

MEMORANDUM ON THE OBJECTS OF THE SECTIONAL TITLES AMENDMENT BILL

1. OBJECTS OF BILL

The Sectional Titles Amendment Bill, 2010 (hereinafter referred to as “the Bill”), seeks to amend the Sectional Titles Act, 1986 (Act No. 95 of 1986) (hereinafter referred to as “the Act”), in order to, amongst others-

- (a) amend certain definitions;
- (b) redefine the boundaries between certain sections and common property;
- (c) regulate the substitution of bonds registered in respect of different pieces of land shown on the sectional plan;
- (d) to provide for the issuing of certificates of real rights of extension and certificates of real right of exclusive use areas at the opening of a sectional title register;
- (e) to provide for the issuing of a certificate of registered sectional title in respect of a fraction of an undivided share in a section;
- (f) to further provide for the vesting of rights of exclusive use areas where an owner ceases to be a member of a body corporate; and
- (g) to provide for the cancellation of exclusive use area rights.

2. CLAUSE BY CLAUSE ANALYSIS

CLAUSE 1

2.1.1 The definition of “developer” provides, for purposes of sections 10 and 15B(3)(c), for the inclusion of an agent or his or her successor in title, or any other person acting on behalf of any of the above-mentioned persons, to act on behalf of a developer. However, the definition does not include the developer’s agent or his or her successor in title in respect of the approval of development schemes, as contemplated in section 4 of the Act. Clause 1(a) of the Bill provides for the necessary inclusion.

2.1.2 In view of the recently appointed members of Cabinet, the Minister’s title is changes for legal certainty with regard to the administration of the Act. Clause 1(b) therefore substitutes the definition of the Minister.

2.1.3 The definition of “owner” still makes reference to the Agricultural Credit Act, 1966 (Act No. 28 of 1966), yet the said Act has been repealed by the Agricultural Debt Management, 2001 (Act No. 45 of 2001). Clause 1(b) of the Bill proposes the omission of such reference, so as to reflect the correct legal position.

2.1.4 Section 1(3A) of the Act provides for a body corporate to approach the Court for relief in instances where it is unable to obtain a unanimous resolution. However, subsection (3A) is made subject to the provisions of subsection (3)(c) which stipulates that where a resolution adversely affects the proprietary rights or powers of any member as owner, such resolution shall not be regarded as

having been passed unless such member consents thereto in writing. By making subsection (3A) subject to subsection (3)(c), the opportunity remains for an unreasonable owner to jeopardise a body corporate administration. The current wording creates an unbearable situation whereby a Court's discretion relating the question whether the "proprietary rights or powers of any member as an owner" have been affected is excluded. Clause 1(d) of the Bill seeks to remedy this situation.

CLAUSE 2

2.2 The phrase "the median line of the dividing floor, wall or ceiling", used in section 5(4) of the Act, stipulates the boundary of any section in a sectional title scheme. The phrase suggests that in the absence of a contrary indication on the sectional plan the legal nature of any window, door or other structure, which fills an aperture in the exterior wall, floor or ceiling of a section, is determined by reference to that wall, floor or ceiling. It would be of considerable assistance to those who manage sectional title schemes if the Act is amended to provide that the median line of a section will always pass through the centre of exterior windows, doors and other structures built into the section's exterior walls, floors and ceilings. The amendment of section 5(5)(a), as proposed in clause 2 of the Bill, seeks to provide for the inclusion of any window, door or other structure which divides a section from another section or common property to form part of such floor, wall or ceiling.

CLAUSE 3

2.3.1 Section 4(2) provides for a sectional title register to be opened in respect of more than one piece of land, without having to first consolidate such pieces of land. If any of such pieces of land is hypothecated under a registered mortgage bond, section 40(5) of the Deeds Registries Act, 1937 (Act No. 47 of 1937), which deals with the substitution of pieces of land mortgaged and the issuing of certificates where the bonds are cancelled, must be complied with. However, the application of section 40(5)(a) causes grave confusion, especially with regard to the format and content of the application. The amendment of section 11(3)(d) of the Act as proposed by clause 3(a) of the Bill, seeks to eliminate this confusion.

2.3.2 Section 11 of the Act does not provide for the lodgement of certificates of real rights of extension and certificates of real rights of exclusive use areas, as contemplated in sections 25(1) and 27(1) of the Act. Section 12 of the Act, however, provides for the issuing of the said certificates by the registrar of deeds. The proposed amendments in clause 3(b) of the Bill seek to rectify this anomaly.

CLAUSE 4

2.4 Section 12(1)(e) of the Act provide for the issuing of the certificate of real right of extension of a scheme and a certificate of real right of exclusive use areas in respect of a condition reserved or imposed by a developer in terms of sections 25(1) and 27(1) of the Act, respectively. This creates problems in instances where a real right of extension is subdivided and depicted on a plan.

The amendment of section 12(1)(e) as proposed in clause 4 of the Bill, addresses the issue.

CLAUSE 5

2.5 Section 14(8) of the Act makes provision for the cancellation of a registered sectional plan only by order of the Court. A registered sectional plan may, however, also be cancelled upon the destruction of or damage to buildings and upon the disposal of the destruction of buildings, as contemplated in sections 48 and 49, without the necessity of a Court Order. Clause 5 of the Bill seeks to make it clear that a Court Order is not necessary for the cancellation of a sectional plan where the buildings are damaged or destroyed.

CLAUSE 6

2.6 Section 15B contains provisions with regard to the registration of the transfer of ownership and other rights in a deeds registry. However, it does not cater for the issuing of a certificate of registered sectional title to a sole owner of a unit in respect of a fraction of an undivided share in a unit in a sectional titles scheme. Clause 6 of the Bill seeks to rectify this situation.

CLAUSE 7

2.7.1 Section 24(4)(b) of the Act provides that the submission of a draft sectional plan of extension of a section shall be accompanied by a revised schedule, in substitution for the schedule referred to in section 7(2)(b).

However, section 7(2)(b) does not make reference to any schedule. Clause 7(a) of the Bill seeks to remedy this defect.

2.7.2 Section 24(6)(d) of the Act requires the consent of every mortgagee in a scheme if the extension of a section would result in a deviation of more than 10 per cent in the participation quota of any section. Conveyancers are not in a position to determine any deviation and this determination must be determined either by a land surveyor or an architect. The amendment of section 24(6)(d), as proposed in clause 7(b) of the Bill, seeks to address this problem.

CLAUSE 8

2.8.1 Section 25 of the Act provides for the extension of a scheme by the addition of sections and exclusive use areas. The extension of a scheme by the addition of exclusive use areas is only provided for where the addition of rights to exclusive use is incidental or linked to the extension of the scheme by the creation of new sections in the scheme.

Section 25 does not provide for the extension of a scheme by the addition of rights to exclusive use only. Clause 8(a),(b),(c), (f)-(m) of the Bill, seeks to rectify the situation pertaining to the addition of further rights.

2.8.2 The Act does not provide for a mechanism to extend the period of time in which a right of extension in terms of section 25 must be exercised. The amendment of section 25(1) by clause 8(b) of the Bill caters for this situation by

way of certain agreements which must be anonymously agreed upon between the body corporate and bond holders.

2.8.3 Section 25(1) of the Act provides that a right of extension can only be reserved in respect of a right to erect and complete a further building or buildings or the horizontal or vertical extension of an existing building. However, the Act does not provide for the reservation of a right of extension in respect of a building or buildings that already exist. Clause 8(b) and (c) provide for such a reservation.

2.8.4 Sections 25(4)(a) and 27(6) refer to “a right to urban immovable property”. The Mutual Building Societies Act, 1965 (Act No. 24 of 1965), and the Building Societies Act, 1986 (Act No. 82 of 1986), which have since been repealed, limited loans on mortgages to urban immovable property. Loans for the acquisition of immovable property are regulated by the National Credit Act, 2005 (Act No. 34 of 2005). Whereas the latter Act in general deals with “immovable property”, it is necessary, also for the sake of legal certainty, to reconcile the provisions of sections 25(4)(a) and 27(6) with the provisions of the National Credit Act, 2005. The proposed amendments in clauses 8(f) and 9(d) of the Bill seek to achieve this goal.

2.8.5 A certificate by a conveyancer issued in terms of section 15B (3)(a) of the Act is applicable only to money due to the body corporate in respect of a unit or undivided share therein, to be transferred and is silent with regard to money due

to the body corporate in respect of an exclusive use area and a right to extend a scheme, as contemplated by section 25. This state of affairs is prejudicial to the body corporate as it makes the cession of exclusive use areas and rights of extension possible, without ensuring that moneys due to the body corporate by holders of such rights have been duly paid. The insertion of section 25(4A), as proposed by clause 8(g) of the Bill, remedies this defect.

CLAUSE 9

2.9.1 Section 27(1) of the Act makes the registration of exclusive use areas depicted in a sectional plan, optional. This creates an untenable situation whereby it is possible to partially register a sectional plan. The amendment proposed by clause 9(a) of the Bill, will render the registration of exclusive use areas depicted in a sectional plan obligatory and make it impossible to register a sectional plan partially.

2.9.2 Section 27(4)(b) of the Act provides for the vesting of an exclusive use area in the body corporate free from any mortgage bond. The Act, however, is silent with regard to the position of the holder of a registered lease or holder of a registered right to usufruct, *habitatio* or *usus*. The amendment of section 27(4)(b), as proposed by clause 9(b) of the Bill, provides for the vesting of an exclusive use area in the body corporate free from any mortgage bond, a registered lease, usufruct, *habitatio* or *usus* if the owner ceases to be a member of a body corporate.

2.9.3 No provision is made in the Act for the consent by the holder of a registered personal common law servitude or the holder of a lease to the cancellation of an exclusive use area. The amendment of section 27(5), as proposed by clause 9(c) of the Bill, remedies this defect.

CLAUSE 10

2.10 Section 29(3) of the Act provides for the consent of all bondholders for the registration of a servitude or restrictive agreement over land in a sectional title scheme. New bonds are registered over sections and exclusive use areas on a daily basis and it becomes virtually impossible to get the consent of every such bondholder. Clause 10 of the Bill proposes the amendment of section 29(3) to make provision for the obtaining and filing, in the protocol of the notary, of the consent of bondholders that exist on the date of execution of such servitude or agreement. This will eliminate the problem and also facilitate and expedite the work of conveyancers and the registrar of deeds in this respect.

CLAUSE 11

2.11.1 Section 37 of the Act, to the detriment of the body corporate, does not oblige a developer to pay attributable costs in respect of areas of common property subject to future development rights as provided for in section 25 of the Act. The amendment of section 37(1)(b), as proposed in clause 11(a) of the Bill, addresses this problem.

2.11.2 Section 37 of the Act provides for the levying of contributions. In terms of section 37(2) contributions so levied are due and payable on the passing of a resolution by the trustees of the body corporate and the persons who were owners of units at the time the resolution was passed, are liable for the payment thereof. The Act, however, does not regulate the payment of contributions where ownership has changed. The addition of the proviso to this subsection, as proposed in clause 11(b) of the Bill, seeks to give clarity on the question pertaining to the payment of contributions in cases where ownership of units has changed. Payment of contributions is also extended to right holders of exclusive use area and real rights of extension.

2.11.3 Section 37 of the Act does not provide for the levying of special contributions. Over the years the levying of special contributions by the trustees of bodies corporate has, however, become a general established practice. The amendment proposed in clause 11(c) of the Bill merely confirms and legalises a situation that has existed for a considerable number of years.

CLAUSE 4

2.12 Section 44(1)(g) of the Act provides for the use of a section as shown on a registered sectional plan. This section, however, does not deal with the use of an exclusive use area. This state of affairs has resulted in the use of exclusive use

areas for purposes for which they could not have been intended, for example garages being used for residential purposes.

Clause 12 of the Bill seeks to include the regulation of the use of exclusive use areas for purposes shown on the registered sectional plan.

2.13 Clause 13 of the Bill proposes the amendment of section 54(2)(c)(i) of the Act, in order to provide for the change of name of the Association of Law Societies of the Republic of South Africa to the Law Society of South Africa.

CLAUSE 14

2.14 Section 60 of the Act still contains provisions in respect of savings and transitional provisions that have already lapsed. The amendment of section 60, as proposed in clause 14 of the Bill, seeks to omit these provisions.

2.15 The amendment of section 60A of the Act, as proposed in clause 15 of the Bill, is consequential amendment due to the amendment of section 60, as referred to in paragraph 2.14 above.

2.16 Clause 16 of the Bill contains the short title.

3. DEPARTMENTS / BODIES / PERSONS CONSULTED

- The Law Society of South Africa
- The South African Council for the Architectural Profession

- The South African Council for Professional and Technical Surveyors
- The Banking Council of South Africa
- The Institute of Estate Agents of South Africa
- National Association of Managing Agents

4. FINANCIAL IMPLICATIONS FOR STATE

None

5. CONSTITUTIONAL IMPLICATIONS

There are no constitutional implications.

6. COMMUNICATION IMPLICATIONS

To be undertaken by the Department of Rural Development and Land Reform.

7. PARLIAMENTARY PROCEDURE

7.1. The State Law Advisers and the Department of Land Affairs are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution, since it contains no provision to which the procedure set out in section 74 or section 76 of the Constitution applies.

7.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.