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Date: 9 August 2013

Dear Sirs

EXTENSION OF SECTION AND EXCLUSIVE USE AREAS

Our consultation on 18 July 2013 regarding the extension of various units in the Clavadel River Lodge sectional title scheme refers.

As requested, we provide hereunder a brief outline of the necessary steps in the process of extending either a sectional title unit or an exclusive use area in a sectional title scheme.

1. **SECTIONAL TITLE UNIT**
- 1.1 The extension of a sectional title unit is governed by the provisions of Section 24 of the Sectional Titles Act, 95 of 1986, as amended (herein referred to as "the Act" for ease of reference).
- 1.2 The extension of the boundaries or floor area of a section requires the approval of the Body Corporate authorised by a *special resolution* of its members.
- 1.3 A "special resolution" is defined in the Act as a resolution passed by a majority of not less than three-fourths of the votes (reckoned in value) and not less than three-fourths of the votes (reckoned in number) of members of a body corporate who are present or represented by proxy or by a representative recognized by law at a general meeting of which at least 30 days' written notice, specifying the proposed resolution, has been given, or a resolution agreed to in writing by at least 75% of all the members of a body corporate (reckoned in number) and at least 75% of all such members (reckoned in value) personally or by proxy or by a representative of any such member recognized by law."
- 1.4 It must be noted that the consent of the Trustees or a "letter of approval" from the Trustees is not sufficient.
- 1.5 In formulating the resolution to be put to the members of the Body Corporate, account may be taken of the provisions, if any, contained in the Conduct Rules of the Scheme or in any "house rules" which relate to aspects such as aesthetics, architecture and style of any buildings or extensions to buildings in the Scheme. The resolution may therefor refer in very specific terms to the architecture, style, colour, nature of materials, etc. of the

proposed extension. Other conditions which may be imposed include conditions relating to the date of commencement and completion of the extension, the approval of municipality plans, the use of lifts, parking areas and other facilities during the construction, the placement and removal of rubble, times of work, payment of a deposit to ensure the repair or restoration of property damaged during construction, etc.

1.6

It is important to note that the use of the words "extension of the boundaries or floor area of a section" in the Act is deliberate and is intended to bring the introduction of a mezzanine floor in a double volume area of a section or the enclosing of an exclusive use area (such as a balcony) within the meaning of "extension of a section". The enclosing of common balconies or the addition of a loft room would thus qualify as an extension of the section and would require consent in the form of a special resolution.

- 1.7 Once the extension is approved by special resolution, a sectional plan of extension indicating the increased floor area of the section and the adjusted participation quotas of all the sections in the Scheme must be prepared by a land surveyor for submission to the Surveyor-General for approval. Owners must discuss the stage of construction at which the land surveyor will be able to survey the extension for the purposes of preparing the sectional plan of extension with the land surveyor. Very often, the extension must be completed before it can be surveyed.
- 1.8 Once approved by the Surveyor-General, the owner must appoint a conveyancer who will submit the approved sectional plan of extension together with the title deed relating to the extended section and certain other documents to the Registrar of Deeds.
- 1.9 The Registrar of Deeds will register the sectional plan of extension and endorse the title deed relating to the extended section with the new, larger floor area of the section.
- 1.10 Only once the Registrar of Deeds has registered the sectional plan of extension and endorsed the title deed relating to the extended section with the new, larger floor area of the section can the whole process of extending the section be considered complete.
- 1.11 Where the proposed extension to the section will result in a deviation of more than 10 (Ten) per cent in the participation quota of the section being extended, the consent of each mortgagee of each section in the Scheme will have to be obtained by the conveyancer appointed by the owner to register the sectional plan of extension in the deeds office. This, in effect, means that the consent of every bank or other third party which holds a mortgage bond over a section in the scheme will have to be obtained by the conveyancer.
- 1.12 The provisions relating to the manner in which the consents of all the banks and other third parties who hold mortgages over sections in the Scheme is to be obtained have recently been amended so as to make it considerably easier to obtain the consents. In the past, the owner or his/her conveyancer would, in effect, have to obtain some form of formal communication from the mortgagee advising that the mortgagee consented to the extension of the section. The process of obtaining the consents in sectional title schemes which consisted of a large number of units was a time consuming and very costly exercise since the banks often took months to forward their consents to the relevant conveyancer.
- 1.13 The simplified procedure for obtaining consents now requires that the owner (or the owner's conveyancer) forward a notice containing details of the proposed extension by registered mail to the bank's head office. If the bank does not respond to the notice within

30 (Thirty) days of posting, it can be accepted that the bank does not have any objection to the extension and accordingly consents thereto.

- 1.14 Notwithstanding the more relaxed procedure which must now be followed to extend a section in a sectional title scheme, the extension of a section still remains a costly exercise. Not only are there construction costs involved, but also the costs of architects, structural engineers, land surveyors and attorneys.
- 1.15 In our experience, we have found that owners very often underestimate the costs of extending a section. Owners are often under the impression that all that is required is the consent of the Trustees and the approval of the building plans by the local municipality and do not take into consideration the costs of structural engineers, land surveyors and attorneys in the whole process of extending a section.
- 1.16 It may, in light of the "hidden costs" involved in the process of extending a section, be prudent to require an owner who seeks to extend his or her section to submit copies of quotations or cost estimates obtained by the owner from the intended architects, structural engineers, land surveyors and attorneys to the Trustees before the Trustees agree to embark on the process of securing the relevant special resolution required for the extension. This will ensure that owners confront both the scope and the cost of the procedure involved in the extension of a section before even commencing the process.

2. EXTENSION OF AN EXCLUSIVE USE AREA

2.1 The Act does not make provision for the extension, consolidation or subdivision of exclusive use areas.

2.2 The extension of the boundaries of an exclusive use area can thus only be achieved by cancelling the exclusive use area in question and then registering a new, larger exclusive use area in its place.

2.3 The boundaries of the new, larger exclusive use area cannot overlap with the boundaries of already existing exclusive use areas. Where the boundaries of the larger exclusive use area will overlap with one or more existing exclusive use areas, those exclusive use areas will have to be cancelled by, and with the approval of, the holders of those exclusive use areas and new, smaller exclusive use areas with altered boundaries will have to be registered.

2.4 In schemes where the developer has not reserved the right to extend a scheme, or where such right has lapsed, the right to extend the scheme by adding exclusive use areas vests in the Body Corporate authorised by a *unanimous resolution* of its members.

2.5 A "unanimous resolution" is defined in the Act as a resolution passed unanimously by all the members of a body corporate who are present or represented by proxy or by a representative recognized by law at a general meeting of the body corporate of which at least 30 days' written notice, specifying the proposed unanimous resolution, has been given, and at which meeting at least 80% of all the members of a body corporate (reckoned in number) and at least 80% of all the members (reckoned in value) are present or so represented, or, alternatively, a resolution agreed to in writing by all the members of the body corporate personally or by proxy or by a representative of any such member recognized by law.

- 2.6 Once the unanimous resolution is passed, a sectional plan of extension indicating the new exclusive use area must be prepared by a land surveyor for submission to the Surveyor-General for approval.
- 2.7 Note that the consent of banks and other third parties which hold mortgage bonds over sections in the Scheme is not required for the creation of exclusive use areas. The consent of any bank or other third party which holds a mortgage bond over the exclusive use area being "extended" to the cancellation of that exclusive use area must, however, be obtained.
- 2.8 Once approved by the Surveyor-General, the owner must appoint a conveyancer to take the process further.
- 2.9 The conveyancer will prepare a notarial deed cancelling the exclusive use area which is to be extended for signature by both the owner of the exclusive use area and the Body Corporate representing all the owners in the Scheme.
- 2.10 The conveyancer will submit the approved sectional plan of extension on which the new exclusive use area is reflected to the Registrar of Deeds for registration.
- 2.11 The new exclusive use area which will have been created on the registration of the sectional plan of extension will now have to be transferred by means of a notarial deed of cession from the Body Corporate, authorized by a unanimous resolution, to the proposed owner.
- 2.12 In practice, the cancellation of the existing exclusive use area, the registration of the sectional plan of extension and the cession of the new exclusive use area to the owner are attended to simultaneously in the deeds office.

The above is intended only as a very brief overview of the procedure and steps involved in the extension of a section in a sectional title scheme and the "extension" of an existing exclusive use area and is not intended to be either extensive or exhaustive.

It is recommended that owners always obtain independent legal advice in respect of their specific circumstances before embarking on any extension of their section or the cancellation of an existing exclusive use area and the registration of a new exclusive use area in its place.

Please feel free to contact the writer should you have any further queries.

Yours faithfully

per  C.M.F. MALHOU