance structure for complicated sectional title schemes should be catered for in the Act rather than in special management rules introduced by the developer when registering the sectional plan or in the regulations under the Act.³⁸ It has been suggested that an opportunity could be created for developers to introduce a two-tier governance structure by an amendment of the regulations promulgated under the Act. The regulations could, for instance, be amended by the addition of a subregulation under reg 30 providing as follows:

‘(3A) If the schedule referred to in section 11(3)(b) of the Act contains a condition allowing the developer to create a two-tier management structure for that particular development, the developer may, when submitting an application for the opening of a sectional title register, make rules which cater for such a structure and for this purpose substitute any management rule contained in Annexure 8.’

This will give developers of large or multi-use schemes the option of making their own rules to provide for a two-tier management structure that suits that particular scheme. But this solution suffers from the same shortcomings as are apparent in current practice. First, it is optional and not

³⁷ This Act was amended frequently and finally split into two Acts, namely the Strata Schemes (Freehold Development) Act 1973, dealing primarily with registration matters, and the Strata Schemes Management Act 1996, dealing primarily with governance matters pertaining to strata title schemes. The same division took place in Singapore: see note 18.

³⁸ GNR664 GG 11245 of 8 April 1988 as amended.

mandatory, which means that only developers who have the necessary professional assistance would take the trouble to introduce the new structure for their schemes. Secondly, since no model exists, this would lead to a proliferation of different two-tier structures in practice, while uniformity is obviously desirable.

We have already mentioned that the existing practice of developers assisted by professional advisers introducing a new governance structure for especially mixed-use schemes in special management rules when registering the sectional plan might offend against the principle that nothing in the management rules of a scheme is allowed to conflict with the provisions of the Act.³⁹ Since the Act provides only for a single management structure, it could be argued that catering for two-tier structures in special rules would be *ultra vires*. Furthermore, past experience has shown that attempts to rectify lacunae in the Act by the introduction of special rules have been awkward, have not worked very efficiently in practice, and have soon been superseded by detailed regulatory provisions in an amended Sectional Titles Act.

An obvious example is the way in which the concept of exclusive-use areas was introduced into the sectional title industry. The Sectional Titles Act of 1971 did not make provision for the establishment of exclusive-use areas. When the practical necessity for the establishment of these areas arose, it was initially catered for either by the registration of so-called garden servitudes or by specific provision in the rules of a particular scheme.⁴⁰ These methods soon proved too expensive or unwieldy, and the scant regulation of the institution of exclusive-use rules led to malpractices by developers at the expense of sectional owners and the disruption of the harmony in sectional title schemes.⁴¹ Consequently, the legislator stepped in and regulated the creation and operation of exclusive use areas extensively in the provisions of the Act.⁴²

The same happened with the institution of phased developments. Since the reservation of development rights was not catered for in the 1971 Sectional Titles Act, the Chief Registrar issued draft conditions to enable developers to reserve for themselves the right to develop a sectional title scheme in phases by the insertion of these conditions in the annexure to the first sheet of the sectional plan prepared by a conveyancer.⁴³ This awkward way of reserving a right to develop a scheme in phases was soon superseded

³⁹ See under heading II above.

⁴⁰ See C G Van der Merwe & D W Butler *Sectional Titles, Share Blocks and Time-sharing* (1985) 177–80; Hanri Mostert ‘The regulation of exclusive use areas in terms of the Sectional Titles Act 95 of 1986: An evaluation of the existing position and suggested alternatives’ 1997 *Stellenbosch LR* 324 at 325–6. Other mechanisms such as notarial leases and servitudes were used in addition to establish these areas.

⁴¹ For malpractices by developers with regard to exclusive use areas created in the rules of the scheme, see Van der Merwe op cit note 9 at 11–15–11–16.

⁴² See now ss 27 and 27A of the Act.

⁴³ See Van der Merwe & Butler op cit note 40 at 201–6.

by a detailed provision in the 1986 Sectional Titles Act to cater extensively for development in phases.⁴⁴

Apart from the fact that it would be even more difficult for developers and their advisers to fit special rules into the management rules which they are allowed to amend,⁴⁵ such a mechanism would not create absolute certainty since those rules could be amended again by unanimous resolution. In the final analysis, a proliferation of various governance structures as is currently occurring in practice militates against the principle of uniformity, which is important for regulating the sectional title industry. We therefore suggest that an amendment of the Act to provide a uniform framework for a two-tier management structure for complicated sectional title schemes is the only way forward. In our view a uniform set of statutory provisions providing a skeleton for such governance, would be preferable and is necessary to create order and to avoid unnecessary confusion.

3. What happens to existing schemes with adaptation of the governance structure in their rules?

We have indicated that at present many sectional title schemes contain special management arrangements in the management rules inserted by the developer when registering the sectional plan of the scheme. A question that arises is this: How can the existing rights and obligations under these special rules be protected, and how long should the existing arrangements be allowed to continue before being converted to the 'ideal' position as embodied in the proposed amendment of the Act? In order to create uniformity and good governance in the sectional title industry, we are of the opinion that existing governance arrangements in special rules under both the Sectional Titles Act of 1971 and that of 1986 should lapse on the expiry of a period of four years from the date of commencement of the proposed Amendment Act introducing the new system or on the expiry of such extended period as the Minister may prescribe by regulation. During this period the bodies corporate of these schemes would have the opportunity to convert to the two-tier management system if the stipulated conditions were met.

In addition, it is proposed that bodies corporate in mixed or large schemes that qualify for conversion to a two-tier governance system, and which have not introduced a new governance system in special rules, should be given the option to convert if authorized by a special resolution of their members.⁴⁶ The conversion would involve the body corporate, authorized by a special resolution, applying for the approval of an amending sectional plan delineating the areas of limited common property and then applying to the

⁴⁴ See now s 25 of the Act.

⁴⁵ Note that reg 30(1) prescribes that most of the management rules may not be amended by the developer when submitting the sectional plan for registration.

⁴⁶ Cf s 78(1)(a)(ii) of the the Singapore Building Maintenance and Strata Management Act of 2004, which requires a 'comprehensive resolution'.

Registrar for the registration of that plan at the deeds registry. Upon registration of the application, the Registrar would issue certificates of establishment for the subsidiary bodies corporate.⁴⁷

4. *Types of schemes that may be included*

In order to decide which type of scheme would be suitable for two-tier management, one would have to look at the design of the building or buildings in the scheme, the type of user groups accommodated in the scheme and the type of common property comprised in the scheme. The following guidelines can be used to determine the suitability of a particular sectional title scheme for two-tier governance:⁴⁸

- (i) The layout and physical boundaries of the general and limited common property must be distinctly and clearly identifiable and capable of being marked and described on the sectional plan in order to avoid disputes between the main body corporate and the subsidiary bodies corporate and between subsidiary bodies corporate;
- (ii) each limited common-property component should be capable of being used primarily by the sectional owners living in that component and managed by one subsidiary body corporate only, without management being shared by two or more bodies corporate;
- (iii) to facilitate primary use and management by subsidiary bodies corporate, the limited common property should not include physically distinct non-adjointing parts of the common property;
- (iv) the limited common-property component marked out must be sufficiently large to be managed meaningfully by a subsidiary body corporate; and
- (v) there must be sufficient sectional title units in each limited common-property component to ensure that there will be a sufficient number of owners to serve as trustees and a critical mass of limited common property to give subordinate bodies corporate economies of scale to collect sufficient funds for maintenance.

Under the Singapore Building Maintenance and Strata Management Act the types of schemes catered for include mixed-use schemes as well as residential schemes with different types of residential units, namely:⁴⁹

- (i) Schemes containing residential and non-residential units ⁵⁰ (for example, apartments and commercial units or a mix of an hotel and residential units);
- (ii) schemes containing non-residential units used for different purposes⁵¹ (for example, as offices and retail shops);

⁴⁷ Cf para 2(A)(ii) of the Singapore Land Authority Practice Circular 2 of 2005.

⁴⁸ These guidelines were culled from Singapore Building and Construction Authority op cit note 26 at 34–5.

⁴⁹ Section 77.

⁵⁰ Section 77(1)(a).

⁵¹ Section 77(1)(b)(i).

- (iii) non-residential units used for the same purpose in physically detached blocks⁵² (for example, different office tower blocks⁵³ in the same scheme);
- (iv) different types of residential units which comply with the criteria prescribed by regulation⁵⁴ (for example, a high-rise tower block and a low-rise walk-up block or town houses or different wings of a low-rise building).⁵⁵

It is proposed that basically the same types of schemes should qualify for two-tier management under the amended Sectional Titles Act, namely schemes consisting of:

- (i) Residential and non-residential units;
- (ii) residential or non-residential units used for different purposes; and
- (iii) residential and non-residential units used for the same purpose but situated in physically distinct locations.

The second instance would cater also for a separate management tier for each commercial component in a commercial sectional title scheme. The third instance would cover schemes consisting of a residential tower block and a lateral residential development.

To obtain the critical mass it is further suggested that the total size of the sections in the scheme should be equal to or exceed 5 000m² and that a maximum number of five subordinate bodies corporate should be allowed for one scheme.⁵⁶

5. *Should only the developer be able to introduce the two-tier management arrangement or should the body corporate also be able to do it later?*

We have to consider whether the amended Act should make provision for the introduction of the two-tier management arrangement, not only by developers for new schemes qualifying for such structure, but also by the

⁵² Section 77(1)(b)(ii). This is subject to the proviso that the two-tier system will not adversely affect the use and enjoyment of units in the other limited property components and the conditions prescribed by regulation for this purpose. Regulation 18(b) of the Building Maintenance (Strata Management) Regulations 2005 prescribes that the total floor area of all the units whose owners constitute each subsidiary management corporation to be formed is at least 5 000m². This was proposed by the Real Estate Developer's Association of Singapore in op cit note 4 (Paper 20).

⁵³ See especially the publication cited in note 4 (Paper 26 para 6.4.1.1 and Paper 45 para 2.2.2).

⁵⁴ Section 77(1)(c) read with s 77(2). Regulation 19 defines different types of residential units as units comprised in the following buildings in the same scheme: an apartment block with a lift, an apartment block without a lift and a townhouse, a semi-detached house, a detached house or a terrace.

⁵⁵ This example is given in the Minister's speech op cit note 3 para 13. His motivation is that this would address the usual complaint that certain common properties serve only a particular group of residents, e.g lifts in high-rise blocks.

⁵⁶ The minimum of 5 000m² for a limited common-property area was also suggested by Real Estate Developers' Association of Singapore op cit note 4 (Paper 20).

bodies corporate of existing schemes qualifying for it. In our view, the developer of new schemes should be compelled to introduce the proposed new governance structure on registration of the sectional plan and the opening of the sectional title register. In addition, the bodies corporate of existing schemes qualifying for a two-tier management structure should also be entitled to make the provisions of the Act applicable to their particular scheme — although it would need to be considered what measure of authorization by sectional owners must precede the introduction of a two-tiered structure. Should the written consent of all sectional owners be required for such introduction or would a unanimous or even a special resolution suffice?⁵⁷ In our opinion the body corporate should need a special resolution to proceed, but any owner who is of the opinion that the delineation or allocation is unfairly prejudicial to his ownership rights should, within 30 days after the resolution was adopted, have the opportunity to apply to the High Court for relief.

6. *Creation of special category of limited common property*

In order to provide a more sophisticated governance structure for complicated sectional title schemes, it is our view that it is essential that the Act should also be amended to introduce a new category of common property, namely ‘limited common property’, in addition to the existing category of ‘exclusive use areas’. ‘Limited common property’ should then be defined as common property used by more than one of the owners but not by all of them. One would then have to distinguish between ‘general common property’, ‘limited common property’ and ‘exclusive-use areas’.

In order to create certainty and clarity we suggest that the limited common-property component of a sectional title scheme should be clearly demarcated on the sectional plan rather than on a scale plan as is allowed for the creation of exclusive-use areas in terms of the management or conduct rules under the Act.⁵⁸ The layout, boundaries and other physical aspects of each limited common-property area must be distinctly and clearly identifiable, as well as capable of being marked and described on the sectional plan. This would necessitate an amendment of the provisions of the Act and the regulations dealing with sectional plans.

⁵⁷ Section 53(1) of the British Columbia Condominium Act of 1979 requires a special resolution for the creation of new limited common areas. Most statutes require an amendment of the project documents to accommodate new areas of limited common property. This usually necessitates a unanimous resolution, but more lenient provisions are also found in, for example, s 5(6) of the Condominium Act of Manitoba of 1979, which requires an 80 per cent majority. Cf s 78(1)(a)(ii) of the Singapore Building Maintenance and Strata Management Act of 2004, which requires a ‘comprehensive resolution’ (for which see note 34 above).

⁵⁸ Section 27A.

7. Creation of main body corporate and subsidiary bodies corporate to govern particular limited common-property areas

Once limited common-property areas have been clearly demarcated on a registered sectional plan, we suggest that separate subsidiary bodies corporate should automatically be created for the management and administration of the different limited common-property components of the scheme and that these special management structures should be linked with the main management structure administering the 'general common property'. Consequently, a subsidiary management body would be responsible for administering the interests of the owners entitled to the use and enjoyment of a specific limited common-property area, while the main management structure would be responsible for administering the interests of all the sectional owners in respect of the general common property. The subsidiary body corporate should have the same powers and functions as the main body corporate with regard to any matter which relates solely to the limited common property, except perhaps for certain important matters such as the power of alienation, improvement and addition to the common property, and the provisions relating to insurance and proceedings against sectional owners.

8. Relationship between the main body corporate and the subsidiary bodies corporate

The main body corporate consisting of all the sectional owners would maintain, govern and control the general common property, whereas the subsidiary bodies corporate consisting of the owners of sections in a particular limited common-property area would maintain, manage and control that specific limited property area. To promote liaison in governance functions between the main and subsidiary bodies corporate, it is suggested that at least two of the trustees of each subsidiary body corporate should be elected to serve as trustees on the main body corporate. A division between 'common' expenses payable by all owners in the scheme and 'shared' expenses payable by the owners entitled to an area of limited common property has to be worked out. We suggest that the way in which expenses regarding exclusive use areas are dealt with might, with certain qualifications, be a good model for allocating the expenses arising in limited common areas.

9. Management and conduct rules

It is proposed that the prescribed management and conduct rules would apply equally to the main and subsidiary bodies corporate, but that the various subsidiary bodies corporate should be given the power to make additional conduct rules applicable to their limited common-property area only.

V SUMMARY OF SUGGESTED AMENDMENTS TO THE
SECTIONAL TITLES ACT

The Act should allow the creation (establishment) of subsidiary bodies corporate within the main body corporate where each subsidiary body

corporate will represent the interests of a user group or physical component (e.g residential, office or shop) that comprises a distinct group of sectional owners having a common interest.

Developers or bodies corporate adopting the two-tier system must:

- (i) delineate the limited common property clearly on the draft sectional plan;
- (ii) apply for approval of the draft sectional plan by the Surveyor-General; and
- (iii) apply for the registration of sectional plan by the Registrar and the issue of certificates of establishment of subsidiary bodies corporate.

Conveyancers acting for developers of new schemes and the body corporate for existing schemes must use specific forms in their application for the registration of the sectional plan containing a limited common-property component and the registration of this plan in the sectional-title register. In this form conveyancers must state the number of subsidiary bodies corporate, the respective sectional title units comprising each subsidiary body corporate, the numbers of the subsidiary bodies corporate (for example, subordinate body corporate no 1 and subordinate body corporate no 2) and their addresses for service. Upon registration the Registrar will issue the certificates of establishment for the main body corporate as well as for the subsidiary bodies corporate.⁵⁹

The subsidiary bodies corporate will then have the same powers and functions with regard to the limited common area allocated to them as the main body corporate. It has to manage the area for the exclusive benefit of its members. The subsidiary body corporate will elect its own trustees and conduct its own general meeting; it will have its own budget and management and reserve fund, and allocate its own expenses and service charges amongst its members proportionate to individual participation quotas; it will control its own utilities and facilities and create and operate its own exclusive use areas. Finally, it will be entitled to make special conduct rules tailored to the needs of the particular limited common-property component.

The main body corporate will have the same functions and powers with regard to the general common property and certain matters reserved for its governance. It will consist of all the sectional owners. In order to safeguard the interests of the various subsidiary bodies corporate included in the scheme, at least two trustees of every subsidiary body corporate must also be a trustee of the main body corporate.⁶⁰

⁵⁹ Cf para 2(A)(1) of the Singapore Land Authority Practice Circular 2 of 2005.

⁶⁰ Provision should also be made for the merger of subsidiary bodies corporate allowing subsidiary bodies corporate to amalgamate their respective limited common properties to constitute a single subsidiary body corporate for the amalgamated limited common property. Conveyancers should use a specific application form for this. The Registrar will issue a certificate of establishment of a subsidiary body corporate upon registration of the application. Provision should also be made for the dissolution

VI CONCLUSION

There are many advantages to allowing mixed-use and larger sectional title schemes to have a two-tier management structure with subsidiary bodies corporate managing different areas of the scheme designated as limited common property. First, it would result in a fairer distribution of expenses for the maintenance and repair of parts and facilities situated in a particular area. In a mixed-use scheme consisting of a hotel, offices and a residential component, there is no reason why all the owners should be responsible for the upkeep of the lifts and the cleaning of internal passages that serve only one limited property component. Secondly, a two-tier governance system will facilitate the management of a mixed-use or large sectional title scheme by allowing the formation of layered management organs within such schemes, with each limited common-property area being managed by a subsidiary body corporate representing the interests of the specific user group of that area. It will, for instance, solve the problem in one-tier schemes where one user group may block any proposed upgrading works that will primarily serve the interests of another group of sectional owners. It will also facilitate the overall management of the scheme and the budgeting for expenses for the maintenance of that particular limited common area. Thirdly, sectional owners of a specific limited common-property area will be more enthusiastic and prepared to participate in the management of the scheme, especially in the affairs of the subsidiary body corporate designated to manage that part of the common property and facilities which directly affect them. Fourthly, it will reduce conflicts encountered in single-tier schemes because the scope of commonality will be restricted to the general common property. Fifthly, the fact that subsidiary bodies corporate would be entitled to make their own rules for their own areas would mean that the model conduct rules designed for residential sections and 'quiet businesses' of the 1970s could be adapted to meet the needs of that particular component. Many of the special rules inserted by the developer in mixed-use schemes do not deal with the real issues but in fact entrench various developer rights, cater for the convenient exit of the developer from the scheme, and leave the scheme with a set of inappropriate rules. Finally, the better management of mixed-use and large sectional-title schemes will enhance the attractiveness of such schemes to all owner residents and investors, including foreigners and institutions.⁶¹

The main criticism against the introduction of a two-tier governance system for sectional titles is that the additional management structures will be costly. A managing agent would probably have to be appointed for every

of a subsidiary body corporate and the re-designation as common property of its limited common property if both the main body corporate and the subsidiary bodies corporate resolve to dissolve the subsidiary body corporate. A new application form must then be lodged with the Registrar for registration.

⁶¹ See in general the publication cited in note 4 (Papers 4, 20, 26 para 6.4, 27 and 45 para 2).

subsidiary body corporate as well as for the main body corporate; if the same agent is appointed, he would have to attend twice as many meetings. The managing agent or agents will have to handle three times the paperwork. There will also be three sets of accounts and the management cost of the scheme will increase substantially. Furthermore, management and maintenance expenses for each limited common-property area will have to be separately accounted for. It may not always be practical or cost-effective for the subsidiary body corporate to engage a separate set of contractors just to manage and maintain the limited common property. Moreover, a two-tier governance structure will probably require at least three separate bodies corporate, many more volunteers to act as trustees, and at least three general meetings per year instead of one. These concerns could be countered by the argument that owners would be prepared to spend money on administrative services to avoid inequitable cross-subsidization of expenses and would be more willing to serve as trustees and to attend a general meeting if their interests were affected directly. Again, accurately delineating the boundaries of some types of limited common property, for example central air-conditioning for the shops, is going to be an uphill task. Even if the limited common property can be delineated on the plans, the situation on the ground is often not clear. Disputes are bound to arise over maintenance responsibilities, access rights, and in regard to where the limited common property starts and ends. However, it is clear that disputes between various interest groups in the once single-tier governance system will decrease markedly once a two-tier system is introduced and understood. Finally, in order to avoid problems with the election of trustees and budget proposals at the general meeting of the main body corporate, the election of trustees and times for holding the general meetings of subsidiary bodies corporate could be synchronized with the timing of and the budgeting at the general meeting of the main body corporate. This might involve appointing the same accounting officers for both the meetings.⁶²

⁶² Ibid, Paper 23 para 16.2, Paper 26 paras 6.2 and 6.4.2 and Papers 3, 28, 44 and 45.