

Many faces of sectional title: a comparative survey of the inadequate legal treatment of non-residential sectional title schemes

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1 Introduction

Although sectional titles¹ were primarily introduced to meet the growing need for residential accommodation within commuting distance from urban centres, nothing precluded the institution from being utilised for mixed schemes and various kinds of non-residential developments.² The aim of this contribution is to give an overview of the various kinds of non-residential strata developments encountered in Europe, Australia, Canada and the United States and to highlight the advantages of non-residential sectional title schemes compared with the more typical alternatives. The alternatives are commercial, industrial and office units developed on separate plots of land and multi-unit rental schemes containing commercial, industrial and office units leased to businessmen and industrial and professional tenants. It will then be shown that due to the focus on residential schemes, non-residential schemes are inadequately regulated in the various condominium and strata title statutes. The conclusion will focus on the South African non-residential sectional title industry to determine the extent to which the relevant provisions of the Sectional Titles Act³ fall short of the demands of the market.

2 Various kinds of non-residential strata title schemes

The initial aim of strata title or apartment ownership was to meet the urgent need for accommodation in settlements all over the world. A growing number of communities had formed around Egyptian oases, and within ancient Middle Eastern cities and medieval European walled cities, resulting in a need for suitable housing. Furthermore, after the two world wars the demands for home-ownership by thousands of displaced soldiers and other individuals needed to be catered for in order to achieve social, economic and political stability.⁴ Nevertheless, the roots of non-residential apartment ownership go back further, and stalls in the Beirut bazaars were owned from early on by individual traders⁵ and mixed-use and commercial condominiums in the form of ownership of storeys (*Geschosseigentum*), ownership of floors (*Étageigentum*), ownership rights in cellars (*Kellerrecht*) and

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¹ Called strata titles in Australia, condominium in the United States and *Wohnungseigentum* (apartment ownership) in Germany.

² Van der Merwe *European Condominium Law* (2015) 60-61.

³ Act 95 of 1986.

⁴ Van der Merwe (n 2) 9-10, 17 and 22-23.

⁵ Aeby, Gevers and Tombroff *La Propriété des Appartements. Ses Aspects Juridiques et Pratiques* (1983) 41.

ownership of rooms (*Gelasseigentum*), are recorded to have existed in medieval German, French, Italian, Swiss and Southern Dutch towns.⁶ Ownership rights in cellars in multi-unit residential buildings served as storage places, shops, butchers and abattoirs, and ownership of individual rooms in residential buildings was often transferred to farmers and businessmen as barns, stables, studios or repair shops.⁷ Subsequently, strata title statutes in various jurisdictions⁸ expressly extended strata title application to non-residential multi-unit buildings such as shopping centres, industrial parks, office buildings, motels, hotels, resort condominiums and mixed-use condominiums.⁹ The commercial utilization of the condominium concept appears to be more developed in the United States, Canada and Brazil than in Europe.¹⁰

In addition, most European, United States, Australian and Canadian jurisdictions have deviated from the requirement that strata title units must have permanent walls, floors and ceilings and also allow spaces which are clearly demarcated (such as parking bays and storage places) to be structured as units in commercial strata title schemes. Thus strata title schemes consisting of mesh-wire storerooms or clearly painted parking bays in a storage building or a parking garage are often used to supplement storage and parking shortages in nearby residential condominiums.¹¹ In several jurisdictions street markets and underground shopping malls and even cemeteries are developed under the strata titles regime, with the clearly demarcated stands and graves sold to businessmen and relatives of the deceased person respectively.¹² The Netherlands and the American Uniform Condominium legislation explicitly made it possible to structure bare-land or caravan site strata title schemes and dockminiums consisting of demarcated mooring water spaces

⁶ Van der Merwe (n 2) 17-19.

⁷ Goepfert *Das Stockwerkseigentum* (1952 thesis Univ of Heidelberg, Germany) 17.

⁸ See in general Goldstein, Lipson, Rohan and Shapiro "Commercial and industrial condominiums: an overall analysis" 1974 *St John's Law Review* 817; Jackson "Missouri's Condominium Property Act: time for a change" 1977 *Missouri Law Review* 271: "Enlightened promoters or developers could expand the condominium theory into areas such as commercial shops and shopping centers, industrial parks or plants, agricultural or livestock condominiums, cemeteries, mobile home parks, marinas, camping areas, and even fractional time period ownership." See 2015 Minnesota Statutes § 515.02[2] "'Apartment' means a part of the property ... in a building intended for any type of independent use, including, but not restricted to, commercial, industrial, or residential use"; New Jersey 2013 New Revised Statutes § 46:8B-3: "'Unit' means a part of the condominium property designed or intended for any type of independent use ..."

⁹ Germany: Law on Apartment Ownership §§ 1 par 1 and 3; *Gesetz über das Wohnungseigentum und das Dauerwohnrecht – Wohnungseigentumsgesetz* of 15 March 1951, *BGBI* 1951 I 175 (*WEG*); Herold "Die Bedeutung des WEG für Geschäftsräume" 1960 *Blätter für Grundstücks-, Bau- und Wohnungsrecht (BIGBW)* 342-343; England: CLRA 2002 s 1; Scotland: Scottish Law Com No 162 par 4.1; Denmark: Law on Owner Apartments § 1 par 2; Poland: Law on Unit Ownership a 2 s 2. For cemeteries structured as condominiums see Clurman *Business Condominium: a New Form of Business Property Ownership (Real Estate for Professional Practitioners)* (1973) 165 ff.

¹⁰ Van der Merwe "Apartment ownership" in Drobnig and Zweigert (eds) VI *International Encyclopedia of Comparative Law: Property and Trust* ch 5 32-39; Clurman (n 9) 9-10. As early as 1963, eg 80 per cent of the commercial buildings in Sao Paulo and Rio de Janeiro were condominiums.

¹¹ Van der Merwe (n 2) 62.

¹² See Van der Merwe (n 2) 62-63 citing *inter alia* Catalan a 553-2.2 civil code (CC) for structuring grave yards as condominiums. For cemeteries structured as condominiums in the United States, see Clurman (n 9) 165 ff.

for boats and yachts structured around piers or jetties in lakes or at the seaside.¹³ In the United States airspace or “lollipop” strata title schemes are structured in the air space above existing buildings or railway stations erected on heavy load bearing shafts which are firmly attached to the land.¹⁴

3 *Advantages of commercial sectional title units in multi-unit buildings compared to freestanding (standalone) commercial buildings on separate parcels of land*

At the risk of stating the obvious, available land is used more efficiently by constructing multi-unit commercial, industrial or office sectional title schemes on single parcels of land rather than constructing individually owned freestanding non-residential buildings on separate parcels of land. For example, instead of erecting four single-storey factories on four separate industrial stands, a developer can erect one four-storey industrial building on one industrial stand with each storey structured as a separate industrial unit. Thus a number of entrepreneurs may combine to erect a condominium building on industrial land to house a chemical factory, a factory producing medical instruments and an electronic engineering equipment factory on the different floors of the building. Such economic use of available space may be a very important consideration for industrial developers who encounter serious land cost and availability problems.¹⁵

Commercial condominiums on the other hand are especially popular with businessmen who want to establish themselves in a specific location where buying a building or constructing their own premises is not practical. Small tradesmen and firms can buy condominium units that range from 1,200 to 50,000 square feet

¹³ Dutch a 5:106 par 4 CC. See also Catalan a 553-53 to 553-559 CC. For the United States, see Uniform Common Interest Ownership Act (UCIOA) s 1-103(28) “‘Real estate’ means any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests that by custom, usage, or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. The term includes parcels with or without upper or lower boundaries and spaces that may be filled with air or water.” See also Uniform Condominium Act § 1-103(21) (1980); Uniform Common Interest Ownership Act § 1-103(26) (1994).

¹⁴ See Wolf *Powell on Real Property* (2015) ch 18A “Airspace Projects”; Rait “Lollipop condominiums: air rights, the takings clause, and disclosure under New York’s new guidelines” 1989 *Real Estate Law Journal* 335; Mandel and Donohoe “Using the lollipop condominium to revitalize city space” 1987:3 *The Practical Real Estate Lawyer* 55-74; Sandberg “Three-dimensional partition and registration of subsurface land space” 2003-04 *Israel Law Review* 138-141; Van Atta “Mixed-use, mixed ownership developments, air space subdivision: techniques and issues” article prepared for use in the March 2003 program for the American College of Real Estate Lawyers 2 3. Van Atta provides the following example: “Where there is an existing building which cannot be removed, either because of historical landmark status or other compelling reason, the landowner may desire to develop additional facilities above the existing building. In this situation, the developer essentially is developing the airspace situated above the existing building as a separate structure on the same parcel of land, perhaps with certain tie-ins with respect to the existing building for structural support and access for a variety of different utility installations. Therefore, from a vertical view, you would have a separate airspace parcel for the existing structure and a separate air space parcel for the new structure. The airspace for the new improvements could be divided, or subdivided, into more than one airspace ownership. Extending from the airspace for the new structure, through or adjacent to the old structure to the ground and/or basement, would be a stem-like protrusion through which access for location of elevators, stairways and various utility facilities would be provided. This stem for access of such facilities could be created as a reciprocal easement, an exclusive easement, or as an extended portion of the fee of the airspace parcel of the new structure” 3.

¹⁵ See Stokes “Commercial condominiums: statutory roadblocks to development” 1981-82 *University of Florida Law Review* 432 437; See also n 34 below for another example.

inside large buildings in most of the large cities of the world and utilise them as shops, cinemas, parking garages, warehouses, hotels, motels and small factories. Printers and lithographers may combine with other entrepreneurs in the graphic arts industry. An electrical and a plumbing contractor could combine, and a paper distributor and an interior decorator may combine with a home equipment specialist to develop a commercial condominium to house their particular businesses.¹⁶

One would think that most professionals would prefer to conduct their professions in multi-unit condominium buildings rather than on freestanding properties that they could hardly afford. These professionals include medical doctors, dentists, lawyers, architects, engineers, land surveyors, economic advisers as well as officials of religious denominations and non-profit organizations. For example, a group of doctors may utilise a condominium to accommodate a medical centre comprising consulting rooms, a private hospital and a chemist.¹⁷ In this sense there may be additional benefits of sharing a building with members of other professions.

Due to lower construction costs (per unit) and shared common areas, industrial commercial and professional condominium units are generally less expensive than freestanding buildings. Besides, sharing a building with other business concerns or professionals offers numerous other economic advantages. Owners of non-residential units share the cost of such items as maintenance, insurance, property taxes and heating. Moreover, the building is often run by a managing company, saving entrepreneurs the headaches of managing a building as well as operating their own business.¹⁸ Finally, the reputation of a particular condominium may have immeasurable public relations and advertising value.¹⁹

Whether commercial units will appreciate in value as much as a freestanding commercial building is a difficult question to answer. The answer is project-specific and depends on numerous factors, including how the project is run and maintained. In general, commercial condominium units seem to mirror the movements of their freestanding counterparts and will typically appreciate (and depreciate) in a similar fashion.

4 *Advantages of owning a commercial condominium unit over leasing a comparable rental unit*

The purchase of a commercial, industrial or professional condominium unit in urban areas offers significant advantages over leasing of comparable space in a multi-unit commercial rental building.²⁰

Firstly, other than in the case of the development of multi-unit commercial rental shopping centres, smaller companies or single professional entrepreneurs may on their own or in tandem with a developer acquire prime commercial property near major communications and transportation centres or centres supplying support and complementary services to develop their own specialised condominium

¹⁶ Van der Merwe (n 2) 56.

¹⁷ See Clurman "Specialized business condominium regimes" 1974 *St John's Law Review* 859-871 for specialised medical condominiums. Planners of medical condominiums might want to avoid having a private hospital and an undertaker service in the same condominium.

¹⁸ Goldstein *et al* (n 8) 858.

¹⁹ Goldstein *et al* (n 8) 822.

²⁰ See in general Goldstein *et al* (n 8) 818-822; Stokes (n 15) 432-462; Jones "Office condominiums: developer opportunities, marketing and structuring" 1981 *Real Property Probate and Trust Journal* 502; Van der Merwe and Butler *Sectional Titles, Share Blocks and Time-sharing* (1985) 12.

development. For example a group of professionals consisting of physicians, psychologists, dentists and other health-related professionals could group together to develop a commercial condominium close to a medical centre. Such a mixture of professionals would probably be able to negotiate favourable mortgage financing arrangements, deduct interest paid on mortgages for tax purposes²¹ and promote business for all the unit owners as each client is exposed to a variety of services in one building.²²

This advantage is of special importance to a narrow range of professionals such as attorneys, insurance brokers, physicians, and others offering specialised business services. These professionals can more readily ascertain their permanent space requirements, and thus avoid the expansion and contraction problems inherent in condominium ownership. An architectural firm or small advertising agency might do well in such a setting, but a fledgling manufacturing company could find future expansion nigh on impossible.

Secondly, I have already shown that assembling several complementary businesses into one organisational structure allows unit owners to take advantage of economies of scale. By pooling investment resources into a scheme comprised of individually owned units and common areas, which include facilities such as parking lots, storage rooms, railroad sidings, refrigeration units, heavy machinery, technical diagnostic equipment and other forms of support apparatus, smaller businesses acquire advantages they could not attain individually by leasing units in rental commercial buildings.²³ For example a group of attorneys could develop a multi-office sectional title scheme comprising individual office units and a central common area containing common facilities such as a library with reference materials, photocopying machines, conference rooms, a pool of typists and a receptionist. In short, by combining smaller entrepreneurs' resources, and spreading the cost of common areas and facilities among the unit owners the commercial condominium format offers amenities normally available only to larger enterprises. The higher the equipment costs and the more support facilities necessary for the particular business, the greater the benefit that can be reaped through the pooling of resources.²⁴

While the landlords of a significant business such as a supermarket could provide for the same variety of uses, they would not be able to control the mixture of individuals leasing space in the building in the same way as it can be done in a well-designed commercial condominium project. Furthermore, tenants leasing space in the building would face additional expenses to enjoy additional facilities and services.²⁵ In general, the higher the equipment costs and the more support facilities necessary for a particular business, the greater the benefit that can be gained through the pooling of resources.

Thirdly, the most important advantage of purchasing a commercial condominium unit as opposed to leasing similar premises in a rental building is that the purchaser becomes the owner of the commercial unit. Purchasing a commercial unit instead of leasing it is an investment. The annual subsistence cost of commercial condominium units, including contributions to the administrative fund, service charges, rates and taxes and mortgage payments, is historically less than the cost of leasing similar

²¹ Stokes (n 15) 432-436; Goldstein *et al* (n 8) 819-820.

²² Clurman (n 17) 859-860; Goldstein *et al* (n 8) 819-822; Stokes (n 15) 436 and see n 26 below.

²³ In rental buildings the landlord would recover service charges for common facilities shared by tenants.

²⁴ Stokes (n 15) 435.

²⁵ Goldstein *et al* (n 8) 818; Stokes (n 15) 432-435.

space. Although the purchaser must make an initial equity investment of 10 to 20 per cent of the purchase price, the purchaser acquires a proprietary (equitable) interest in the unit that matures over time due to inflation, supply and demand for commercial space, mortgage repayment and the recovery of outlays relating to improvements when the unit is sold.²⁶

Another advantage of unit ownership is the stabilisation of occupancy costs. Commercial condominium owners are insulated from the ever-increasing cost of leasing office space. The commercial owner incurs a fixed mortgage payment and avoids drastic periodic rent increases that cause unpredictable long-term operating expenses.²⁷ The consistency and predictability of occupancy costs enable the business concern to plan its future operations with a greater degree of certainty and to project future costs more accurately.²⁸ By contrast, the unpredictability in commercial leases may force tenants to accept substantial rent increases upon lease renewals in addition to being exposed to rent hikes due to use of percentage leasing²⁹ and short-term arrangements resulting from market demand for commercial space.³⁰

Furthermore, commercial unit ownership allows owners to dictate all aspects of design and improvement of their units to suit their specialised use and occupancy needs, without fear of having to abandon these improvements upon termination of their ownership. A tenant's ability to redesign and remodel may be limited by the flexibility of the landlord.³¹ An investment in improvements under an office lease would be lost by the tenant at the expiration or non-renewal of the lease and he or she would never enjoy equity appreciation in the same way as a unit owner.³²

The commercial unit owner will generally have greater influence over the nature and frequency of maintenance activities in his or her unit and the common property and facilities. From the standpoint of wishing to exclude undesirable or competing fellow occupants, a commercial or industrial lessee has little control over the

²⁶ According to Gold: "Office condominium owners build equity with their monthly payments while earning tax benefits, like deductions for depreciation and interest" ... "Office condos can be a good match for some service firms" 2006 *Denver Business Law Journal*. Goldstein *et al* (n 8) 820: "Finally, the condominium arrangement enables the business concern to gain an equity position, which, in turn, enables it to share in the rapidly escalated value of favorably situated real property." See in general 866 UNP Brochure *World Class Ownership Office Condominiums at 866 United Nations Plaza* 6-7 (<http://866unplaza.com/building/>) (15-01-2016).

²⁷ Commercial unit owners will of course have to pay monthly levies for the upkeep of the common property and the operation of services, but it is generally accepted that mortgage payments combined with monthly levies are still equal to monthly rental or only slightly higher.

²⁸ Gold (n 26) summarises the rental dilemma as follows: "Rental properties are always under the control of a landlord, which means that monthly rent could be raised or the lease terminated with short notice to the tenant. By owning the space, companies in condominiums can avoid such surprises. The monthly mortgage should remain relatively stable over the life of the loan." Jones is of the opinion that "condominium injects an element of stability and cost control, long-range budgeting and strategic planning" (n 20) 503.

²⁹ In a percentage lease the rent is based upon the percentage of gross or net profits of the tenant's business, or of his gross sales with a stipulated minimum rent. Such leases are primarily used where location, for example in a shopping centre, is an important part of its value.

³⁰ Goldstein *et al* (n 8) 819 especially n 5.

³¹ See, however, Van der Merwe (n 2) 56-57, who notes that the English reporter warns that the indefinite nature of a freehold in units combined with the requirement of payment of assessments with no finite cut-off period may not appeal to all potential business users who might prefer business tenancies granted for short terms of up to five years fixed, suggesting reluctance to carry long-term financial commitments. Moreover, in theory a business lease can be individually tailored to suit an individual tenant, which is not possible to the same extent with commonhold documentation, which is largely standardised.

³² 866 UNP Brochure (n 26) 7.

landlord's leasing practices. However, a condominium unit owner, acting through the executive management board (the trustees in a sectional title scheme), can to a certain extent control the entry of new purchasers or unit lessees, and is entitled to remedies that may be invoked against recalcitrant fellow occupants.³³

Finally, in a submarket with little supply of available commercial or office space, securing a permanent location is crucial for the many businesses and organisations that require close proximity to urban commercial hubs. The security of ownership avoids the possibility of losing a prime commercial location. Unit ownership in a commercial or professional condominium and the security of tenure that goes with it means never being forced out of a prime location by the non-renewal or termination of a lease.³⁴

The main disadvantage ascribed to commercial sectional title schemes is that the purchaser of a non-residential unit would be "locking himself into" an ownership position without the flexibility for expansion, contraction or complete relocation that a lessee would have. On closer analysis, it seems that this disadvantage is more apparent than real. Thus where expansion is anticipated, both the unit purchaser and the tenant frequently acquire more space than required at the outset and lease or sublease the excess space to third parties pending expansion. However, commercial lease contracts frequently contain a prohibition on subletting or at the very least require the landlord's consent, which may sometimes be withheld arbitrarily or subject to unfavourable conditions. Moreover, there is always the danger of termination of the sublease that would result from the landlord terminating the tenant's prime lease for default under the prime lease.³⁵

In the event that the need for expansion was neither anticipated nor sufficiently provided for, the unit owner would still have the edge of flexibility over the lessee of a commercial unit if the sectional title documents grant a right of first refusal to the management board or to the owners of other units in the scheme.³⁶ Alternatively the unit owner can utilise the provisions on consolidation and extension of sections in the Sectional Titles Act to expand the unit.³⁷ The granting of similar rights to tenants of commercial units or the granting of an undertaking on the part of the landlord to relocate the tenant under certain circumstances in commercial leases is not common.

In the case of contraction of space requirements, the owner of a commercial unit is in substantially the same position as the lessee of comparable space because both may lease or sublease the superfluous space in whole or in part to others. In addition

³³ Goldstein *et al* (n 8) 819; Stokes (n 15) 432-434; Jones (n 20) 503.

³⁴ Goldstein *et al* (n 8) 819-820; Stokes (n 15) 432-436; Jones (n 20) 503.

³⁵ It is only fair to mention that a lessee could seek to assign its lease (*ie* the equivalent to the sale by an owner).

³⁶ Jones (n 20) 505 suggests that if included in the condominium documentation the right of first refusal should be applicable to voluntary as well as involuntary sales. Such a right would be exercisable first by the management board and, in the event of its failure to exercise, then by the other unit owners according to a prescribed system of priority. He suggests that other unit owners of space on the same floor might perhaps have first priority, then owners of space on the next higher floor, then the next lower floor, and so on, with the priority among owners on the same floor being determined according to a prescribed grid system derived from the structural layout of space on a floor.

³⁷ Act 95 of 1986 s 22 and 24.

the commercial unit owner may utilise the provisions on subdivision in the Sectional Titles Act³⁸ to contract the space of his or her commercial unit.³⁹

In the cases where complete relocation is needed the lessee of a commercial unit who has entered into long-term commitments would have to fall back on subleasing the unit accompanied by the risks mentioned above. By contrast, the owner of a commercial unit can cope with possible complete relocation in the future via the sale of the unit to a third party or to other condominium unit owners that might be interested in expanding, or by leasing the unit to a third party, either on a long-term basis or pending its eventual sale.⁴⁰

Another frequently cited disadvantage is that the purchaser of a commercial unit must make an equity investment of 10 to 20 per cent of the purchase price, which he or she could have invested more profitably in the principal business. However, while the initial outlay may in actual fact temporarily strain the business' cash flow or resources, we have seen that the business would benefit from security against rent increases, non-renewal of the lease, and the loss of a prime location, coupled with additional common facilities and appreciation of the unit at the time of its ultimate resale.⁴¹

5 *Under-regulation of non-residential strata titles*

5.1 General

Although most condominium or strata title statutes recognise (either expressly or implicitly) that condominiums could be put to residential, non-residential or mixed use, the provisions of the original statutes were primarily framed with residential apartments in mind.⁴² Without perceiving the need to distinguish between residential and commercial strata titles, the statutes ignored the needs of commercial developers and unit purchasers. In residential condominiums stability is important, as owners are concerned with the protection of their investment and prefer provisions that make unit alteration rules, allocation of expenses, and highly flexible structuring arrangements either impossible or expensive and time-consuming to amend. In commercial sectional title developments business rather than personal considerations are paramount, such as a central locality, ample scope for advertising and constant modernisation. These are of course the polar opposite of the typical characteristics one would look for in a residential scheme – namely a quiet environment, privacy and not too much bother with modernisation.⁴³

Condominium or strata title legislation is unsuitable in matters such as common expense allocation, insurance, and procedures for physical alterations of the condominium building when these provisions are applied to the commercial

³⁸ Act 95 of 1986 s 21.

³⁹ Jones (n 20) 504; Stokes adds: “In some projects, it may also be possible for the developer to divide the office building into many small units – the ‘boundaries’ of which could be defined by the use of reference points such as structural bays or even a brass nail, rather than actual partitions – and to sell multiple units to each purchaser, thereby affording the purchaser the ability to sell off one or more integral units without any need to amend the declaration” (n 15) 435.

⁴⁰ Goldstein *et al* (n 8) 820-822; Jones (n 20) 503-504.

⁴¹ Jones (n 20) 504.

⁴² German Law on Apartment Ownership § 1 par 4 makes a distinction between *Wohnungseigentum* and *Teileigentum* and provides expressly that the provisions pertaining to residential condominiums apply also to non-residential condominiums. Goldstein *et al* (n 8) 822.

⁴³ Stokes (n 15) 441.

context.⁴⁴ The following paragraphs will analyse the most problematic areas of current condominium legislation with regard to non-residential strata title schemes.

5.2 Basic policy decisions

A developer or a group of professionals intending to develop a commercial or industrial condominium would have to make some basic policy decisions to be included in the scheme's constitutive documents and by-laws. These include such matters as the kind of commercial or industrial enterprises that will be accommodated in the scheme. It may for instance be necessary to decide whether the prospective owners must be in the same business or an allied business⁴⁵ or whether the initial unit purchasers should have a monopoly by banning their competitors from acquiring units in the scheme on resale.⁴⁶ Again, in an office block condominium the constitutive documents may prohibit business operations that could adversely impact office tranquillity such as a bar, restaurant or a veterinarian surgery or methadone treatment clinic.

Furthermore, it may be sensible to empower the board of managers or the original unit owners in the constitutive documentation with a right of first refusal. Based upon a pre-arranged priority list in the documentation, this would give each unit owner an opportunity to acquire additional space as such space becomes available. This could also cover cases where a unit is subdivided and sold off to a purchaser.⁴⁷

The developer must also consider whether certain use restrictions encountered in residential condominiums should be watered down to make the units more attractive to business enterprises. In Germany developers often impose specific restrictions on the particular type of commercial activity that may be carried out in units in the by-laws or rules of the condominium or sectional title scheme.⁴⁸

5.3 Classification of outside shell of building as part of common elements

In most condominiums the boundaries of units extend to the median line⁴⁹ or the structural parts of the walls, floors and ceilings that surround a unit.⁵⁰ This means that the outer structure or shell of the building comprises part of the common elements. Consequently, unless otherwise stipulated in the constitutive documentation or by-laws,⁵¹ commercial or industrial unit owners would need the approval of the management board or association to use the outside walls for advertising. This

⁴⁴ Stokes (n 15) 442; Goldstein *et al* (n 8) 822-831; Rohan and Resskin *Condominium Law & Practice app. B-1* (1982) § 21.04 mention the sharing of common expenses, minimum number of units, unintended government regulation, alterations, lien priority, personal liability, mortgage recording taxes, specifying number of rooms, insurance, right to sue, destruction of premises, eminent domain, subdivision, combination and alteration of units, phase projects, leaseholds, percentage voting requirements, easements, and arbitration.

⁴⁵ German developers often impose specific restrictions on the particular type of commercial activity that may be carried out in units in the by-laws (*Gemeinschaftsordnung*) of the scheme. See Van der Merwe (n 2) 61.

⁴⁶ Goldstein *et al* (n 8) 823. Note, however, that restrictions on the right of disposal of a unit may infringe the absolute right of an owner to dispose of his or her property: Van der Merwe (n 2) 126-127.

⁴⁷ Goldstein *et al* (n 8) 823.

⁴⁸ See Van der Merwe (n 2) 149.

⁴⁹ Sectional Titles Act 95 of 1986 s 5(4).

⁵⁰ See for example UCIOA § 2-102.

⁵¹ In terms of a 1438-A of the Portuguese code civil supplemented by Decree-Law 267 of 94 of 25 Oct 1994, developers of commercial schemes may use their wide individual autonomy to adopt a by-law which would allow unit owners to use part of the outside shell of the building for advertisement purposes.

applies particularly with regard to the signage of the particular businesses in the scheme. Condominium by-laws frequently place restrictions on the size and type of signage permitted. There are a number of questions that occupants will wish to have addressed: Will any exterior building signage be allowed? Will the developer be providing a marquee sign outside the building which will list the name of each company in the building? Alternatively, will the developer provide interior building signage on a central directory or through an electronic building display?

5.4 Sharing of common expenses

Condominium statutes generally provide that common expenses must be charged to the unit owners in proportion to their respective interests in the condominium as set out in the documentation⁵² or sectional plan.⁵³ These proportionate shares or participation quotas are in principle based on the proportionate value of a unit with regard to the aggregate value of all the units in the scheme and do not take into account the so-called “service test”, which concentrates on the use made by a particular unit of the common facilities of the scheme.⁵⁴

However, commercial condominiums frequently consist of several distinct businesses with particular requirements that result in them using disproportionate shares of the common elements, facilities or services. For instance, a restaurant or retail store would utilise facilities not required by professional service providers such as a law firm or insurance broker. Again in the context of an office condominium, some unit owners may require facilities or services (such as cleaning or janitorial services, window washing and the like) not required by other owners. An expense allocation system based on proportionate quota in the common elements, while some unit owners disproportionately use them, would produce inequitable assessments.⁵⁵

The Uniform Common Interest Ownership Act and other progressive condominium statutes address this problem by providing that a common expense benefitting fewer than all of the units or their owners may be assessed exclusively against those units or owners, and that the costs of utilities must be assessed in proportion to usage.⁵⁶ The difficulty is, however, that if such an allocation is not covered in the constitutive document (declaration), it can be inserted only by an amendment of the declaration, which is a very cumbersome process. The Polish Law on Ownership of Units⁵⁷ provides that the community of owners may pass a resolution obliging the owners of non-residential units to make greater contributions toward the maintenance of the common property than owners of residential units, so long as this is justified by the particular uses of the non-residential units.⁵⁸

⁵² In terms of the UCIOA § 2-107 the declaration must allocate to each unit a fraction or percentage of the undivided interests in the common expenses of the association and state the formulas used to establish such allocation.

⁵³ Sectional Titles Act 95 of 1986 s 32(5).

⁵⁴ See Van der Merwe and Sonnekus I *Sectional Titles, Share Blocks and Time-sharing: Sectional Titles* (Service Issue 19 Oct 2014) 4-21.

⁵⁵ See in general Jones (n 20) 506; Goldstein *et al* (n 8) 824-825; Stokes (n 15) 444-446.

⁵⁶ UCIOA § 3-115(c)(2) and (3).

⁵⁷ Law of 24 June 1994, a 12 s 3.

⁵⁸ Such justifications may include the need to pay more for cleaning the hallways used by clients of the non-residential unit owners, a higher consumption of energy in the common parts as a result of the non-residential use, or more frequent repairs of parking areas used by clients of the non-residential unit owners. See Pisuliński “Własność lokali” in Gniewek *System Prawa Prywatnego. Tom 4 Prawo rzeczowe* (2007) 281-282.

5.5 Insurance cover and sharing of premium expenses

The traditional condominium statutes do not provide for adequate insurance cover for some of the risks encountered in commercial condominiums. These statutes generally authorise the board of managers to insure the project against loss or destruction to full replacement value⁵⁹ (some only where the declaration so provides), and the board usually purchases a master liability policy covering the common areas.⁶⁰ While adequate for residential condominiums, greater flexibility is needed for the diverse needs of commercial and industrial condominiums. Very few statutes authorise the allocation of excess insurance premium costs in terms of liability insurance and insurance against loss or damage in accordance with the extra hazard potential of the business involved as, for example, a restaurant in an office building. The same should happen in the case where the value of particular business units have increased significantly on account of fixtures and other permanent improvements installed therein.

Serious thought should also be given to the introduction of business interruption insurance⁶¹ covering interruptions on account of damage or loss. Statutory amendments which would give greater flexibility to commercial and industrial condominiums should be considered. The insurance industry should also make strenuous attempts to develop integrated master and unit owner policies for commercial condominiums in order to reduce the possibility of multiple carriers covering the same risk with attendant waste of premiums and difficulties in settlement discussions.⁶²

5.6 Alterations inside a unit

Some statutes provide that alterations inside a unit require approval by the management board or a resolution of the unit owners. However, alterations inside business units are frequently desired on account of changes in business requirements or in connection with a sale of the unit. Furthermore, an important inducement for buying instead of renting a commercial unit is that disputes with landlords over alterations can be avoided.⁶³

This problem is avoided in modern condominium statutes, which allow improvements and alterations inside residential or non-residential units as long as the structural integrity and mechanical systems of the scheme are not impaired or

⁵⁹ Jones (n 20) 507. See generally Note “Condominium casualty and liability insurance” 1974 *St John’s LR* 1112. UCIOA § 3-113(a)(1) requires that property insurance on the common property must not be less than 80 per cent of the actual cash value of the insured property at the time the insurance is purchased and at each renewal date. § 3-113(b) stipulates that in the case of a building that contains units divided by horizontal boundaries described in the declaration, or vertical boundaries that comprise common walls between units (townhouse projects), the insurance maintained under subsection (a)(1), to the extent reasonably available, must include the units, but need not include improvements and betterments installed by unit owners. Given the great interdependence of the unit owners in the stacked unit situation, mandating property insurance for the entire building is the preferable approach. The 80 per cent is a minimum requirement and typically many condominiums require insurance cover equal to the replacement cost.

⁶⁰ Liability or casualty insurance indemnifies against liability on account of injuries to the person or property of another.

⁶¹ Jones (n 20) 507. Business interruption insurance protects a business from losses, including loss of net profits, due to inability to operate because of fire and other hazards.

⁶² Goldstein *et al* (n 8) 827-828; Stokes (n 15) 446-447. See *eg* CGU Commercial Strata Insurance (<http://www.cgu.com.au/insurance/Business/Products/Commercial-strata> (23-05-2016)).

⁶³ Goldstein *et al* (n 8) 825-826.

the support of any part of the scheme is not weakened.⁶⁴ Furthermore, the external appearance of any portion of the scheme may not be changed without the permission of the association.⁶⁵

5.7 Subdivision, consolidation, extension of units

It is essential for owners of commercial or industrial condominium units to have the ability to expand or contract their business space in tandem with their success in the market place. They do not want to be locked into an inflexible space. Although the unit owner can sell his or her unit when his or her space needs change, the very purpose of commercial unit ownership (to allow the owner to tailor the unit to his or her business needs), is undermined if the owner is forced to dispose of his or her unit whenever the business encounters space problems. Most of the condominium statutes do not contain the necessary mechanisms for accomplishing such a change.⁶⁶

For contraction of the unit, the mechanism of subdivision can be used in terms of which the owner subdivides his unit and sells off a subdivided portion to a neighbouring owner or another third party. The Uniform Common Interest Ownership Act provides a simple administrative procedure by which the unit owner can subdivide his or her unit if the declaration so permits.⁶⁷ The problem is, however, that subdivision must be provided for in the declaration and must be executed in terms of the declaration, which might require a particularly large majority. In the case of subdivision of an industrial or commercial unit, the consent of the owners' association should be sufficient. This is indeed what is provided for in the Sectional Titles Act in the case of subdivision of a unit in any sectional title schemes thus including commercial, industrial and professional sectional title schemes.⁶⁸

For enlargement (expansion) of a unit, the Uniform Common Interest Ownership Act⁶⁹ provides that subject to the provisions of the declaration the owners of adjoining units may apply to the association for the relocation of their boundaries by an amendment to the declaration. Unless the executive board determines, within 30 days, that the reallocations are unreasonable, the association shall prepare an amendment that identifies the units involved and states the reallocations. When a commercial unit owner wants to enlarge his or her unit by the relocation of the boundaries between units and common elements to incorporate part of the common elements in the unit, the procedure is more strenuous. Unless the declaration provides otherwise, the amendment may be approved only if persons entitled to cast

⁶⁴ See Sectional Titles Act 95 of 1986 s 18(1) for implied servitude of subjacent and lateral support and annexure 8 prescribed management rule 68(1)(iii) against alterations which are likely to impair the stability of the building and rule 68(1)(iv) against alterations likely to impair the harmonious appearance of the building.

⁶⁵ UCIOA § 2-111(1) and (2).

⁶⁶ Goldstein *et al* (n 8) 830; Stokes (n 15) 450-451. The grid approach to commercial condominiums utilising a condominium structure called cubing to settle the problems as suggested by Stokes (n 15) 454-459 seems unnecessarily complicated.

⁶⁷ UCIOA § 2-113 provides that subject to the declaration (which may require a majority vote of less than 67%) a unit owner may apply for the subdivision of his or her unit. On such application the management association must prepare, execute, and record an amendment to the declaration, including the plats and plans subdividing that unit.

⁶⁸ Act 95 of 1986 s 21-22. Before the Sectional Titles Amendment Act 44 of 1997 a special resolution was required for subdivision of a section. See in general on subdivision of sections Van der Merwe and Sonnekus (n 54) 10-14(1) – 10-25.

⁶⁹ UCIOA § 2-112(a).

at least 67 per cent of the votes in the association (not including the owner seeking to enlarge his unit) agree to the action.⁷⁰

As in the case of subdivision of a unit, the owner of a commercial unit needs only the consent of the management board (trustees in a sectional title scheme) for consolidation of two units (which need not adjoin one another) in terms of the Sectional Titles Act.⁷¹ For extension of a section to include part of the common property, a special resolution is needed.⁷²

The Sectional Titles Act of 1971⁷³ sanctioned the mechanism of re-subdivision, namely a rearrangement or reallocation of the floor area of two or more sections so as to enlarge the floor area of one or more of the affected sections while simultaneously diminishing the floor area of the remaining affected sections. This mechanism was primarily aimed at the reorganisation of commercial units by the alteration of the existing physical boundaries of the sections.

Unfortunately the Sectional Titles Act of 1986 did not adopt the mechanism of re-subdivision. The only manner in which a re-subdivision of various adjoining commercial sections can be attained in terms of the Sectional Titles Act of 1986 would be by utilising the mechanisms of subdivision and consolidation. A sectional owner who desires to diminish the floor area of his section could subdivide his section and sell one portion of the subdivision to an adjoining owner of a commercial section. The latter can then consolidate the newly bought portion with his existing section. Such a cumbersome procedure could obviously have been avoided by the retention of the provisions on re-subdivision of the Sectional Titles Act of 1971.

Another gap in the mechanisms provided for readjustment of commercial units is that no provision is made for the incorporation of parts of the common property in sections and *vice versa* to effect a complete rearrangement or reorganisation of the internal structure of the commercial sectional title scheme.⁷⁴ Such a reorganisation would be particularly appropriate in a large shopping centre where the inner partitions between the various commercial units are usually easily adjustable. Apart from a possible utilisation of the provisions on extension of a section,⁷⁵ coupled with the mechanisms of subdivision and consolidation, such a rearrangement can probably be effected only by utilising the provision on notional destruction of the building, which would require a unanimous resolution.⁷⁶

5.8 Termination of the scheme

Most condominium statutes require either an unsuitably large majority vote or almost total destruction for the termination of a condominium. The Uniform Common Interest Ownership Act⁷⁷ provides that (save in the case of catastrophic damage) a condominium may be terminated only by agreement of unit owners to whom at least 80 per cent of the votes in the association are allocated, or any larger percentage specified in the declaration. In the case of a commercial or industrial condominium, the declaration may specify a smaller percentage.

⁷⁰ UCIOA § 2112(b).

⁷¹ Act 95 of 1986 s 21 and 23; see in general Van der Merwe (n 54) 10-25 – 10-27

⁷² s 24; see in general Van der Merwe and Sonnekus (n 54) 11-10 – 11-16.

⁷³ Act 66 of 1971 s 17.

⁷⁴ See in general Inglis “Expanding condominiums in Ohio” 1978 *Case Western Reserve Law Review* 266-267.

⁷⁵ s 24.

⁷⁶ Sectional Titles Act 95 of 1986 s 48 and 49; See in general Van der Merwe and Sonnekus (n 54) 10-28 – 10-29.

⁷⁷ UCIOA § 2-118.

In the case of destruction of the building, the typical condominium legislation requires a 75 per cent majority vote for reconstruction if the building is substantially damaged. Some statutes require that the authorisation must be given within a period of 120 days. If reconstruction is thwarted, most statutes stipulate that the insurance proceeds and amount realised on sale of the damaged project are to be distributed according to the undivided fractional interest of each unit owner as set forth in the constitutive documentation. This could prejudice a unit owner who has expended a large sum on renovation of his or her unit, and could result in an unfair allocation of insurance proceeds. In short, the legislature should grant greater flexibility to the drafters of commercial and industrial condominium documents, to enable them to tailor suitable provisions relating to total and partial destruction of the scheme.⁷⁸

It is suggested that the archaic method of making termination dependent on destruction of or damage to the building is particularly unrealistic in the case of commercial and industrial condominiums. Additionally, the requirement of an unsuitably large majority may in certain circumstances impede the modernisation of the scheme or sale and redevelopment of the land. It may therefore be prudent to introduce court proceedings by which it is left to an independent arbiter to determine whether a particular scheme should be dissolved. In such a case factors such as obsolescence of the scheme and the structural decay of the common elements, facilities and services should be taken into account to determine whether it is just and equitable for the scheme to be terminated.⁷⁹

5.9 Servitudes

Most condominium statutes state that the declaration must provide for the creation of servitudes for entry and exit as part of the common elements⁸⁰ but fail

⁷⁸ According to Goldstein *et al* (n 8) 829 this could adversely affect a unit owner who has expended a large sum to renovate his or her unit space, or could unfairly generate a larger insurance recovery than would normally be the case. He suggests that the legislature should grant greater flexibility to the drafters of commercial and industrial condominium documents, to enable them to tailor suitable provisions relating to total and partial destruction of the buildings. UCIOA § 2-124 was adopted in 2008 as a result of several Florida condominium projects that could not be rebuilt following storm damage. In those cases it proved impossible to secure the required vote for termination. The section permits “any interested” person to petition the court for an order terminating the common interest community or reducing its size. Recognising that the statute cannot contemplate every possible eventuality, the section grants the court powers to issue whatever temporary orders the court deems “appropriate”, including the power to appoint a receiver. Further, after a hearing, the court is empowered to “issue any other order the court considers to be in the best interest of the unit owners and persons holding an interest in the common interest community”. It is clear that this section does not assist owners of commercial units.

⁷⁹ Van der Merwe (n 2) 531-532; see Florida Statute Title XL ch 178.117(2) on termination because of economic waste or impossibility introduced by the legislature in circumstances that may create economic waste, areas of disrepair, or obsolescence of a condominium property for its intended use and thereby lower property tax values; see also Cordato “Strata title law reform in NSW – what it means for property investors” 2013 *Cordato Partners Redevelopment Newsletter Redevelopment: Strata Title Reform NSW*, who describes a strata title reform in NSW introducing a process for a collective sale/renewal where the owners can proceed to terminate the strata scheme by a 75% majority vote in number. This process is designed for strata buildings where the cost of repairing or maintaining the building is more than the cost of re-building, or where the land is re-zoned to high rise (allowing more than 3 storeys) which means that the land value is greatly increased, making it ripe for redevelopment – <http://www.lexology.com/library/detail.aspx?g=707bela3-b0ea-461c-8e79-1961cd125aec> last accessed on (12-04-2016).

⁸⁰ Florida Statute Title XL ch 178.104(4)(n) states that the declaration must provide for the creation of a non-exclusive easement for ingress and egress over streets, walks, and other rights-of-way serving the units of a condominium, as part of the common elements.

to grant authority to associations to grant or relocate easements. In commercial condominiums, the transient nature of unit owners and the variety of businesses accommodated require an expeditious procedure for relocating entry and exit servitudes.⁸¹ In this regard the Florida statute allows the association to relocate easements for access, egress and utilities without the joinder of any unit owner unless otherwise provided for in the constitutive documents.⁸² This is particularly important to ensure access for large trucks taking shipments or making deliveries.

5.10 Reduction of special majorities for certain resolutions

Most condominium statutes require unanimity or very high majorities for certain resolutions to be adopted such as the amendment of the by-laws or reconstruction of the building due to damage or destruction. The requirements to attain these majorities cause difficulty in the residential context but can be an even greater impediment in a business setting.⁸³

The Uniform Condominium Act or the Uniform Common Interest Ownership Act have adopted more flexible thresholds in the case of non-residential schemes for example in respect of the amendment of the constitutive documents (declaration);⁸⁴ the alienation and encumbrance of the common elements in a non-residential scheme⁸⁵ and the insurance provisions of the Uniform Condominium Act.⁸⁶ In respect of purchaser protection measures, the Uniform Common Interest Ownership Act permits waiver or modification of article 4 protections in common interest communities where all units are restricted to non-residential use.⁸⁷

5.11 Strata title by-laws mostly not suitable for commercial or industrial schemes

Strata title by-laws (sectional title rules) primarily contain rules related to residential units such as the keeping of pets; the prevention of noise; the hanging of washing; floor coverings, damage to lawn and plants on the common property and ensuring

⁸¹ Goldstein *et al* (n 8) 830; Stokes (n 15) 441.

⁸² Florida Statute Title XL ch 178.111(10): “Unless prohibited by the declaration, the board of administration has the authority, without the joinder of any unit owner, to grant, modify, or move any easement.”

⁸³ See in general Jones (n 20) 505 and 507.

⁸⁴ Instead of a 67 per cent majority for the amendment of the declaration, the Uniform Condominium Act of 1980 § 2-117(a) provided that the declaration may specify a smaller number only if all of the units are restricted exclusively to non-residential use. This was replaced by the UCIOA § 2-117(a) which provides that the 67 per cent majority is required unless the declaration specifies a different percentage for all amendments or for specific subjects of amendment.

⁸⁵ UCIOA § 3-112(a) provides that instead of the 80 per cent majority required to transfer or encumber portions of the common elements with a mortgage, the declaration may specify a smaller percentage only if all of the units are restricted exclusively to non-residential uses.

⁸⁶ The 1980 version of the Uniform Condominium Act § 3-113(i) provided that its insurance provisions may be varied or waived if all the units in a condominium are restricted to non-residential use. This provision was not taken over in the UCIOA.

⁸⁷ UCIOA § 4-101(a) comment 1 explains that in the case of commercial and industrial condominiums, the purchaser is often more sophisticated than the purchaser of residential units and thus better able to bargain for the protections he believes necessary. While this may not always be true, no objective test can be developed which easily distinguishes those commercial purchasers who are able to protect themselves from those who, in the ordinary course of business, have not developed such sophistication. At the same time, the cost of purchaser protection imposed by a 4 may be substantial.

unit owners being adequately clothed and behaving appropriately.⁸⁸ A separate set of rules for non-residential schemes, including for instance rules on the use of parking spaces and toilets, or specified hours of business, is surely desirable due to the stark differences in purpose and use between residential and commercial or industrial schemes.⁸⁹ This would assist in bringing commercial scheme by-laws more in line with commercial realities.

In terms of the Portuguese civil code,⁹⁰ the developer enjoys wide individual autonomy to design a set of by-laws to regulate the powers and duties of the various entrepreneurs inter se. Such by-laws may cover the use of the building, units, common facilities and equipment in addition to special provisions regulating the use of parking spaces and toilets by clients of the businesses within the scheme.⁹¹

The following unique provisions contained in the New South Wales Model by-laws⁹² pertain only to industrial and commercial/retail schemes: the prevention of hazards; the kinds of amenities and services which may be provided to unit owners by the owners' association;⁹³ and parking restrictions on unit owners and their clients/customers. The Model by-laws of commercial schemes contain unique provisions on the behaviour of invitees;⁹⁴ controls on hours of operation and the use of facilities⁹⁵ and mention temporary displays⁹⁶ as an exception to a general prohibition on obstruction of the common property.

The South African conduct rules,⁹⁷ which may be replaced by the developer on registration of a sectional plan and the opening of a sectional titles register and by special resolution at a general meeting,⁹⁸ contain only rules suitable for residential schemes. The rules concern (amongst other things) the keeping of pets;⁹⁹ refuse disposal;¹⁰⁰ repairs to motor vehicles on the common property;¹⁰¹ littering;¹⁰² erection of washing lines;¹⁰³ and the eradication of pests.¹⁰⁴ There is thus an obligation on

⁸⁸ Compare the sch 2 Model By-laws for residential strata schemes with the sch 4 and 6 Schedules Model By-laws for industrial and commercial/retail schemes respectively in the NSW Strata Schemes Management Regulation 492 of 2010 in terms of the Strata Schemes Management Act 138 of 1996.

⁸⁹ Catalan CC a 553-1 ff require that the by-laws of condominiums must be adapted to the nature of each particular scheme. In terms of the Norwegian statute the rules applicable to commercial schemes are less restrictive than the rules applicable to residential condominiums.

⁹⁰ a 1438-A supplemented by Decree-Law 267 of 94 of 25 Oct 1994.

⁹¹ Decisions of the supreme court of 7 Oct 1986, 9 March 2004, 30 June 2009 and 27 Jan 2010 in www.dgsi.pt.

⁹² See sch 4 and 6 of the NSW Strata Schemes Management Regulation 492 of 2010.

⁹³ S 13 and s 12 respectively referring uniquely to security services and promotional services.

⁹⁴ S 4 provides that an owner or occupier of a lot must take all reasonable steps to ensure that invitees of the owner or occupier (including all customers and staff) do not behave in a manner likely to interfere with the peaceful enjoyment of the owner or occupier of another lot or any person lawfully using common property.

⁹⁵ S 13 provides that the owners' association may by special resolution determine that commercial or business activities may be conducted on a lot or common property or facilities situated on the common property may be used only during certain times and in the case of facilities only during certain times or on certain conditions.

⁹⁶ s 2.

⁹⁷ annexure 9 of the regulations.

⁹⁸ s 35(2)(b).

⁹⁹ annexure 9 rule 1.

¹⁰⁰ annexure 9 rule 2.

¹⁰¹ annexure 9 rule 3(4).

¹⁰² annexure 9 rule 7.

¹⁰³ annexure 9 rule 8.

¹⁰⁴ annexure 9 rule 11.

developers and their legal advisers to put together at least an appropriate set of conduct rules for the particular non-residential scheme they are establishing. Once the Community Schemes Ombud Service Act¹⁰⁵ has come into operation, the Ombud Service would have to assess the suitability of the proposed rules for each particular scheme.¹⁰⁶

5.12 Management board

Provisions governing the office of members of the executive board should take account of the fact that juristic persons such as a company or partnership are generally made up of individuals who have a connection with the business entity. In the event that any of these individuals are elected as members of the executive board (trustees in a sectional title scheme), it would be necessary to regulate the situation where such a legal representative severs his employment or legal relationship with the company or partnership that owns the commercial or industrial unit.¹⁰⁷

6 Conclusion: South African position

Unlike various other condominium or strata title legislation, the Sectional Titles Act does not explicitly apply to both residential and non-residential schemes. However, the act's application to non-residential units can be implied from other sections in the act. For example, the fact that tenant protection measures in the conversion of rental buildings to sectional title applies only to residential units¹⁰⁸ suggests that the majority of the provisions of the act may apply equally to residential and non-residential. Furthermore, the participation quota of non-residential units is calculated differently from the participation quota of residential units, substantiating the belief that the legislation applies to all kinds of condominium regimes.¹⁰⁹ Again, the conduct rule concerning signs and notices is expressly made to apply only to sections used for residential purposes.¹¹⁰ It may be added that *Hansard* dealing with the second reading of the Sectional Titles Bill records clearly that the legislation was intended also to embrace office and factory buildings.¹¹¹

In South Africa non-residential sectional title schemes are limited to "condohotels"¹¹² (including time-share hotels structured as sectional title schemes),

¹⁰⁵ Act 9 of 2011.

¹⁰⁶ Community Schemes Ombud Service Act 9 of 2011 s 4(1)(c).

¹⁰⁷ Goldstein *et al* (n 8) 823. Since the prescribed rules permit a non-owner to be elected as trustee, the severance with the enterprise will not necessarily affect his or her position as trustee of the scheme.

¹⁰⁸ s 4(3).

¹⁰⁹ s 32 (1) and (2).

¹¹⁰ annexure 9 rule 6.

¹¹¹ *Hansard* 16/ 24-28 May 7408-7409 and 7416.

¹¹² From the middle of 2014 purchasers could purchase sectional title suites in the Franschhoek Valley Wellness Resort, Praia do Cossa in Mozambique and later in Corail de Plage in Mauritius. Investors are allowed to purchase a two-month-long stay at a prime destination while receiving an annual return on their investment by placing their suites in a rental pool for the rest of the year. The owners share the net income generated by the hotel as a whole after cost and management fees have been deducted. This is one of the 19 sectional title hotels developed by the eLan Hospitality Group since 1998 with Riverside Hotel in Durban as their first project. The hotel rooms are sold fully furnished and are managed and maintained by professional and experienced hotel operators. The rentals are pooled and hotels operate a strict reservation system to ensure that rooms are rotated on a strict basis, to even occupancy for equal distribution of income to hotel room investors. Consequently, purchasers do not have to deal with the complexities and challenges of letting a unit, non-payment of rent, maintenance and repairs.

office condominiums¹¹³ and small factories.¹¹⁴ There are also a reasonably high number of mixed-use schemes consisting of commercial units on the ground floors, office condominiums on the lower floors and residential units on the higher storeys.¹¹⁵ One of the main reasons for the popularity of office condominiums is that professionals can fairly accurately estimate their future space needs and would readily accept being “locked into” a permanent space.

Although it is possible to structure parking spaces in a building as separate units, I could not find examples of parking garages being developed as commercial sectional title schemes in South Africa. The same is true of genuine sectional title caravan sites and sectional title dockominiums. To circumvent the requirement that a *building* must be subdivided, camp sites and dockominiums are at present structured around subdivided building structures such as storage places for boats in a marina or small subdivided buildings on the campsite. The storage places or parts of the subdivided building are then treated as units and the mooring spaces and areas surrounding the unit are allocated as exclusive-use areas to the unit owners concerned.

In conclusion it should be noted that although various facets of non-residential schemes can be appropriately regulated in the scheme’s conduct rules, these rules may not contravene any provisions of the Sectional Titles Act. Thus it becomes imperative that certain provisions of the Sectional Titles Act should be adapted to make them suitable for application to non-residential sectional title schemes. Aspects that need urgent attention are the facilitation of advertisements and signage on the common property; the propriety of the application of insurance provisions to non-residential schemes; the provisions on the re-subdivision and reorganisation of unit spaces in commercial sectional title schemes; and the recognition that obsolescence is an important factor when the court is approached to determine whether a particular non-residential scheme is no longer financially viable, and should be terminated. Finally, as is the case in German law, the appointment of a professional manager should be considered to conduct the management of a large shopping centre that accommodates a collection of commercial units. A board of trustees consisting mainly of sectional owners could still be elected to supervise the operation of the scheme by the professional manager.

¹¹³ Mhlanga reports that areas of high demand in Johannesburg include Bryanston, Sandton, Rivonia and Sunninghill, in Cape Town the Waterfront and Century City and in Pretoria Hatfield, Menlyn and Brooklyn *Property 24* (29-10-2013). Chas Everitt International Property Group states that office accommodation represents a good investment, particularly where it is of good quality and enjoys a good geographic location within an established office node. Prices in office nodes in Sandton are reported to range from R16 000 to R20 000 per square metre. Completion of Grovenor Square, a new R120 million sectional title office park at Century City in Cape Town aimed at small to medium size owner and rental units, and scheduled for September 2015, was completed in early 2016. A total of 200 parking bays are provided. Units are selling at R22 000 per square metre, inclusive of parking and A-Grade tenant installation, including all internal finishing, air conditioning, communal bicycle storage facilities and shower and change rooms. See <http://www.property24.com/articles/demand-for-sectional-title-offices/18731> (10-04-2016).

¹¹⁴ See *Oribel Properties 13 (Pty) Ltd v Blue Dot Properties 271 (Pty) Ltd* 2010 4 All SA 282 (SCA).

¹¹⁵ In *Herald Investments Share Block (Pty) Ltd v Meer, Meer v The Body Corporate of Belmont Arcade* 2010 6 SA 599 (KZD) the sectional title building in question, Belmont Arcade on the Durban beachfront, consisted of three floors of commercial premises, three floors of parking and fifteen floors of residential apartments. The dispute was about who was liable to pay for the cost of refurbishing three lifts which serviced the upper apartments.

SAMEVATTING**VELE FASETTE VAN DEELTITELS: 'N REGSVERGELYKENDE OORSIG VAN DIE NIE-RESIDENSIËLE KENMERKE VAN DEELTITELSKEMAS**

Die doel van hierdie artikel is om aan te toon dat deeltitelwetgewing veral na die twee wêreldoorloë daarop gerig was om huisvesting te verskaf aan die miljoene daklose persone en terugkerende soldate ten einde hulle aan die grond te bind en sodoende sosiale, ekonomiese en uiteindelik politieke sekuriteit te verkry. Die fokus was dus op residensiële deeltitelskemas en het daartoe gelei dat nie-residensiële skemas tot 'n groot mate afgeskeep is. Nietemin is talle vorme van nie-residensiële skemas van vroeg af in die praktyk erken. Voorbeelde hiervan is die gemengde skemas in die Duitse ommuurde stede bestaande uit woonstelle op die grondvloere en winkels, biersale, restaurante, stalle en slaghuise in die kelder verdiepings.

In die moderne tyd word suiwer nie-residensiële skemas in die vorm van besigheidsdeeleiendom wat vir besigheids- en industriële doeleindes gebruik word, beroepsdeeleiendom wat kantoorgeriewe aan dokters, argitekte, prokureurs, ingenieurs en tandartse verskaf en vakansiedeleeiendom in die vorm van vakansiewoonstelle en deeltitelhotelle en motelle in die praktyk aangetref. Daarnaas word eenhede in parkeergarages, massiewe stoorgeboue, kampeerterreine en selfs “dockominiums” wat vasmeerplekke aan plesierbooteienaars te koop aanbied, as nie-residensiële deeltiteleenhede op die mark geplaas.

In die artikel word die voordele wat kommersiële of besigheidsdeeltiteleenhede vir sake- en beroepslui inhou vergelyk met gevalle waar sake- of beroepslokale aan sakelui en professionele persone uitverhuur word. Daarna word na verskeie bepalinge in deeltitelwetgewing en bestuursreëls verwys wat onvanpas is indien dit op besigheidsdeeleiendom toegepas word en word voorgestel dat nie-residensiële deeltitelskemas deur eiesoortige wetsbepalinge, bestuurs- en veral gedragsreëls beheer en bestuur behoort te word. Ten slotte word aangetoon watter verskyningsvorme van sake-, beroeps- en vakansiedeleeiendom in die Suid-Afrikaanse deeltitelindustrie neerslag gevind het.