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GENERAL NOTICES

NOTICE 1447 OF 2009 DEPARTMENT OF HUMAN SETTLEMENTS

SECTIONAL TITLES SCHEMES MANAGEMENT BILL, 2009

I, Tokyo Mosima Gabriel Sexwale, Minister of Human Settlements hereby publishes the Sectional Titles Schemes Management Bill, 2009 for public comment. A draft Bill together with a Memorandum on the Objects of the Bill is attached.

Interested persons and institutions are invited to submit written comments on the draft Bill on or before 30 November 2009 to the Director-General, Department of Human Settlements, for the attention of the following person:

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SECTIONAL TITLES SCHEMES MANAGEMENT BILL

To provide for the establishment of bodies corporate to manage and control sections and common property in sectional title schemes and for that purpose to apply rules; for the establishment of a sectional titles schemes management regulation board; and to provide for incidental matters

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

ARRANGEMENT OF ACT

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Definitions

1. (1) In this Act and the rules, unless the context otherwise indicates—

“body corporate”, in relation to a building and the land in a sectional title scheme, means the body corporate of that building referred to in section 2(1);

“Court” means a provincial or local division of the High Court having jurisdiction and, for the purposes of section 18, a magistrates' court having jurisdiction;

“Department” means the Department of Human Settlements;

“Director-General” means the Director-General: Human Settlements;

“exclusive use area” means a part or parts of the common property for the exclusive use by the owner or owners of one or more sections;

“lease” for the purposes of section 10 means a lease which—

- (a) was entered into for a period of not less than ten years;
- (b) was entered into for the natural life of the lessee or of any other person mentioned in the lease; or
- (c) is renewable from time to time at the will of the lessee indefinitely or for periods which, together with the first period, amount in all to not less than 10 years;

“Minister” means the Minister of Human Settlements;

“prescribed” means prescribed by this Act or by regulation;

“regulation” means a regulation made and in force under this Act;

“rules”, in relation to a building or buildings which has or have been divided into a section or sections and common property, means the management rules and conduct rules referred to in section 8(2) for the control, management, administration, use and enjoyment of the sections and common property;

“special resolution” means 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: Provided that in circumstances determined in the rules, a meeting of the body corporate may be convened for a date 30 days or less after notice of the proposed resolution has been given to all the members of the body corporate: Provided further that the written notice shall be deemed adequate if—

- (a) it has been delivered by hand to a member not less than 30 days prior to the relevant general meeting; or
- (b) it was dispatched by prepaid registered post not less than 30 days prior to such meeting to the address of a member's unit in the relevant scheme, or to such other address as a member may have indicated in writing for the purposes of such notice.

“this Act” includes the regulations;

“unanimous resolution” means a resolution—

- (a) 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: Provided that in circumstances determined in the rules, a meeting of the body corporate may be convened for a date 30 days or less after notice of the proposed resolution has been given to all the members of the body corporate; or
- (b) agreed to in writing by all the members of the body personally or by proxy or by a representative of any such member recognized by law:

Provided that —

- (aa) a notice contemplated in that definition shall be deemed adequate if it has been delivered to, or dispatched to the address of a member, as contemplated in paragraphs (a) and (b), respectively, of the definition of 'special resolution';

- (bb) a member present or represented at a meeting contemplated in that definition, who himself, or through a proxy or representative, as the case may be, abstains from voting on the resolution in question, shall be regarded as having voted in favour of the resolution; and
- (cc) where the resolution in question adversely affects the proprietary rights or powers of any member as owner, the resolution shall not be regarded as having been passed unless such member consents in writing thereto.

"Sectional Titles Act" means the Sectional Titles Act, 1986 (Act No. 95 of 1986) as amended from time to time.

(2) the terms 'building', 'common property', 'conveyancer', 'deeds registry', 'developer', 'development scheme', 'land', 'land surveyor', 'local authority', 'owner', 'participation quota', 'quota', 'registrar', 'scheme', 'section', 'sectional mortgage bond', 'sectional plan', 'sectional title deed', 'sectional title register', 'Surveyor- General', 'undivided share in common property' and 'unit' apply in the interpretation of this Act as they are defined in the Sectional Titles Act.

PART I

BODIES CORPORATE

Establishment, membership, name, capacities and first meeting

2. (1) With effect from the date on which any person other than the developer becomes an owner of a unit in a scheme, there shall be deemed to be established for that scheme a body corporate of which the developer and such person are members, and every person who thereafter becomes an owner of a unit in that scheme shall be a member of that body corporate.

(2) The developer shall cease to be a member of the body corporate when he ceases to have a share in the common property as contemplated in section 34(2) of the Sectional Titles Act, and any other member of the body corporate shall cease to be a member thereof when he ceases to be the owner of a unit in the scheme in question.

(3) The body corporate shall be designated as 'the Body Corporate of the(name).....Scheme, No' such name and number to be inserted being the name and number referred to in sections 5(3)(b) and 12(1)(a) of the Sectional Titles Act, respectively.

(4) The body corporate shall, subject to the provisions of this Act, be responsible for the enforcement of the rules referred to in section 8, and for the control, administration and management of the common property for the benefit of all owners.

(5) The provisions of the Companies Act, 1973 (Act No. 61 of 1973), shall not apply in relation to the body corporate.

(6) The body corporate shall have perpetual succession and shall be capable of suing and of being sued in its corporate name in respect of-

- (a) any contract entered into by it;
 - (b) any damage to the common property;
 - (c) any matter in connection with the land or building for which the body corporate is liable or for which the owners are jointly liable;
 - (d) any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this Act or any rule; and
 - (e) any claim against the developer in respect of the scheme if so determined by special resolution.
- (7) (a) A developer shall convene a meeting of the members of the body corporate not later than 60 days after the establishment of the body corporate, the agenda of the meeting to be as prescribed in the management rules, at which meeting he shall furnish the members with—
- (i) a copy of the sectional plan;
 - (ii) a certificate from the local authority to the effect that all rates due by the developer up to the date of the establishment of the body corporate have been paid; and

- (iii) proof of revenue and expenditure concerning the management of the scheme from the date of the first occupation of any unit until the date of the establishment of the body corporate.
 - (aa) The developer shall pay over to the body corporate any residue, as revealed by the proof referred to in paragraph (a)(iii).
 - (bb) A developer who fails to comply with any provision of paragraphs (a) or (aa), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.
- (8) The developer shall promptly on demand pay any moneys due in terms of subsection 25(2)(e) of the Sectional Titles Act to the body corporate.

Functions

3. (1) A body corporate referred to in section 2 shall perform the functions entrusted to it by or under this Act or the rules, and such functions shall include-
- (a) to establish for administrative expenses a fund sufficient in the opinion of the body corporate for the repair, upkeep, control, management and administration of the common property (including reasonable provision for future maintenance and repairs), for the payment of rates and taxes and other local authority charges for the supply of electric current, gas, water, fuel and sanitary and other services to the building or buildings and land, and any premiums of insurance, and for the discharge of any duty or fulfillment of any other obligation of the body corporate;
 - (b) to require the owners, whenever necessary, to make contributions to such fund for the purposes of satisfying any claims against the body corporate: Provided that 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 repealed Sectional Titles Act, 1971, to make such additional contribution to the fund as is estimated necessary to defray the costs of rates and taxes, insurance and 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;

- (c) to determine from time to time the amounts to be raised for the purposes aforesaid;
- (d) to raise the amounts so determined by levying contributions on the owners in proportion to the quotas of their respective sections;
- (e) to open and operate an account or accounts with a banking institution or a building society;
- (f) to insure the building or buildings and keep it or them insured to the replacement value thereof against fire and such other risks as may be prescribed;
- (g) to insure against such other risks as the owners may by special resolution determine;
- (h) subject to the provisions of section 23 and to the rights of the holder of any sectional mortgage bond, forthwith to apply any insurance money received by it in respect of damage to the building or buildings, in rebuilding and reinstating the building or buildings in so far as this may be effected;
- (i) to pay the premiums on any policy of insurance effected by it;
- (j) properly to maintain the common property (including elevators) and to keep it in a state of good and serviceable repair;
- (k) to comply with any notice or order by any competent authority requiring any repairs to or work in respect of the relevant land or building or buildings;
- (l) to comply with any reasonable request for the names and addresses of the persons who are the trustees of the body corporate in terms of

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the rules referred to in section 8, or who are members of the body corporate;

- (m) to notify the registrar and the local authority concerned of its *domicilium citandi et executandi*, which shall be its address for service of any process;
- (n) to ensure compliance with any law relating to the common property or to any improvement of land comprised in the common property;
- (o) to keep in a state of good and serviceable repair and properly maintain the plant, machinery, fixtures and fittings used in connection with the common property and sections;
- (p) subject to the rights of the local authority concerned, to maintain and repair (including renewal where reasonably necessary) pipes, wires, cables and ducts existing on the land and capable of being used in connection with the enjoyment of more than one section or of the common property or in favour of one section over the common property;
- (q) on the written request of any owner or registered mortgagee of a section, to produce to such owner or mortgagee, or any person authorized in writing by such owner or mortgagee, the policy or policies of insurance effected by the body corporate and the receipt or receipts for the last premium or premiums in respect thereof; and
- (r) in general, to control, manage and administer the common property for the benefit of all owners.

(2) Any contributions levied under any provision of subsection (1), shall be due and payable on the passing of a resolution to that effect by the trustees of the body corporate, and may be recovered by the body corporate by action in any court (including any magistrate's court) of competent jurisdiction from the persons who were owners of units at the time when such resolution was passed.

(3) The body corporate shall, on the application of an owner or mortgagee of a unit, or any person authorized by such owner or mortgagee, certify in writing—

- (a) the amount determined as the contribution of that owner;

- (b) the manner in which such contribution is payable;
- (c) the extent to which such contribution has been paid by the owner; and
- (d) the amount of any rates and taxes paid by the body corporate in terms of section 24 and not recovered by it.

(4) The body corporate shall, for the purposes of effecting any insurance under subsection (1)(f), be deemed to have an insurable interest for the replacement value of the building and shall, for the purposes of effecting any other insurance under that subsection, be deemed to have an insurable interest in the subject-matter of such insurance.

Powers

4. The body corporate may exercise the powers conferred upon it by or under this Act or the rules, and such powers shall include the power-

- (a) to appoint such agents and employees as it may deem fit;
- (b) when essential for the proper fulfillment of its duties, to purchase or otherwise acquire, take transfer of mortgage, sell, give transfer of, or hire or let units;
- (c) to purchase, hire or otherwise acquire movable property for the use of owners for their enjoyment or protection, or in connection with the enjoyment or protection of the common property;
- (d) where practicable, to establish and maintain on the common property suitable lawns, gardens and recreation facilities;
- (e) to borrow moneys required by it in the performance of its functions or the exercise of its powers;
- (f) to secure the repayment of moneys borrowed by it and the payment of interest thereon, by negotiable instrument or the hypothecation of unpaid contributions (whether levied or not), or by mortgaging any property vested in it;
- (g) to invest any moneys of the fund referred to in section 3(1)(a);

- (h) to enter into an agreement with the local authority or any other person or body for the supply to the building or buildings and the land of electric current, gas, water, fuel and sanitary and other services;
- (i) to enter into an agreement with any owner or occupier of a section for the provision of amenities or services by the body corporate to such section or to the owner or occupier thereof, including the right to let a portion of the common property to any such owner or occupier by means of a lease other than a lease contemplated in section 10;
- (j) to do all things reasonably necessary for the enforcement of the rules and for the control, management and administration of the common property; and
- (k) if it is unable to obtain a unanimous resolution, subject to the provisions of proviso (cc) in the definition of a unanimous resolution in section 1, approach the Court for relief.

Functions and powers of bodies corporate to be performed or exercised by trustees

5. (1) The functions and powers of the body corporate shall, subject to the provisions of this Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules.

(2) For the purposes of an agreement in respect of the beacons and boundaries of the common property required in terms of the Land Survey Act, 1997 (Act No. 8 of 1997), the trustees shall be deemed to be the owner of the land.

Fiduciary position of trustees

6. (1) Each trustee of a body corporate shall stand in a fiduciary relationship to the body corporate.

(2) Without prejudice to the generality of the expression 'fiduciary relationship', the provisions of subsection (1) shall imply that a trustee—

- (a) shall in relation to the body corporate act honestly and in good faith, and in particular—
 - (i) shall exercise such powers as he may have to manage or represent the body corporate in the interest and for the benefit of the body corporate; and
 - (ii) shall not act without or exceed the powers aforesaid; and
- (b) shall avoid any material conflict between his own interests and those of the body corporate, and in particular—
 - (i) shall not derive any personal economic benefit to which he is not entitled by reason of his office as trustee of the body corporate, from the body corporate or from any other person in circumstances in which that benefit is obtained in conflict with the interests of the body corporate;
 - (ii) shall notify every other trustee, at the earliest opportunity practicable in the circumstances, of the nature and extent of any direct or indirect material interest which he may have in any contract of the body corporate.
- (3) (a) A trustee of a body corporate whose *mala fide* or grossly negligent act or omission has breached any duty arising from his fiduciary relationship, shall be liable to the body corporate for—
 - (i) any loss suffered as a result thereof by the body corporate; or
 - (ii) any economic benefit derived by the trustee by reason thereof.
- (b) Where a trustee fails to comply with the provisions of subsection (2)(b)(ii) and it becomes known to the body corporate that the trustee has an interest referred to in that subsection in any contract of the body corporate, the contract in question shall, at the option of the body corporate, be voidable: Provided that where the body corporate chooses not to be bound, a Court may on application by any interested person, if the Court is of the opinion that in the circumstances it is fair to order that such contract shall nevertheless

be binding on the parties, give an order to that effect, and may make any further order in respect thereof which it may deem fit.

(4) Except as regards his duty referred to in subsection (2)(a)(i), any particular conduct of a trustee shall not constitute a breach of a duty arising from his fiduciary relationship to the body corporate, if such conduct was preceded or followed by the written approval of all the members of the body corporate where such members were or are cognizant of all the material facts.

Proceedings on behalf of bodies corporate

7. (1) When an owner is of the opinion that he and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in section 2(6), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit, or where the body corporate does not take steps against an owner who does not comply with the rules, the owner may initiate proceedings on behalf of the body corporate in the manner prescribed in this section.

(2) (a) Any such owner shall serve a written notice on the body corporate calling on the body corporate to institute such proceedings within one month from the date of service of the notice, and stating that if the body corporate fails to do so, an application to the Court under paragraph (b) will be made.

(b) If the body corporate fails to institute such proceedings within the said period of one month, the owner may make application to the Court for an order appointing a *curator ad litem* for the body corporate for the purposes of instituting and conducting proceedings on behalf of the body corporate.

(3) The court may on such application, if it is satisfied—

- (a) that the body corporate has not instituted such proceedings;
- (b) that there are prima facie grounds for such proceedings; and
- (c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified,

appoint a provisional *curator ad litem* and direct him to conduct such investigation and to report to the Court on the return day of the provisional order.

(4) The Court may on the return day discharge the provisional order referred to in subsection (3), or confirm the appointment of *the curator ad litem* for the body corporate, and issue such directions as it may deem necessary as to the institution of proceedings in the name of the body corporate and the conduct of such proceedings on behalf of the body corporate by the *curator ad litem*.

(5) A provisional *curator ad litem* appointed by the Court under subsection (3) and a *curator ad litem* whose appointment is confirmed by the Court under subsection (4) shall, in addition to the powers expressly granted by the Court in connection with the investigation, proceedings and enforcement of a judgment, have such powers as may be prescribed by regulation.

(6) If the disclosure of any information about the affairs of a body corporate to a provisional *curator ad litem* or a *curator ad litem* would in the opinion of the body corporate be harmful to the interests of the body corporate, the Court may on an application for relief by that body corporate, and if it is satisfied that the said information is not relevant to the investigation, grant such relief.

(7) The Court may, if it appears that there is reason to believe that an applicant in respect of an application under subsection (2) will be unable to pay the costs of the respondent body corporate if successful in its opposition, require sufficient security to be given for those costs and the costs of the provisional *curator ad litem* before a provisional order is made.

PART II

BODY CORPORATE RULES & PARTICIPATION QUOTAS

Rules

8. (1) A scheme shall as from the date of the establishment of the body corporate be controlled and managed, subject to the provisions of this Act, by means of rules.

(2) The rules shall provide for the control, management, administration, use and enjoyment of the sections and the common property, and shall comprise—

- (a) management rules, prescribed by regulation, which rules may be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title register, to the extent prescribed by regulation, and which rules may be substituted, added to, amended or repealed from time to time by unanimous resolution of the body corporate as prescribed by regulation;
- (b) conduct rules, prescribed by regulation, which rules may be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title register, and which rules may be substituted, added to, amended or repealed from time to time by special resolution of the body corporate: Provided that any conduct rule substituted, added to or amended by the developer, or any substitution, addition to or amendment of the conduct rules by the body corporate, may not be irreconcilable with any prescribed management rule contemplated in paragraph (a).

(3) Any management or conduct rule made by a developer or a body corporate shall be reasonable, and shall apply equally to all owners of units put to substantially the same purpose.

(4) The rules referred to in subsection (2) shall as from the date of establishment of the body corporate be in force in respect of the building or buildings and land concerned, and shall bind the body corporate and the owners of the sections and any person occupying a section.

- (5) (a) If the rules contemplated in subsection (2) are substituted, added to, amended or repealed, the body corporate shall lodge with the registrar a notification in the prescribed form of such substitution, addition to, amendment or repeal.
- (b) The registrar shall not be involved in the enforcement or application of the rules contemplated in subsection (2) and is not required to

examine any substitution, addition, amendment or repeal thereof against any certificate or other document.

- (c) A substitution, addition, amendment or repeal contemplated in paragraph (a) shall come into operation on the date of filing of the notification referred to in that paragraph.

(6) The body corporate shall, on the application of any owner or any person having a registered real right in or over a unit, or any person authorized in writing by such owner or person, make any rules then in force available for inspection to such owner, person or authorized person.

(7) A developer or a body corporate may make rules which confer rights of exclusive use and enjoyment of parts of the common property upon members of the body corporate: Provided that such rules shall—

- (a) include a layout plan to scale on which is clearly indicated—
 - (i) the locality of the distinctively numbered exclusive use and enjoyment parts; and
 - (ii) the purposes for which such parts may be used;
- (b) include a schedule indicating to which member each such part is allocated.

Effect of quotas and variation thereof

9. (1) Subject to the provisions of subsection (2) of this section, the quota of a section shall determine—

- (a) the value of the vote of the owner of the section, in any case where the vote is to be reckoned in value;
- (b) the undivided share in the common property of the owner of the section; and
- (c) subject to the provisions of section 3(1)(b), the proportion in which the owner of the section shall make contributions for the purposes of section 3(1)(a), or may in terms of section 20(1) be held liable for the

payment of a judgment debt of the body corporate of which he is a member.

(2) Subject to the provisions of section 3(1)(b), the developer may, when submitting an application for the opening of a sectional title register, or the members of the body corporate may by special resolution, make rules under section 8(5) by which a different value is attached to the vote of the owner of any section, or the liability of the owner of any section to make contributions for the purposes of section 3(1)(a) or 20(1) is modified: Provided that where an owner is adversely affected by such a decision of the body corporate, his written consent must be obtained: Provided further that no such change may be made by a special resolution of the body corporate until such time as there are owners, other than the developer, of at least 30 per cent of the units in the scheme: Provided further that, in the case where the developer alienates a unit before submitting an application for the opening of a sectional title register no exercise of power to make a change conferred on the developer by this subsection shall be valid unless the intended change is disclosed in the deed of alienation in question.

PART III

DEALINGS WITH COMMON PROPERTY, SECTIONS AND EXCLUSIVE USE RIGHTS

Alienation and letting of common property

10. The owners and holders of a right of extension contemplated in section 25 of the Sectional Titles Act may by unanimous resolution direct the body corporate on their behalf to alienate common property or any part thereof, or to let common property or any part thereof under a lease, and thereupon the body corporate shall have power to deal with such common property or such part thereof in accordance with the direction, and to execute any deed required for the purpose.

Expropriation of common property

11. (1) Whenever the whole or any part of, or any right in, the common property is expropriated under the provisions of any law, service of a notice of expropriation on the body corporate shall be deemed to be service thereof on the

registered owner of every section in the building or buildings concerned, and each such owner shall be deemed to have appointed the trustees of the body corporate concerned as his duly authorized agents and representatives—

- (a) to negotiate and settle the compensation payable to him, and to that end to employ attorneys, advocates and other experts; and
- (b) on his behalf to receive and give valid acquittance for any compensation moneys paid.

(2) Any compensation moneys received by the trustees on behalf of the owners in terms of subsection (1), shall be paid to the owners in accordance with their participation quotas after they have received notice of such distribution in writing: Provided that an owner may notify the trustees before such moneys are so distributed that he considers *such a distribution inequitable*, in which event the compensation moneys shall be distributed—

- (a) in accordance with a division approved by unanimous resolution; or
- (b) in accordance with a division approved by an arbitrator, being a practising advocate of not less than ten years' standing or a practising attorney of not less than ten years' standing, nominated by the trustees.

Exercise of Right of Extension

12. The body corporate shall only exercise or alienate or transfer a right of extension of the scheme by the addition of sections in terms of section 25(6) of the Sectional Titles Act with the written consent of all the members of the body corporate as well as with the written consent of the mortgagee of each unit in the scheme: Provided that a member or mortgagee shall not withhold such approval without good cause in law.

Extension of common property

13. (1) A body corporate, authorized thereto in writing by all of its members, may purchase land to extend the common property.

(2) Land purchased by a body corporate in terms of subsection (1) shall be deemed to be owned by the owners of the sections in the building concerned in the same proportion as their participation quota as reflected on the relevant sectional plan.

Servitudes in favour of or burdening the land

14. The owners may by special resolution direct the body corporate—
- (a) to execute on their behalf a servitude or restrictive agreement burdening the land shown on the relevant sectional plan; and
 - (b) to accept on their behalf a servitude or restrictive agreement benefiting the said land.

Subdivision and consolidation of sections

15. If an owner proposes to subdivide a section or to consolidate two or more sections, the owner shall apply for the consent of the trustees of the body corporate, which consent shall not unreasonably be withheld.

Extension of sections

16. If an owner proposes to extend the boundaries or floor area of a section, the owner shall apply for the approval of the body corporate, authorized by a special resolution of its members.

Delineation and cession of exclusive use rights

17. (1) The body corporate, duly authorized thereto by a unanimous resolution of its members, may request the delineation and cession of exclusive use rights to particular owners in terms of sub-section 27(2) of the Sectional Titles Act.

(2) The body corporate may cede the right to the exclusive use of a part or parts of the common property delineated on the sectional plan to the owner or owners on whom such right has been conferred by the body corporate.

PART IV

OWNERS, ADMINISTRATORS AND BUILDINGS

Duties of owners

18. (1) An owner shall-
- (a) permit any person authorized in writing by the body corporate, at all reasonable hours on notice (except in case of emergency, when no notice shall be required), to enter his section or exclusive use area for the purposes of inspecting it and maintaining, repairing or renewing pipes, wires, cables and ducts existing in the section and capable of being used in connection with the enjoyment of any other section or common property, or for the purposes of ensuring that the provisions of this Act and the rules are being observed;
 - (b) forthwith carry out all work that may be ordered by any competent public or local authority in respect of his section, other than such work as may be for the benefit of the building generally, and pay all charges, expenses and assessments that may be payable in respect of his section;
 - (c) repair and maintain his section in a state of good repair and, in respect of an exclusive use area, keep it in a clean and neat condition;
 - (d) use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by other owners or other persons lawfully on the premises;
 - (e) 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;

- (f) notify the body corporate forthwith of any change of ownership in his section and of any mortgage or other dealing in connection with his section; and
 - (g) when the purpose for which a section is intended to be used is shown expressly or by implication on or by a registered sectional plan, not use nor permit such section to be used for any other purpose: Provided that with the written consent of all owners such section may be used for another purpose.
- (2)
- (a) Any owner who is of the opinion that any refusal of consent of another owner in terms of the proviso to subsection (1)(g) is unfairly prejudicial, unjust or inequitable to him, may within six weeks after the date of such a refusal make an application in terms of this subsection to the Court.
 - (b) If on any such application it appears to the Court that the refusal in question is unfairly prejudicial, unjust or inequitable to the applicant, and if the Court considers it just and equitable, the Court may with a view to bringing the dispute to an end make such order as it deems fit, including an order that it shall be deemed that the requirement stated in the proviso to subsection (1)(g) is met, an order that the provisions of section 14 of the Sectional Titles Act which the Court deems appropriate, shall be applied with reference to the amendment of the registered sectional plan in question, any other supplementary order as the Court deems fit, and an order concerning costs as it deems appropriate.

Insurance by owners

19. (1) Notwithstanding the existence of a valid policy of insurance effected by the body corporate pursuant to the provisions of section 3(1)(f), an owner may effect a policy of insurance in respect of any damage to his section arising from risks covered by the policy effected by the body corporate.

- (2) Where a policy of insurance contemplated in subsection (1) is in force, and—

- (a) where the damage to the section is made good by the body corporate pursuant to the provisions of section 3(1)(h), the insurer shall not be liable in terms of the policy of insurance effected by the owner;
 - (b) where the damage to the section is covered by the policy of insurance effected by the body corporate pursuant to the provisions of section 3(1)(f), but is not made good by the body corporate, the insurer shall be liable in terms of the policy of insurance effected by the owner; and
 - (c) where the damage to the section is not covered by the policy of insurance effected by the body corporate as aforesaid, the terms and conditions of the policy of insurance effected by the owner shall apply.
- (3) Nothing in this section contained shall limit the rights of an owner to insure against risks other than damage to his section.

Recovery from owners of unsatisfied judgment against bodies corporate, and non-liability of bodies corporate for debts and obligations of developers

20. (1) If a creditor of a body corporate has obtained judgment against the body corporate, and such judgment, notwithstanding the issue of a writ, remains unsatisfied, the judgment creditor may, without prejudice to any other remedy he may have, apply to the Court which gave the judgment, for the joinder of the members of the body corporate in their personal capacities as joint judgment debtors in respect of the judgment debt and, upon such joinder, the judgment creditor may recover the amount of the judgment debt still outstanding from the said members on a pro rata basis in proportion to their respective quotas or a determination made in terms of section 9(2): Provided that any member who has paid the contributions due by him or her in terms of section 3(1)(b) to the body corporate in respect of the same debt prior to the judgment against the body corporate may, not be joined as a joint judgment debtor in respect of the judgment debt.

(2) No debt or obligation arising from any agreement between the developer and any other person shall be enforceable against the body corporate.

Appointment of administrators

21. (1) A body corporate, a local authority, a judgment creditor of the body corporate for an amount of not less than R500, or any owner or any person having a registered real right in or over a unit, may apply to the Court for the appointment of an administrator.

(2) (a) The Court may in its discretion appoint an administrator for an indefinite or a fixed period on such terms and conditions as to remuneration as it deems fit.

(b) The remuneration and expenses of the administrator shall be administrative expenses within the meaning of section 3(1)(a).

(3) The administrator shall, to the exclusion of the body corporate, have the powers and duties of the body corporate or such of those powers and duties as the Court may direct.

(4) The Court may, in its discretion and on the application of any person or body referred to in subsection (1) remove from office or replace the administrator or, on the application of the administrator, replace the administrator.

(5) The Court may, with regard to any application under this section, make such order for the payment of costs as it deems fit.

Destruction of or damage to buildings

22. (1) The building or buildings comprised in a scheme shall, for the purposes of this Act, be deemed to be destroyed—

- (a) upon the physical destruction of the building or buildings;
- (b) when the owners by unanimous resolution so determine and all holders of registered sectional mortgage bonds and the persons with registered real rights concerned, agree thereto in writing; or
- (c) when the Court is satisfied that, having regard to all the circumstances, it is just and equitable that the building or buildings shall be deemed to have been destroyed, and makes an order to that effect.

(2) In any case where an order is made under subsection (1)(c), the Court may impose such conditions and give such directions as it deems fit for the purpose of adjusting the effect of the order between the body corporate and the owners and mutually among the owners, the holders of registered sectional mortgage bonds and persons with registered real rights.

(3) (a) Where the building or buildings is or are damaged or is or are destroyed within the meaning of subsection (1), the owners may by unanimous resolution, or the Court may by order, authorize a scheme—

- (i) for the rebuilding and reinstatement in whole or in part of the building or buildings;
- (ii) for the transfer of the interests of owners of sections which have been wholly or partially destroyed, to the other owners.

(b) In the exercise of their powers under this subsection, the owners may pass such resolution or the Court may make such order as they or it may deem necessary or expedient to give effect to the scheme, in connection with *inter alia*—

- (i) the application of insurance moneys received by the body corporate in respect of damage to or the destruction of the building or buildings;
- (ii) the payment of money by or to the body corporate or by or to the owners or by or to one or more of them;
- (iii) an amendment of the sectional plan so as to include in the common property an addition thereto or subtraction therefrom;
- (iv) the variation of the quota of any section; or
- (v) the imposition of conditions.

(4) An application may, for the purposes of this section, be made to the Court by the body corporate or by any owner or by any holder of a registered sectional mortgage bond or a registered lease or by any insurer who has effected insurance on the building or buildings or any section therein, or by the local authority.

(5) Any insurer who has effected insurance on the building or buildings or any part thereof (being insurance against destruction of sections or damage to the building or buildings) shall, on any application to the Court under this section, have the right to intervene in the proceedings.

(6) (a) The Court may, on the application of a body corporate or any member thereof or any holder of a registered real right concerned, or any judgment creditor, by order make provision for the winding-up of the affairs of the body corporate.

(b) The Court may, by the same or any subsequent order, declare the body corporate dissolved as from a date specified in the order.

(7) The Court may, with regard to any application under this section, make such order for the payment of costs as it deems fit.

(8) Where two or more buildings are comprised in a scheme, and only one or part of one of the said buildings is damaged or destroyed, the provisions of this section shall apply *mutatis mutandis* as if the said buildings were one building and part of such building has been damaged or destroyed.

Disposal on destruction of buildings

23. When in terms of section 22 the building or buildings comprised in a scheme is or are deemed to be destroyed and the owners have by unanimous resolution resolved not to rebuild the building or buildings, the body corporate shall lodge with the Registrar of Deeds a notification in the form prescribed under the Sectional Titles Act, 1986 of such destruction and a copy of the relevant resolution of the owners as certified by two trustees of the body corporate.

Valuation of land and buildings and recovery of rates by local authorities

24. (1) (a) When a local authority causes land and buildings comprised in a scheme to be valued for any lawful purposes, the land and buildings thereon shall, subject to the provisions of subsection (3), be valued as if they were owned by a single owner, and for the purposes of such valuation and all purposes incidental thereto (including an objection to a valuation), the land and

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buildings thereon shall be deemed to be owned by the body corporate.

- (b) A separate valuation shall be made of—
- (i) the land; and
 - (ii) the building or buildings.

(2) Subject to the provisions of subsection (3) of this section, and section 21, the local authority may recover any rates and taxes levied by it, from the body corporate.

(3) When by law provision has been made for the separate rating of units, each relevant unit shall for the purposes of valuation and the levying and recovery of rates by a local authority be deemed to be a separate entity.

PART V

MISCELLANEOUS

Sectional Titles Schemes Management Regulation Board

25. (1) There is hereby established a Sectional Titles Schemes Management Regulation Board (in this section referred to as the Regulation Board), which shall—

- (a) make recommendations to the Minister concerning any matter specified in section 26 in regard to which the Minister may make regulations;
- (b) keep the working and implementation of this Act and the regulations under regular review and which may make recommendations to the Minister in regard to any amendments or other action which may be advisable; and
- (c) advise the Minister on any matter referred to it by the Minister.

(2) The Regulation Board shall consist of the following members—

- (a) a person nominated by the Minister, who shall act as chairperson at the proceedings of the Regulation Board;

- (b) seven members appointed by the Minister, who shall consist of persons with a specialised knowledge of the management of sectional titles schemes, including—
- (i) an owner of a unit in a residential scheme;
 - (ii) an owner of a unit in a commercial scheme;
 - (iii) an owner of a unit in a retail scheme;
 - (iv) a managing agent nominated by the National Association of Managing Agents;
 - (v) a person nominated by the South African Property Owners Association;
 - (vi) a person nominated by the Banking Association of South Africa; and
 - (vii) an official of the Department of Human Settlements.

(3) For every member of the regulation board there shall be an alternate member appointed in the same manner as such member, and any alternate member so appointed shall act in the place of the member in respect of whom he has been appointed as alternate member, during such member's absence or inability to act as a member of the Regulation Board.

(4) The chairperson nominated in terms of subsection (2) may designate a person as an alternate chairperson when she or he is unable to attend.

(5) When any nomination in terms of subsection (2)(c)(i), (ii), (iii) or (iv) becomes necessary, the body concerned shall at the request of the Director-General furnish the nomination required for appointment to the Regulation Board, within a period of 60 days from the date of such request, failing which the Minister may appoint, subject to the provisions of that subsection, any suitable person as a member in place of the person he or she would have appointed if the said body had not so failed to nominate a person.

(6) A member of the Regulation Board appointed by the Minister shall hold office for the period determined by the Minister, but the Minister may, if in the Minister's opinion

there is good reason for doing so, terminate the appointment of such a member at any time before the expiration of such member's period of office.

(7) If a member of the Regulation Board dies or vacates his office before the expiration of that member's period of office, the Minister may, subject to the provisions of subsection (2)(c), appoint a person to fill the vacancy for the unexpired portion of the period for which such member was appointed.

(8) A member of the Regulation Board whose period of office has expired, may be reappointed.

(9) A member of the Regulation Board, excluding a member in the fulltime service of the State, shall, while he is engaged in the business of the regulation board, be paid such remuneration and travelling and subsistence allowances as the Minister, with the concurrence of the Minister of Finance, may determine.

(10) In the absence of the chairperson, the official of the Department of Human Settlements shall act as chairperson of the Regulation Board.

(11) (a) The Regulation Board shall from time to time meet at such times and places as are determined by the chairperson.

(b) The Minister may at any time direct the chairperson of the Regulation Board to convene a meeting of the board at a time and place specified by the Minister.

(12) (a) Five members of the Regulation Board, one of whom shall be a member referred to in subsection (2)(a), shall form a quorum for a meeting of the board.

(b) A decision of a majority of the members of the Regulation Board present at any meeting shall be a decision of the Regulation Board and, in the event of an equality of votes, the person presiding at the meeting shall have a casting vote in addition to his deliberative vote.

(13) The Regulation Board may regulate the proceedings at its meetings as it may think fit, and shall cause minutes of such proceedings to be kept.

Regulations

26. The Minister may, after consultation with the Sectional Titles Schemes Management Regulation Board, make regulations in regard to—

- (a) any matter required or permitted to be prescribed by regulation under this Act; and
- (b) generally, any matter which he considers necessary or expedient to prescribe in order that the purposes of this Act may be achieved.

Savings and transitional provisions

27. (1) Where an owner, prior to 1 June 1988, acquired in terms of an agreement or was granted in terms of rules made under the repealed Sectional Titles Act, 1971 or any other provision, the right to the exclusive use of a part or parts of common property, the body corporate concerned shall, if so requested by the owner, transfer such right to the owner in terms of section 60 of the Sectional Titles Act, 1986.

(2) Any reference in any law or document to a body corporate established in terms of the repealed Sectional Titles Act, 1971, or any other provisions as a 'Controlling Body' referred to in section 28(3) of that Act, shall after 1 June 1988 be construed as a reference to a 'body corporate' referred to in section 2 of this Act.

(3) Rules decided on by unanimous resolution under the repealed Sectional Titles Act, 1971, or any other provision before 1 June 1988 replacing rules contained in Schedule 1 to that Act, and at the said date not yet lodged with the registrar as contemplated in section 27(3) of that Act, did, where not so lodged within the said period, lapse and are deemed in any such case to have been replaced, subject to addition, amendment or repeal as contemplated in section 8(2)(a) by prescribed management rules contemplated in the last-mentioned section.

- (4) (a) Unaltered rules contained in Schedule 1 to the repealed Sectional Titles Act, 1971, or any other provision and applying immediately prior to 1 June 1988 in respect of any scheme, lapsed on that date, and such rules are deemed to have been replaced, subject to addition, amendment or repeal as contemplated in section 8(2)(a), by

prescribed management rules contemplated in those last-mentioned sections; and

- (b) unaltered rules contained in Schedule 2 to the repealed Sectional Titles Act, 1971, or any other provision and so applying in respect of any scheme, lapsed on that date, and such rules are deemed to have been replaced, subject to addition, amendment or repeal as contemplated in section 8(2)(b), by prescribed conduct rules contemplated in those last-mentioned sections.

(5) Any rules other than rules referred to in subsection (4) of this section, which applied in respect of a scheme immediately prior to 1 June 1988, shall, subject to such substitution, addition, amendment or repeal as contemplated in paragraph (a) or (b) of section 8(2) of this Act, as the case may be, remained in force after the said date, except to the extent that any such rule may be irreconcilable with any prescribed management rule contemplated in section 8(2)(a), in which case the management rule concerned applies: Provided that any such rules were as from 1 June 1988 deemed to be supplemented by any rule for which it did not make provision but for which provision was made in the prescribed rules.

(6) Any rule made under the Sectional Titles Act shall be deemed to have been made under this Act.

Amendment of Act 95 of 1986

28. The Sectional Titles Act, 1986 (Act No. 95 of 1986) is hereby amended to the extent set out in the Schedule.

Short title and commencement

29. This Act shall be called the Sectional Titles Schemes Management Act, 2009, and shall come into operation on a date to be fixed by the President by proclamation in the Gazette.

SCHEDULE**AMENDMENT OF THE SECTIONAL TITLES ACT, 1986****(ACT NO 95 OF 1986)****SECTION 28**

Provision	Extent of repeal or amendment
Preamble	<p>1. The substitution for the preamble of the following preamble:</p> <p>"To provide for the division of buildings into sections and common property and for the acquisition of separate ownership in sections coupled with joint ownership in common property; the control of certain incidents attaching to separate ownership in sections and joint ownership in common property; the transfer of ownership of sections and the registration of sectional mortgage bonds over, and real rights in, sections; the conferring and registration of rights in, and the disposal of, common property; [the establishment of bodies corporate to control common property and for that purpose to apply rules;] and the establishment of a sectional titles regulation board; and to provide for incidental matters."</p>
Section 1	<p>2. (a) The repeal of :</p> <ul style="list-style-type: none">(i) the definition of "rules";(ii) the definition of "special resolution";(iii) the definition of "unanimous resolution";(iv) subsection (2);

	<p>(v) subsection (3); and</p> <p>(vi) subsection (3A); and</p> <p>(b) the substitution for the existing definition of "body corporate" of the following definition:</p> <p>"'body corporate', in relation to a building and the land on which such building is situated, means the body corporate of that building [referred to in section 36 (1)] <u>as defined in the Sectional Titles Schemes Management Act</u>."</p>
Section 11	<p>3. The substitution for subsection (3)(e) of the following subsection:</p> <p>"(e) a certificate by a conveyancer stating that the rules prescribed in terms of <u>section 8 of the Sectional Titles Schemes Management Act</u> [section 35 (2)] are applicable, and containing the other rules (if any) substituted by the developer for those rules as contemplated in that section;"</p>
Section 17	<p>4. The substitution for subsections (1) and (2) of the following subsections:</p> <p>"(1) [The owners and holders of a right of extension contemplated in section 25 may by unanimous resolution direct the body corporate on their behalf to alienate common property or any part thereof, or to let common property or any part thereof under a lease, and thereupon] <u>If the direction contemplated in section 10 of the Sectional Titles Schemes Management Act has been obtained</u>, the body corporate shall notwithstanding any provisions of section 20 of the Deeds Registries Act, but subject to compliance with any law relating to the subdivision of land or to the letting of a part of land, as the case may</p>

	<p>be, have power to deal with such common property or such part thereof in accordance with the direction, and to execute any deed required for the purpose: Provided that if the whole of the right referred to in section 25 or section 60(1)(b) is affected by the alienation of common property, such right shall be cancelled by the registrar with the consent of the holder thereof on submission of the title to the right.</p> <p>(2) Any transaction in pursuance of a resolution referred to in [subsection (1)] <u>section 10 of the Sectional Titles Schemes Management Act</u> shall be accompanied by a copy of the relevant resolution, certified by two trustees of the body corporate: Provided that where the transaction in question requires to be notarially executed, such resolution so certified shall be produced to the notary public concerned and be retained by him in his protocol."</p>
Section 19	<p>5. (a) Repeal of subsections (1) and (2); and</p> <p>(b) substitution for subsection (3) of the following subsection:</p> <p><u>"(3) Whenever an expropriation has taken place in terms of section 11 of the Sectional Titles Schemes Management Act, the provisions of section 17 (3) (a) and (b) of this Act and sections 31 (4) and 32 (4) of the Deeds Registries Act shall apply mutatis mutandis to a transfer pursuant to an expropriation of land or a servitude or other real right in land comprising common property."</u></p>
Section 21	<p>6. Substitution for subsection (1) of the following subsection:</p> <p>"(1) If an owner of a section proposes to subdivide his</p>

	<p>or her section or to consolidate two or more sections registered in his or her name, he or she shall with the consent of the trustees of the body corporate, [which consent shall not unreasonably be withheld,] <u>as required in terms of section 15 of the Sectional Titles Schemes Management Act</u>, cause the land surveyor or architect concerned to submit the draft sectional plan of subdivision or consolidation, as the case may be, to the Surveyor-General for approval."</p>
Section 24	<p>7. Substitution for subsection (3) of the following subsection:</p> <p>"(3) If an owner of a section proposes to extend the boundaries or floor area of his or her section, he or she shall with the approval of the body corporate [, authorized by a special resolution of its members,] <u>as provided for in terms of section 16 of the Sectional Titles Schemes Management Act</u>, cause the land surveyor or architect concerned to submit a draft sectional plan of the extension to the Surveyor-General for approval."</p>
Section 25	<p>8. (a) repeal of subsection (3); and</p> <p>(b) substitution for subsection (6) of the following subsection:</p> <p>"(6) If no reservation was made by a developer in terms of subsection (1), or if such a reservation was made and for any reason has lapsed, the right to extend a scheme including the land contemplated in section 26, shall vest in the body corporate, which shall be entitled, subject to this section and after compliance, with the necessary changes, with the requirements of paragraphs (a), (b), (c), (d) and (g) of subsection (2), to obtain a</p>

	<p>certificate of real right in the prescribed form in respect thereof: [Provided that the body corporate shall only exercise or alienate or transfer such right with the written consent of all the members of the body corporate as well as with the written consent of the mortgagee of each unit in the scheme: Provided further that a member or mortgagee shall not withhold such approval without good cause in law.]"</p>
Section 26	<p>9. (a) Repeal of subsection (1); and</p> <p>(b) substitution for subsection (2) of the following subsection:</p> <p>"(2) Land purchased by a body corporate in terms of [subsection (1)] <u>section 13 of the Sectional Titles Schemes Management Act</u> shall be deemed to be owned by the owners of the sections in the building concerned in the same proportion as their participation quota as reflected on the relevant sectional plan."</p>
Section 27	<p>10. (a) Substitution for subsection (2) of the following subsection:</p> <p>"(2) A body corporate [, duly authorized thereto by a unanimous resolution of its members, may,] <u>may, if duly authorised in terms of section 17 (1) of the Sectional Titles Schemes Management Act</u> and subject to the provisions of section 5 (1), request an architect or land surveyor to apply to the Surveyor-General for the delineation on a sectional plan in the manner prescribed of a part or parts of the common property in terms of section 5 (3) (f) for the exclusive use by the owner or owners of one or more sections: Provided that no such</p>

	<p>delineation shall be made on the sectional plan in terms of this subsection if such delineation will encroach upon a prior delineation on the sectional plan of a part of the common property for the exclusive use by one or more of the owners.", and</p> <p>(b) substitution for subsection (3) of the following subsection:</p> <p>"(3) [The body corporate, duly authorized thereto by a unanimous resolution of its members, shall transfer the] <u>A right to the exclusive use of a part or parts of the common property delineated on the sectional plan in terms of subsection (2) shall be transferred</u> to the owner or owners on whom such right has been conferred by the body corporate by the registration of a notarial deed entered into by the parties and in which the body corporate shall represent the owners of all the sections as transferor."</p>
Section 27A	11. Repeal of section.
Section 29	<p>12. (a) Repeal of subsection (1); and</p> <p>(b) substitution for subsection (2) of the following subsection:</p> <p>"(2) Every [such] servitude or agreement referred to in section 14 of the <u>Sectional Titles Schemes Management Act</u> shall be embodied in a notarial deed and shall be registered by the registrar by noting such deed on the schedule of servitudes and conditions referred to in section 11 (3) (b) and on the title deeds of any party to such servitude or restrictive agreement whose title deeds are</p>

	registered in the land register.".
Section 32	13. Repeal of subsections (3) and (4).
Sections 35 to 48 (inclusive)	14. Repeal of sections.
Section 49	15. (a) Repeal of subsection (1); and (b) substitution for subsection (2) of the following subsection: "(2) Upon receipt of [such] a notification <u>in terms of section 23 of the Sectional Titles Schemes Management Act</u> the registrar shall make an entry thereof in the relevant sectional title register.".
Section 51	16. Repeal of section.
Section 55	17. Repeal of subsection (k).
Section 60	18. (a) Substitution for subsection (3) of the following subsection: " <u>(3) The right to the exclusive use of a part or parts of common property referred to in section 27(1) of the Sectional Titles Schemes Management Act shall be transferred to the owner concerned by the registration of a notarial deed entered into by the parties, in which the body corporate shall represent the owners of all relevant sections as transferor.</u> "; and (b) repeal of subsections (4) to (8) (inclusive).

Section 60A	<p>(a) Substitution for subsection (3) of the following subsection:</p> <p><u>"(3) The right to the exclusive use of a part or parts of common property referred to in section 27(1) of the Sectional Titles Schemes Management Act shall be transferred to the owner concerned by the registration of a notarial deed entered into by the parties, in which the body corporate shall represent the owners of all relevant sections as transferor.";</u></p> <p>and</p> <p>(b) repeal of subsections (4) to (8) (inclusive).</p>
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DEPARTMENT OF HUMAN SETTLEMENTS

MEMORANDUM ON THE OBJECTS OF THE SECTIONAL TITLES SCHEMES MANAGEMENT BILL, 2009

1. OBJECTS

- 1.1 The main aim of the Bill is, in respect of the management of sectional title schemes, to give effect to Cabinet's strategy to bring all housing-related legislation currently administered by other Departments under the administration of the Department of Human Settlements ("the Department"). In terms of the Breaking New Ground, the mandate of the Department has been expanded to encompass the entire residential market. One of the Department's tasks in the mandate is to ensure that all housing matters reside under one roof.
- 1.2 The Department of Rural Development and Land Reform is at present responsible for the administration of the Sectional Titles Act, 1986 (Act No. 95 of 1986) ("the Act") that currently deals with the survey and registration of sectional plans and the registration of real rights in sectional title units as well as the management and administration of sectional title schemes. The Department of Rural Development and Land Reform deals primarily with registration and survey issues. Its mandate does not extend to dealing with complaints from the public or dealing with problems arising from scheme governance.
- 1.3 The aim of the Sectional Titles Schemes Management Bill is to remove the scheme governance provisions currently contained in the Sectional Titles Act, as amended, and to incorporate these provisions in a new Act in a more user-friendly format but without changing the substance of the provisions

1.4 The Bill will —

1.4.1 remove the scheme management provisions from the Act;

1.4.2 incorporate the scheme management provisions in a new statute to be administered by the Minister of Human Settlements; and

1.4.3 re-arrange the scheme management provisions so as to make them more understandable to the members of the public and the persons and authorities who must implement these provisions, but without substantially changing their content.

1.5 The first part of the Bill contains definitions. The remainder of the Bill is divided into Parts, arranged as follows:

1.5.1 Part I deals with the establishment, membership, name, capacity, functions and powers of sectional title bodies corporate as well as the fiduciary duties of trustees.

1.5.2 Part II covers the rules applicable to bodies corporate and sectional owners and the allocation of participation quotas to sectional owners in a sectional title scheme.

1.5.3 Part III regulates legal transactions with regard to the common property, the sectional title units and the rights of exclusive use in a sectional title scheme.

1.5.4 Part IV deals with the duties of owners, insurance, recovery of unsatisfied judgment debts from owners, the appointment of an administrator for the scheme and the dissolution or

reconstruction of the scheme on destruction of or damage to the buildings in the scheme.

1.5.5 Part V deals with miscellaneous matters, including the establishment of a Sectional Titles Schemes Management Regulation Board to advise and make recommendations to the Minister.

1.6 Amendments to the Act are set out in a Schedule to the Bill.

1.7 The Act will retain all provisions regulating the survey and registration aspects of sectional title schemes and will continue to operate under the Minister of Rural Development and Land Reform.

1.8 The Sectional Titles Schemes Management Bill, 2009 has been drafted in close consultation with the Department of Rural Development and Land Reform and a copy of a letter from the Chief Registrar of Deeds dated 1 August 2008 approving the Bill in principle is attached to this Memorandum.

2. PERSONS CONSULTED

2.1 The Bill is to be published in the Gazette for public comment and will simultaneously be distributed to relevant stakeholders, institutions and government departments.

2.2 The Bill has been drafted in close consultation with the Department of Rural Development and Land Reform.

3. FINANCIAL IMPLICATIONS

The only cost that will be incurred at this stage is the cost of publication of the Bill in the *Government Gazette* for public comments, which costs will be defrayed from the Departments budget.

4. PARLIAMENTARY PROCEDURE

4.1 The State Law Advisers and the Department of Human Settlements are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 76(1) or (2) of the Constitution of the Republic of South Africa, 1996, since it falls within functional areas listed in Schedule 4 to the said Constitution, namely "Housing".

4.2 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.

NOTICE 1448 OF 2009
DEPARTMENT OF HUMAN SETTLEMENTS

COMMUNITY SCHEME OMBUD SERVICE BILL, 2009

I, Tokyo Mosima Gabriel Sexwale, Minister of Human Settlements hereby publishes the Community Scheme Ombud Service Bill, 2009 for public comment. A draft Bill together with a Memorandum on the Objects of the Bill is attached.

Interested persons and institutions are invited to submit written comments on the draft Bill on or before 30 November 2009 to the Director-General, Department of Human Settlements, for the attention of the following person:

Adv S S Burger

Street Address:

Room 502
Govan Mbeki House
240 Walkerstreet
Sunnyside
Pretoria
0002

Postal Address:

Private Bag X644
Pretoria
0001
Fax: (012) 421 1429
E-mail: santie.burger@dhs.gov.za

COMMUNITY SCHEME OMBUD SERVICE BILL

To establish the Community Scheme Ombud Service; to provide for its functions and powers; and to provide for matters connected therewith.

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa,
as follows:—

ARRANGEMENT OF BILL

	Section
Interpretation	1
PART I Community Scheme Ombud Service	2 – 37
PART II Applications	38 – 49
PART III Investigation and representation	50 – 53
PART IV Adjudicator's orders	54 – 58
PART V Levies and miscellaneous	59 – 61

Interpretation

Definitions

1. In this Act, unless the context indicates otherwise the following words and expressions and their derivatives shall have the specified meanings:

“adjudicator” means a person appointed to adjudicate over disputes in terms of section 49 of this Act;

“association” means any body which is responsible for the administration of a community scheme;

“Board” means the Governing Board contemplated in section 6 of this Act;

“chief executive officer” means the chief executive officer appointed in terms of section 14 of this Act;

“chief financial officer” means the chief financial officer appointed in terms of section 14 of this Act;

“common area” means any part of land and a building in a community scheme which is intended for common use;

“community scheme” means any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to a sectional titles development scheme, a share block company and a housing scheme for retired persons and **scheme** has the same meaning;

“Department” means the Department of Human Settlements;

“Director-General” means the Director-General in the National Department responsible for human settlements;

“dispute” means a dispute in regard to the administration of a community scheme between persons who have a material interest in that scheme, provided that one of the parties to the dispute must be the association, an occupier or an owner, acting individually or jointly;

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"executive committee" means the executive body of a community scheme, including but not limited to the trustees of a sectional title body corporate, the board of directors of a share block company and the management association of any housing scheme for retired persons;

"managing agent" means any person who provides management services to a community scheme for reward;

"mandate" means the mandate of the Service established in terms of section 3 of this Act;

"Minister" means the Minister responsible for human settlements;

"occupier" means a person who occupies a private area;

"ombud" means an ombud appointed by the Service to manage one of its regional offices;

"owner" means a person who has a legally secured right to possession and occupation of a private area, including but not limited to the owner of a sectional title unit, the holder of shares in a share block company and the holder of an occupation right in a housing scheme for retired persons;

"person" includes a natural person, association, partnership, trust, corporation, private or public entity and includes a person's representatives, successors and assignees;

"practice directive" means a practice directive made in terms of section 36 of this Act;

"private area" means any area in a community scheme set aside for separate occupation or ownership, excluding any common area;

"prescribe" means to prescribe by regulation made under this Act;

"Public Finance Management Act" means the Public Finance Management Act, 1999 (Act No. 1 of 1999);

"regulation" means a regulation made in terms of this Act;

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“Service” means the Community Scheme Ombud Service established by section 3 of this Act.

“scheme governance documentation” means any rules, regulations, articles, constitution, terms, conditions or other provisions that control the administration or occupation of private areas and common areas in a community scheme; and

“this Act” includes the regulations made under this Act.

PART I

COMMUNITY SCHEME OMBUD SERVICE

Purpose of Act

1. The purpose of this Act is to provide for the—
 - (a) establishment of the Service; and
 - (b) functions and operations of the Service.

Establishment of Service

2. (1) The Community Scheme Ombud Service is hereby established as a juristic person.

(2) The Service operates as a national public entity with its executive authority vested in the Minister.

Functions of Service

3. (1) The Service must—
 - (a) develop and provide a dispute resolution service in terms of this Act;
 - (b) provide training for adjudicators and other employees of the Service;

- (c) monitor and control the quality of all scheme governance documentation submitted to it in terms of the Sectional Titles Schemes Management Act, 2009; and
 - (d) take custody of, preserve and provide public access to sectional title and such other scheme governance documents as may be determined by the Minister from time to time.
- (2) In performing its functions the Service may—
 - (a) promote good governance of community schemes;
 - (b) provide education, information, documentation and services to assist—
 - (i) owners, occupiers, executive committees and other persons or entities who have rights and obligations in community schemes to become aware of those rights and obligations; and
 - (ii) members of the public to become aware of the rights and obligations existing in community schemes;
 - (c) monitor community scheme governance; and
 - (d) do all such other things as may be necessary to give effect to the provisions of this Act.

Mandate

5. (1) The Minister must, after consultation with MINMEC, conclude a written mandate with the Service as soon as possible, but not later than six months after the appointment of the Board.

- (2) The mandate must—
 - (a) contain the operational and performance indicators against which the performance of the Service is measured;

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- (b) contain specific service delivery targets that the Service must attain; and
- (c) contain directions regarding the utilisation of any surplus revenue.
- (3) The mandate may deal with any other matter that the Minister and the Service agree on.
- (4) The mandate must be reviewed every five years.
- (5) The mandate must be consistent with this Act.

Governing Board

- 6. (1) The Board is responsible for governing the Service.
- (2) The Board consists of—
 - (a) two executive members; and
 - (b) seven non-executive members.
- (3) The executive members may not be the Chairperson or Deputy Chairperson of the Board or members of any committee of the Board.
- (4) The Chairperson and Deputy Chairperson must be appointed by the Minister from the non-executive members of the Board.
- (5) The Board may designate any other non-executive member to act as Chairperson if both the Chairperson and Deputy Chairperson are absent or unable to perform any function.

Functions of Board

- 7. (1) The Board—
 - (a) must give effect to the mandate contemplated in section 5 and to the strategy of the Service in order to achieve the objectives of the Service;
 - (b) is the accounting authority of the Service;

- (c) takes decisions on behalf of the Service and gives effect to those decisions;
- (d) provides guidance to the *chief executive officer* concerning the exercise of the functions of the Service;
- (e) must notify the Minister immediately of any matter that may prevent or materially affect the achievement of the objects or financial targets of the Service; and
- (f) must refer to the Minister any matter concerning the adverse functioning of the Service.

Persons disqualified from membership of Board

8. A person may not be appointed as or remain a member of the Board if that person—

- (a) is an unrehabilitated insolvent or becomes insolvent and the insolvency results in the sequestration of that person's estate;
- (b) has been declared by a court to be mentally unfit;
- (c) has been convicted, in the Republic or elsewhere, of theft, fraud, forgery, perjury or any other offence involving dishonesty;
- (d) has been convicted of any other offence, whether in the Republic or elsewhere, committed after the Constitution of the Republic of South Africa, 1993 took effect, and sentenced to imprisonment without the option of a fine;
- (e) has been, or is, removed from an office of trust on account of misconduct in respect of fraud or the misappropriation of money;
- (f) is otherwise disqualified from serving as a member of a Board in terms of the Companies Act, 1973 (Act No. 61 of 1973); or
- (g) has or acquires an interest in a business or enterprise, which may conflict or interfere with the proper performance of the duties of a member of the Board.

Appointment and removal of members of Board

9. (1) For the appointment of non-executive members, other than those to be designated by any other Minister, the Minister must by notice in two newspapers and the *Gazette* invite all interested persons to submit, within the period and in the manner mentioned in the notice, the names of persons fit to be appointed as members of the Board.

(2) The Minister must appoint a nomination committee to make recommendations to the Minister for the appointment of the non-executive members of the Board.

(3) In establishing a nomination committee, the Minister must ensure that the committee is broadly representative of the various racial groups and geographic areas of the Republic and that both males and females are represented.

(4) The nomination committee, in making a recommendation for appointment to the Board by the Minister, must consider—

- (a) the proven skills, knowledge and experience of a candidate in areas of—
 - (i) risk management;
 - (ii) financial management;
 - (iii) dispute resolution in community schemes;
 - (iv) public education and training;
 - (v) management of community schemes;
 - (vi) community scheme governance documentation; or
 - (vii) development of community schemes; and
- (b) the need for representation of historically disadvantaged persons.

(5) If a suitable person or the required number of suitable persons are not nominated as contemplated in subsection (4), the Minister may call for further nominations in the manner set out in subsection (1).

(6) The Minister must appoint the non-executive members of the board and, by notice in the Gazette, within 30 days thereafter, publish the names of the members so appointed and the date of commencement of their terms of office.

(7) A non-executive member of the Board—

- (a) holds office for a period not exceeding three years;
- (b) may be reappointed but may not serve for more than two terms consecutively;
- (c) is appointed according to the terms and conditions determined by the Minister;
- (d) must be paid from the revenue of the Service such remuneration and allowances as may be determined by the Minister from time to time, taking into consideration regulations and guidelines issued by the Minister for the Public Service and Administration and the National Treasury; and
- (e) is appointed on a part-time basis.

(8) If, after due process, it is found that a member of the Board has become disqualified from membership of the Board in terms of section 8, the Minister must remove the member from the Board by written notice to the member.

(9) Any vacancy occurring in the Board in terms of section 10, must be filled in the same way as the departing member was appointed to the Board.

Resignation, removal from office and vacancies

10. (1) A member of the Board may resign by giving to the Minister—

- (a) one month's written notice; or

- (b) less than one month's written notice, with the approval of the Minister.
- (2) The Minister may remove a member of the Board if that member has—
 - (a) become disqualified;
 - (b) acted contrary to this Act;
 - (c) failed to disclose an interest or withdraw from a meeting as required; or
 - (d) neglected to properly perform the functions of his or her office.

Fiduciary duty and disclosure

11. (1) A member of the Board must, upon appointment, submit to the Minister and the Board a written statement in which it is declared whether or not that member has any direct or indirect financial interest which could reasonably be expected to compromise the Board in the performance of its functions.

(2) A member of the Board may not be present, or take part in, the discussion of or the taking of a decision on any matter before the Board in which that member or his or her family member, business partner or associate has a direct or indirect financial interest.

(3) If a member of the Board acquires an interest that could reasonably be expected to be an interest contemplated in this section, he or she must immediately in writing declare that fact to the Minister and the Board.

(4) If an organisation or enterprise in which a member of the Board has an interest contemplated in this section is requested to offer its services to the Service, or is in the process of concluding any agreement with the Service, including an agreement in respect of the alienation of land to the Service, the organisation or enterprise must immediately, in writing, declare the member's interest to the Minister and the Board.

(5) A Board member must perform his or her functions of office and at all times exercise utmost good faith, honesty and integrity, care and diligence in

performing a member's functions, and in furtherance of this duty, without limiting its scope, must—

- (a) take reasonable steps to inform himself or herself about the Service, its business and activities and the circumstances in which it operates;
- (b) take reasonable steps, through the processes of the Board, to obtain sufficient information and advice about all matters to be decided by the Board to enable him or her to make conscientious and informed decisions;
- (c) regularly attend all meetings;
- (d) exercise an active and independent discretion with respect to all matters to be decided by the Board;
- (e) exercise due diligence in relation to the business of, and necessary preparation for and attendance at meetings of, the Board and any committee to which the Board member is appointed;
- (f) comply with any internal code of conduct that the Service may establish for Board members;
- (g) not engage in any activity that may undermine the integrity of the Service;
- (h) not make improper use of their position as a member or of information acquired by virtue of his or her position as a member; and
- (i) treat any confidential matters relating to the Service, obtained in the capacity as a Board member, as strictly confidential and not divulge them to anyone without the authority of the Service or as required as part of that person's official functions as a member of the Board.

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(6) This section must be interpreted as adding to, and not deviating from, any law relating to the criminal or civil liability of a member of a governing body, and criminal or civil proceedings that may be instituted in respect of such a liability.

(7) A member who contravenes or fails to comply with these provisions is guilty of misconduct and commits an offence.

Committees

12. (1) The Board may from time to time appoint one or more committees.

(2) The Board must—

(a) assign members of the Board to serve on a committee, based on their knowledge and skills;

(b) determine the—

(i) terms of reference of a committee;

(ii) composition of a committee;

(iii) tenure of members on a committee;

(iv) reporting mechanisms of a committee; and

(v) methods and reasons for removal of a member from a committee.

(3) Non-executive members of the Board must make up the majority of the members of a committee.

(4) The Board may appoint specialists to a committee for their technical support.

(5) Unless specially delegated by the Board, a committee has no decision-making powers and can only make recommendations to the Board.

(6) A committee must meet as often as is necessary in order to carry out its functions and may determine its own procedures.

(7) Each committee must be chaired by a non-executive member of the Board.

Delegation and assignment of functions by Board

13. (1) The Board may, by a resolution passed by 75 per cent of its members,—

(a) delegate any of its powers and assign any of its duties to any member of the Board or any committee established in terms of section 12, the chief executive officer, the chief financial officer or any employee of the Service; and

(b) amend or revoke such delegation or assignment.

(2) Notwithstanding a delegation or assignment contemplated in subsection (1), the Board is not divested of any power or duty so delegated or assigned.

(3) (a) Any delegation or assignment contemplated in subsection (1)—

(i) may be made subject to such conditions as the Board may determine; and

(ii) must be communicated to the delegatee or assignee in writing.

(b) The written communication contemplated in paragraph (a)(ii) must contain full particulars of the matters being delegated or assigned and of the conditions subject to which the power may be exercised or the duty must be performed.

(4) The Board may not delegate—

(a) the power to appoint the chief executive officer; and

(b) its role in deciding on—

(i) the appointment of the chief financial officer;

(ii) the mandate; and

(iii) the strategic plan of the Service.

Appointment of chief executive officer and chief financial officer

14. (1) The Board must, with the approval of the Minister, appoint a chief executive officer and a chief financial officer to ensure that the Service meets its objects.

(2) The Board must invite applications for the posts of chief executive officer and chief financial officer by publishing advertisements in the media.

(3) A person appointed as chief executive officer or chief financial officer must—

- (a) have the qualifications or experience relevant to the functions of the Service;
- (b) have extensive knowledge of community schemes; and
- (c) not be disqualified as contemplated in section 8.

Conditions of appointment of chief executive officer and chief financial officer

15. (1) The appointment of the chief executive officer and chief financial officer is subject to the conclusion of an annual performance contract with the Service.

(2) The chief executive officer and the chief financial officer are appointed for a term of five years and may be reappointed for one additional term of five years.

(3) (a) The chief executive officer holds office on terms and conditions determined by the Board, in consultation with the Minister of Finance and the Minister for the Public Service and Administration.

(b) The chief financial officer holds office on terms and conditions determined by the chief executive officer within the limits determined by the Board.

(4) The chief executive officer and chief financial officer are executive members of the Board.

(5) The chief executive officer and chief financial officer are entitled to a remuneration package determined by the Board in consultation with the Minister.

(6) The chief executive officer and the chief financial officer are accountable to the Board.

Vacating of and removal from office of chief executive officer and chief financial officer

16. (1) The Board must, in consultation with the Minister and subject to applicable labour legislation, remove the chief executive officer and chief financial officer from office—

- (a) for misconduct;
- (b) for failing to perform the duties connected with that office diligently;
or
- (c) if the chief executive officer or the chief financial officer becomes subject to any disqualification contemplated in section 8.

(2) The chief executive officer and the chief financial officer may resign on written notice of at least 30 days to the Chairperson.

(3) The Board may suspend the chief executive officer or the chief financial officer during misconduct proceedings against him or her.

Acting chief executive officer and chief financial officer

17. (1) The Board may in writing appoint any senior employee of the Service to act as chief executive officer or chief financial officer when the holder of that office—

- (a) is temporarily unable to perform the duties connected with that office; or
- (b) has vacated or been removed from that office and a new chief executive officer or chief financial officer, as the case may be, has not yet been appointed.

(2) An acting chief executive officer or acting chief financial officer may exercise all the powers and must perform all the duties of the chief executive officer or chief financial officer, as the case may be.

Functions of chief executive officer

18. (1) The chief executive officer is head of the Service's administration.

(2) Subject to directives from the Board, the functions of the chief executive officer are to—

- (a) manage the affairs of the Service;
- (b) implement the policies and decisions of the Board;
- (c) manage and recruit employees; and
- (d) develop efficient, transparent and cost-effective administrative systems.

Functions of chief financial officer

19. The functions of the chief financial officer include—

- (a) risk management of the Service's projects;
- (b) assisting the Board with regard to compliance with its duties in terms of the Public Finance Management Act;
- (c) ensuring that money payable to the Service is properly collected;
- (d) ensuring that there is adequate control over the assets acquired, managed or controlled by the Service;
- (e) ensuring that the liabilities incurred on behalf of the Service are properly authorised;
- (f) ensuring efficiency and economy of operations and avoidance of fruitless and wasteful expenditure;

- (g) ensuring that the financial system is in line with generally accepted accounting practices and procedures;
- (h) ensuring an adequate budgeting and financial system; and
- (i) to provide sound financial control systems for the Service.

Delegation by chief executive officer and chief financial officer

20. (1) The chief executive officer and the chief financial officer may delegate to an employee of the Service any of his or her powers and assign any of his or her duties.

(2) Any delegation contemplated in subsection (1)—

- (a) may be made subject to such conditions as the Board may determine;
- (b) must be communicated to the delegatee in writing;
- (c) may be amended or withdrawn in writing by the chief executive officer or chief financial officer, as the case may be; and
- (d) does not prohibit the holder of the office that made the delegation from exercising that power or performing that duty.

(3) Notwithstanding a delegation or assignment contemplated in subsection (1), the chief executive officer or the chief financial officer, as the case may be, is not divested of any power or duty so delegated or assigned.

Staff of Service

21. (1) The Board must determine the staff establishment necessary to enable the Service to perform its functions, including an ombud and deputy-ombud for each regional Service office.

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(2) An employee is appointed subject to the terms and conditions determined by the chief executive officer in accordance with the policy and within the financial limits determined in accordance with a human resource policy approved by the Minister, which may make provision for non-pensionable allowances for employees.

(3) The chief executive officer must determine and supply each employee with a copy of the code of conduct, applicable to all members of staff of the Service and justiciable for purposes of disciplinary proceedings, to ensure—

- (a) compliance with applicable law;
- (b) the effective, efficient and economical use of the Service's resources; and
- (c) the promotion and maintenance of a high standard of professional ethics.

(4) A person in the employ of the Service becomes a member of the Government Employees' Pension Fund contemplated in section 2 of the Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996), and is entitled to pension and retirement benefits as if that person were in service in a post classified in a division of the public service.

(5) Staff from public entities reporting to the Minister may be employed by the Service subject to the provisions of the Labour Relations Act, 1995 (Act No. 66 of 1995), and the human resource policy referred to in subsection (2).

(6) Staff may also be transferred or seconded to the Service from the public service subject to the provisions of the Public Service Act, 1994 (Proclamation No. 103 of 1994), and the human resource policy referred to in subsection (2).

Funds of Service

22. (1) The funds of the Service consist of—

- (a) money appropriated by Parliament;

- (b) levies collected from community schemes with the approval of the Minister;
- (c) fees for services rendered based on cost recovery;
- (d) interest on investments of the Service;
- (e) loans raised by the Service, subject to section 23;
- (f) donations or contributions received by the Service with the approval of the Minister; and
- (g) subsidies and grants granted by the organs of State.

(2) The Service, subject to section 23, must utilise the funds to defray expenses incurred by it in the performance of its functions.

Application of Public Finance Management Act

23. (1) The Service is subject to the Public Finance Management Act and its financial management, preparation and submission of budgets, preparation of financial statements, audits and annual reports, and reporting must be done in accordance with the Public Finance Management Act.

(2) The powers of the Service must be exercised subject to the provisions of the Public Finance Management Act.

Tabling in Parliament

24. The Minister must table in Parliament the Service's annual report—

- (a) within 14 days after receiving the report, if Parliament is in session; or
- (b) if Parliament is not in session, within 14 days after the commencement of the next Parliamentary session.

Delegation by Minister

25. (1) The Minister may delegate to the Director-General any of his or her powers or assign any of his or her duties conferred or imposed on him or her by this Act.

(2) Any delegation contemplated in subsection (1)—

- (a) may be made subject to such conditions as the Minister may determine;
- (b) must be communicated to the delegatee in writing;
- (c) may be amended or withdrawn by the Minister in writing; and
- (d) does not prohibit the Minister from exercising that power or performing that duty.

(3) The Minister may not delegate the power to—

- (a) make regulations; or
- (b) appoint a member of the Board.

(4) (a) The Minister may issue a directive to the Director-General regarding the delegation contemplated in subsection (1).

(b) The Director-General must give effect to the directive contemplated in paragraph (a).

Additional functions

26. (1) The Minister may, in consultation with the Board, authorise the Service to perform any additional function not inconsistent with this Act.

(2) The authorisation contemplated in subsection (1) must be in writing, detailing the funding arrangements as well as the terms and conditions relating to the additional function.

Provision of information

27. (1) (a) Subject to Chapter 2 of the Constitution of the Republic of South Africa, 1996, the Minister may direct the Board to submit to him or her specific information.
- (b) The Board must comply within a directive contemplated in paragraph (a).
- (2) The Service must provide the Minister or a person authorised by the Minister with access to such books, accounts, documents and assets of the Service as the Minister may require.
- (3) The Minister may appoint a person to investigate the affairs or financial position of the Service and compliance by the Service with this Act and may recover from the Service the fees and disbursements incurred by that person during the investigation.
- (4) An individual member of the Board and an employee of the Service, if requested, must comply with subsections (1) and (2) to the extent that they are able to do so.

Intervention by Minister

28. (1) The Minister may direct the Service to take any action specified by the Minister if the Service—
- (a) is in financial difficulty or is otherwise being mismanaged;
 - (b) is unable to perform its functions effectively due to dissension among Board members;
 - (c) has acted unfairly or in a discriminatory or inequitable way towards a person to whom it owes a duty under this Act;
 - (d) has failed to comply with any law;
 - (e) has failed to comply with any directive given by the Minister under this Act; or

- (f) has obstructed the Minister or a person authorised by the Minister in performing a function in terms of this Act.

(2) A directive contemplated in subsection (1) must state—

- (a) the nature of the deficiency;
- (b) the steps which must be taken to remedy the situation; and
- (c) a reasonable period within which the steps contemplated in paragraph (b) must be taken.

(3) If the Service fails to remedy the situation within the stated period, the Minister may,—

- (a) after having given the Service a reasonable opportunity to be heard; and
- (b) after having afforded the Service a hearing on any submissions received,

replace the members of the Board or, where circumstances so require, appoint a person as an administrator who shall take over the relevant function of the Service until the members of the Board have been replaced.

(4) If the Minister appoints an administrator to take over a function of the Service in terms of subsection (3)—

- (a) the administrator may do anything which the Service might otherwise be empowered or required to do by or under this Act, to the exclusion of the Service;
- (b) the Board may not, while the administrator is responsible for that function, exercise any of its powers or perform any of its duties relating to that function; and
- (c) an employee or a contractor of the Service must comply with a directive given by administrator.

(5) Once the Minister is satisfied that the Service is once more able to perform its functions effectively, the Minister must terminate the appointment of the administrator.

(6) The costs associated with the appointment of an administrator shall be for the account of the Service.

Regulations

29 (1) The Minister must, after consultation with the Service and Parliament make regulations regarding—

- (a) meetings to be held by the Board;
- (b) regularity of meetings;
- (c) special meetings;
- (d) the taking of decisions at meetings;
- (e) convening of meetings and notices of meetings;
- (f) meetings by telephone or video conference or other means of communication;
- (g) quorums at meetings;
- (h) adjournment of meetings;
- (i) the person presiding at meetings;
- (j) minutes;
- (k) resolutions signed by members of the Board;
- (l) execution of documents, and
- (m) the proceedings of the Board.

(2) The Minister must, after consultation with the service and Parliament, make regulations regarding—

- (a) levies payable by schemes to the service and at what intervals such levies shall be payable;
- (b) which schemes shall be entitled to discounts or waivers of levies;
- (c) application, adjudication and other fees payable by persons who make use of the service;
- (d) which persons shall be entitled to discounts or waivers of fees, and
- (e) rates of interest payable on overdue levies and fees.

(3) The Minister may, after consultation with the Service and Parliament, make regulations regarding—

- (a) any matter that this Act requires or permits to be prescribed; and
- (b) generally, any ancillary or incidental, administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.

Dissolution

30. The Service may not be placed under judicial management or liquidation except on the authority of an Act of Parliament.

Security of information

31. A person may not disclose any information kept by the Service except—

- (a) in terms of and subject to any law that compels or authorises the disclosure;
- (b) if it is necessary for the proper functioning of the Service; or
- (c) if it is legally required for the purpose of monitoring, evaluating, investigating or considering any activity relating to the Service.

Documents relating to litigation

32. The Service must provide the Minister with copies of all pleadings, affidavits and other documents in its possession relating to any legal proceedings brought by or against the Service.

Limitation of liability

33. Neither the Service nor any employee of the Service is liable for any damage or loss caused by—

- (a) the exercise of a power or the performance of a duty under this Act; or
- (b) the failure to exercise a power, or perform a duty under this Act,

unless the exercise of or failure to exercise the power, or performance or failure to perform the duty was unlawful, grossly negligent or in bad faith.

Offences and penalties

34. (1) It is an offence to—

- (a) fail to provide access to any books, accounts, documents or assets when required to do so under this Act;
- (b) fail to comply with a directive issued under this Act;
- (c) fail or refuse to give data or information, or give false or misleading data or information when required to give information under this Act;
- (d) intentionally refuse to perform a duty or obstruct any person in the exercise of a power or performance of a duty in terms of this Act;
- (e) accept any unauthorised fees or reward, either directly or indirectly as a result of a person's position with the Service;
- (f) use the Service's name, logo or design without authority; or

(g) contravene or fail to comply with section 31.

(2) Any person who contravenes subsection (1) and has been found guilty, is liable, on conviction, to a fine or imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

(3) Where a person is convicted for a second or subsequent conviction for an offence contemplated in subsection (1), he or she is liable to a fine or imprisonment for a period not exceeding ten years or to both a fine and such imprisonment.

Independence of Service

35. (1) All Service employees shall act independently and impartially in making decisions with regard to the resolution of disputes.

(2) Once an application is referred to an adjudicator, an ombud shall have no role in relation to the substance of the dispute or the outcome sought by the applicant.

Practice directives

36. (1) The chief executive officer may issue practice directives in regard to any matter pertaining to the operation of the Service.

(2) Practice directives shall, subject to the provisions of this Act and the regulations, direct the performance of any act in the operation of the Service.

Privileges, immunities and non-waiver

37. (1) In performing functions in terms of this Act, the chief executive office, an ombud, a deputy ombud and an adjudicator shall have the same privileges and immunities from liability as a judge of the High Court.

(2) The privilege in respect of defamation that applies to any proceeding before the High Court and to the documents and statements in such proceedings shall apply to adjudication in terms of this Act.

(3) A person can not waive or limit the exercise of rights in terms of this Act or contract out of the provisions of this Act.

PART II

APPLICATIONS

Who may make an application

38. A person, including an association, may make an application if such person is a party to or affected materially by a dispute.

How an application is to be made

39. (1) An application shall be—
- (a) made as may be prescribed and required by practice directives;
 - (b) lodged with an ombud; and
 - (c) accompanied by the prescribed application fee.
- (2) The application shall include statements setting out —
- (a) the relief sought by the applicant, which shall be within the scope of one or more of the prayers for relief in section 40;
 - (b) the name and address of each person the applicant considers is affected materially by the application; and
 - (c) the grounds on which the relief is sought.

(3) If the applicant considers that the application qualifies for a discount or a waiver of adjudication fees, the application shall include a request for such discount or waiver.

Prayers for relief

40. An application made in terms of section 39 shall be for one or more of the following orders:

(1) In respect of financial issues:

- (a) An order requiring the association to take out insurance or to increase the amount of insurance.
- (b) An order requiring the association to take action under an insurance policy to recover an amount.
- (c) An order declaring that a contribution levied on owners or occupiers, or the way it is to be paid, is incorrectly determined or unreasonable, and an order for the adjustment of the contribution to a correct or reasonable amount or an order for its payment in a different way.
- (d) An order requiring the association to have its accounts, or accounts for a specified period, audited by an auditor specified in the order.

(2) In respect of behavioural issues:

- (a) An order that particular behaviour or default constitutes a nuisance and requiring an affected person to act, or refrain from acting in a specified way.
- (b) If satisfied that an animal kept in a private area or on shared areas is causing a nuisance or a hazard or is unduly interfering with someone else's peaceful use and enjoyment of another private area or shared areas, an order requiring the owner or occupier in charge of the animal—
 - (i) to take specified action to remedy the nuisance, hazard or interference, or
 - (ii) to remove the animal.
- (c) An order declaring that an animal is being kept in a community scheme contrary to the scheme governance documentation, and requiring the owner or occupier in charge of the animal to remove it.

- (d) An order for the removal of all articles placed on or attached illegally to parts of the common areas.
- (3) In respect of scheme governance issues:
- (a) An order requiring the association to record a new scheme governance provision consistent with a provision approved by the association.
 - (b) An order requiring the association to approve and record a new scheme governance provision.
 - (c) An order declaring that a scheme governance provision is invalid and requiring the association to approve and record a new scheme governance provision to remove the invalid provision.
 - (d) An order declaring that a scheme governance provision is, having regard to the interests of all owners and occupiers in the community scheme, unreasonable, and requiring the association to approve and record a new scheme governance provision—
 - (i) to remove the provision;
 - (ii) if appropriate, to restore an earlier provision;
 - (iii) to amend the provision; or
 - (iv) to substitute a new provision.
- (4) In respect of meetings:
- (a) An order requiring the association to call a general meeting of its members to deal with specified business.
 - (b) An order declaring that a purported meeting of the executive committee, or a purported general meeting of the association, was not validly convened.

- (c) An order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association—
 - (i) was void, or
 - (ii) is valid.
 - (d) An order declaring that a motion considered by a general meeting of the association for a resolution was not passed because of opposition that in the circumstances is unreasonable, and giving effect to the motion as proposed, or a variation of the motion as proposed.
 - (e) An order declaring that a particular resolution passed at a meeting is void on the ground that it unreasonably interferes with the rights of an individual owner or occupier or the rights of a group of owners or occupiers.
- (5) In respect of management services:
- (a) An order requiring a managing agent to comply with the terms of the person's contract of appointment and any applicable code of conduct or authorization.
 - (b) An order declaring that the association does or does not have the right to terminate an appointment as a managing agent, and that the appointment is or is not terminated.
- (6) In respect of works pertaining to private areas and common areas:
- (a) An order requiring the association to have repairs and maintenance carried out.
 - (b) An order requiring an affected person—
 - (i) to carry out specified repairs, or have specified repairs made, or

- (ii) to pay the applicant an amount fixed by the adjudicator as reimbursement for repairs carried out or to be carried out to the property by the applicant.
- (c) An order requiring the association—
 - (i) to carry out, within a specified time, specified works to or on the shared areas for the use, convenience or safety of owners or occupiers; or
 - (ii) not to carry out specified works.
- (d) An order declaring that the association's decision to reject a proposal to make improvements on or alterations to shared areas is an unreasonable decision, and requiring the association—
 - (i) to agree to the proposal; or
 - (ii) to ratify the proposal on specified terms.
- (e) An order requiring the association—
 - (i) to acquire, within a specified time, specified property for the use, convenience or safety of owners or occupiers;
 - (ii) not to acquire specified property; or
 - (iii) to dispose of specified property, within a specified time.
- (f) An order declaring that an owner or occupier reasonably requires exclusive use rights over a certain part of the shared areas, that the association has unreasonably refused to grant such rights and requiring the association to give exclusive use rights to the owner or occupier on terms (that may require a payment or periodic payments to the association) over a specified part of the shared areas.
- (g) An order obliging an owner or occupier to accept obligations in respect of a defined part of a common area.

(7) In respect of general and other issues:

- (a) An order declaring that the applicant has been wrongfully denied access to information or documents, and requiring the association to make such information or documents available within a specified time;
- (b) Any other order approved by the chief executive officer.

Further information or material for applications

41. After receiving the application, an ombud may—

- (1) require the applicant to submit further information or documentation in regard to the application;
- (2) require information to be verified; and
- (3) require the applicant to provide evidence that attempts to mediate the dispute have proved unsuccessful.

Time limit on certain applications

42. An application for an order declaring any decision of an association or an executive committee to be void may not be made later than 60 days after the relevant act.

Rejection of applications

43. An ombud shall reject an application by written notice to the applicant if—

- (1) the relief sought is not within the jurisdiction of the service;
- (2) the applicant fails to comply with a requirement of the ombud in terms of section 11;
- (3) within 14 days after delivery of a notice by the ombud, the ombud does not receive written confirmation from the applicant that the applicant wishes to proceed with the application;

(4) the ombud is satisfied that the dispute should be dealt with in a Court or other tribunal of competent jurisdiction; or

(5) the application does not, in the opinion of the ombud, qualify for the discount or waiver of adjudication fees applied for.

Notice to affected persons and association

44. (1) Unless an application is rejected, the ombud shall serve notice on—

- (a) the association; and
- (b) each person the ombud considers is affected materially by the application,

which notice shall—

- (i) include details of the relief sought in terms of the application;
- (ii) include details of the place and times where the documentation relating to the application can be inspected;
- (iii) confirm whether or not the application qualifies for a discount or waiver of adjudication fees;
- (iv) invite written submissions in regard to the application, and
- (v) draw attention in the prescribed form to the right of representation.

(2) If the application affects owners or occupiers generally, or a particular class of the owners or occupiers, the ombud need not serve a copy of the notice on each affected person individually, but may instead serve notice in a way that ensures, as far as reasonably practicable, that the notice comes to the attention of all owners or occupiers or all members of the class.

Notice to applicant

45. The ombud shall give an applicant notice of any submissions received and give the applicant an opportunity to—

- (1) inspect the submissions; and
- (2) make a written response relating only to issues raised in the submissions.

Amendment or withdrawal of application

46. (1) The ombud shall have a discretion to grant or deny permission to amend the application or to grant permission subject to specified conditions at any time before the ombud refers the application to an adjudicator.

(2) The applicant may withdraw the application at any time before the ombud refers that application to an adjudicator.

Inspection of documentation

47. (1) The ombud shall, on application by an affected person, allow the person to inspect and obtain copies of —

- (a) the application;
- (b) submissions made in regard to the application;
- (c) the applicant's response to the submissions; and
- (d) the ombud's current list of adjudicators.

(2) An application in terms of this section shall be accompanied by the prescribed fee.

Attempt to negotiate settlement of disputes

48. On acceptance of an application and after receipt of any submissions from affected persons or responses from the applicant, if the ombud considers that there is a reasonable prospect of a negotiated settlement of the disputes set out in the application, the ombud may contact the applicant and any of the affected persons with a view to facilitating a settlement of such disputes.

Referral to adjudicator

49. (1) After acceptance of an application and receipt of any submissions from affected persons or responses from the applicant the ombud may attempt to facilitate a settlement in terms of section 48, but if the ombud does not do so or at any stage considers that such process is unlikely to succeed, the ombud shall refer the application together with any submissions and responses thereto to an adjudicator.

(2) If the application qualifies for a waiver or discount of service fees, the ombud shall refer the application to an adjudicator chosen by the ombud.

(3) If the application does not qualify for a waiver of service fees, the ombud shall give the applicant and the affected parties an opportunity to choose an adjudicator from the ombud's list and, if a specific adjudicator is agreed upon, the ombud shall refer the application to the agreed adjudicator: Provided that if a specific adjudicator is not agreed upon the ombud shall refer the application to an adjudicator chosen by the ombud.

(4) The ombud shall give the applicant and all affected parties notice of the referral and, in the case of an application to which no waiver of service fees applies, shall include in such notice details of the costs of the adjudicator's services and the manner in which payment shall be made and secured.

PART III**INVESTIGATION AND REPRESENTATION****Adjudication fees**

50. An adjudicator shall not proceed to investigate an application until the prescribed adjudication fees have been paid or secured to the ombud's satisfaction.

Investigation by adjudicator

51. The adjudicator shall investigate an application to decide whether it would be appropriate to make an order and in this process—

- (1) shall observe the principles of due process of law; and
- (2) shall act as quickly, and with as little formality and technicality as is consistent with a proper consideration of the application, and shall not be obliged to apply the rules of evidence.

Investigative powers of adjudicator

52. (1) When considering the application, the adjudicator may—
- (a) require the applicant or an affected person—
 - (i) to give to the adjudicator further information or documentation;
 - (ii) to give information in the form of an affidavit or affirmation; and
 - (iii) subject to reasonable notice being given of the time and place, to come to the office of the adjudicator for an interview;
 - (b) require a managing agent to surrender any documentation relating to the application;
 - (c) invite persons which the adjudicator considers may be able to help resolve issues raised by the application to make written submissions to the adjudicator within a specified time; and
 - (d) enter and inspect—
 - (i) an association asset, record or other document;
 - (ii) any private area; and
 - (iii) any shared area (including a shared area subject to an exclusive use arrangement).

(2) The adjudicator shall give reasonable notice to the executive committee or occupier of any private area or shared area to be entered in terms of subsection (1)(d).

(3) The association or any other person who is in possession of an association's records must, if required by an adjudicator and without payment of a fee—

- (a) allow the adjudicator access to the records within 24 hours after being notified of the adjudicator's requirement; and
- (b) provide the adjudicator with copies of the records.

(4) Any person who fails to comply with a requirement in terms of subsection (1) or (3), or unreasonably obstructs an adjudicator in the conduct of an investigation, commits an offence.

Legal representation

53. In the process carried out by an adjudicator, the applicant and any affected person shall be entitled to legal representation.

PART IV – ADJUDICATOR'S ORDERS

Order dismissing an application

54. (1) The adjudicator shall make an order dismissing the application if, after investigation, —

- (a) the adjudicator considers that the application is frivolous, vexatious, misconceived or without substance; or
- (b) the applicant fails to comply with a requirement in terms of section 52.

(2) If the adjudicator makes an order in terms of subsection (1)(a), the adjudicator—

- (a) may order costs against the applicant to compensate an affected person for loss resulting from the application; and
 - (b) in ordering the costs, shall have regard to any previous applications made by the applicant.
- (3) The amount of costs ordered in terms of subsection (2) shall not be more than the maximum amount prescribed.

Order dealing with application

55. (1) If the application is not dismissed, the adjudicator shall make an order—
- (a) granting or refusing each part of the relief sought by the applicant;
 - (b) in the case of an application which does not qualify for a waiver of adjudication fees, apportioning liability for costs;
 - (c) including a statement of the adjudicator's reasons; and
 - (d) drawing attention in the prescribed form to the right of appeal.
- (2) An order may require a person to act, or refrain from acting in a specified way.
- (3) The order may contain such ancillary and ensuing provisions as the adjudicator considers necessary or appropriate.
- (4) The order shall fix the time—
- (a) when the order takes effect; or
 - (b) within which the order must be complied with.
- (5) The adjudicator's order may provide that the order shall have the effect of any type of resolution or decision provided for in the scheme governance documentation.

Notice of order to be given

56. (1) An adjudicator shall deliver a copy of an order made in terms of this Act to—

- (a) the applicant;
- (b) the association;
- (c) any other affected person; and
- (d) the ombud.

(2) If the order affects owners or occupiers generally, or a particular class of the owners or occupiers, the adjudicator need not serve a copy of the order on each affected person individually, but may instead serve notice in a way that ensures, as far as reasonably practicable, that the order comes to the attention of all owners or occupiers or all members of the class.

Enforcement of orders

57. (1) If an adjudicator's order is for the payment of an amount of money or any other relief which is within the jurisdiction of the Magistrates Court, the order may be enforced as if it were a judgment of such court and a clerk of such a Court shall, on lodgment of a copy of the order, register it as an order in such Court.

(2) If an adjudicator's order is for the payment of an amount of money or any other relief which is beyond the jurisdiction of the Magistrates Court, the order may be enforced as if it were a judgment of the High Court and a registrar of such a Court shall, on lodgment of a copy of the order, register it as an order in such Court.

Right of appeal

58. (1) An applicant, the association or any affected person who is dissatisfied by an adjudicator's order may appeal to the High Court, but only on a question of law.

(2) An appeal against an order may not be initiated later than 30 days after the date of delivery of the adjudicator's order and shall be made in accordance with prescribed provisions.

(3) A person who appeals against an order may also apply to the High Court to stay the operation of the order appealed against to secure the effectiveness of the appeal.

PART V

LEVIES AND MISCELLANEOUS

Public access to information in regard to orders

59. (1) On receiving an application accompanied by the prescribed fee, the ombud shall make available to the applicant—

- (a) a statement indicating whether an order has been made within the previous 6 years in terms of this Act with regard to a community scheme identified in the application and, if so, a copy of the order; and
- (b) a copy of every order made in respect of the community schemes specified in the application.

(2) The Service shall publish and make any of the following available for inspection by the public—

- (a) a copy of an order made at any time in terms of this Act; and
- (b) the reasons for the order.

Levies

60. Subject to such discounts and waivers as may be prescribed, every community scheme shall pay to the service the levy prescribed from time to time in accordance with practice directives.

Short title and commencement

61. This Act is called the Community Schemes Ombud Service Act, 2009 and shall come into operation on a date to be determined by the President by proclamation in the Gazette.

DEPARTMENT OF HUMAN SETTLEMENTS

MEMORANDUM ON THE OBJECTS OF THE COMMUNITY SCHEME OMBUD SERVICE BILL, 2009

1. OBJECTS

- 1.1 The Community Scheme Ombud Service Bill establishes a dispute resolution service for all 'community schemes', being those property developments (including sectional titles schemes, share block companies, homeowners associations and housing schemes for retired persons) in which there is governance by the community involved, shared financial responsibility and land and facilities used in common, whatever the particular title or tenure arrangements.
- 1.2 An ever-increasing proportion of housing is being developed in the form of community schemes. Because they involve control and administration of finances, facilities and behaviour, community schemes give rise to problems and disputes amongst participants which require effective resolution. Currently there is no effective and affordable dispute resolution mechanism available to parties involved in community schemes.
- 1.3 The Department of Rural Development and Land Reform, in addition to its core land survey and deeds registration functions, is currently responsible for the custody and administration of sectional title governance documentation. The governance of schemes falls outside the Department of Rural Development and Land Reform's mandate and the Bill provides for these functions to be taken over by the Community Scheme Ombud Service.

1.4 The Bill will:

1.4.1 establish the Community Scheme Ombud Service as a national public entity with executive authority vested in the Minister of Human Settlements;

1.4.2 provide a framework for the avoidance and resolution of disputes in community schemes and the custody of community scheme governance documentation determined by the Minister of Human Settlements.

1.5 The first section of the Bill contains definitions. The remainder of the Bill is divided into Parts, arranged as follows:

1.5.1 Part I -dealing with the establishment of the Community Scheme Ombud Service, detailing its mandate and functions, the constitution and operations of its governing board, the offices of chief executive officer and chief financial officer of the Service, its staff and funding, and ancillary matters;

1.5.2 Part II - covering the procedure and scope of applications for relief made to the Service;

1.5.3 Part III - regulating investigation of issues arising from applications for relief and the rights of parties to representation;

1.5.4 Part IV - details the orders adjudicators may make in resolving community scheme disputes and the right of parties to appeal against orders; and

- 1.5.5 Part V - dealing with public access to information in regard to orders, levies payable by community schemes and miscellaneous matters.

2. PERSONS CONSULTED

- 2.1 The Bill is to published in the *Gazette* for public comment and will simultaneously be distributed to relevant stakeholders, institutions and government departments.
- 2.2 The Bill has been drafted in close consultation with the Department of Rural Development and Land Reform.

3. FINANCIAL IMPLICATIONS

- 3.1 The only cost that will be incurred at this stage is the cost of publication of the Bill in the *Government Gazette* for public comments, which costs will be defrayed from the Departments budget.
- 3.2 The Department will also, later during the process, incur the costs of the establishment of the Community Scheme Ombud Service. Thereafter it is envisaged that the Community Scheme Ombud Service will be self funding. Once the Bill has been published for comment and the engagements with Treasury has been completed, the Bill together with the Business Case will be re-submitted to Cabinet for approval for introduction into Parliament.

4. PARLIAMENTARY PROCEDURE

- 4.1 The State Law Advisers and the Department of Human Settlements are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 76(1) or (2) of the Constitution of the Republic of South Africa, 1996, since it

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falls within functional area listed in Schedule 4 to the said Constitution, namely "Housing".

- 4.2 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.
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