

Should short-term letting be allowed in sectional title schemes?

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1 Introduction

Short-term letting of bedrooms and apartments in condominiums for periods shorter than six or three months is not a new phenomenon. It has always been possible to grant tenancies lasting a few months or less. What is new are the digital platforms that are facilitating the commercialisation of such short-term letting. The recent surge in popularity of global accommodation websites such as Airbnb¹ and Stayz enables sectional owners to advertise and market their apartments to holidaymakers all over the world. These opportunities are being seized by apartment owners around South Africa, including premier residential complexes in coastal towns and cities,² where there is a burgeoning demand for secure, affordable, self-catering

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¹ Norman “Airbnb – is hosting your property on Airbnb legal?” *De Klerk & Van Gend Property Law* (12-06-2017) <https://dkvg.co.za/property-law-Van-Gend-Property-Law-2-04-2018>. Airbnb, states that an online hosting website (www.airbnb.com) is a platform where residential property owners can list their apartments to holidaymakers who can instantly book these properties if they meet all the requirements set by the host. Due to the safety measures enforced by the Airbnb platform, which protect both the host and the guest, and the high income generated from such hosting, some property owners prefer this form of income above the traditional forms of renting out properties. See also Hall “Are you the king of your castle? Limitations on short-term rentals of sectional title units” <https://www.news.co.za/article/are-you-the-king-of-your-castle-limitations-on-short-term-rentals/2-04-2018>; Wilkins “Airbnb is NOT automatically permitted in Cape Town apartments” *Home Times* (20-09-2017) <http://hometimes.co.za/2017/09/airbnb-is-not-automatically-permitted-in-cape-town-apartments/2-04-2018> reports that in December 2013 Airbnb’s legal battle against city lawmakers across the world collapsed with the company introducing a “One host, one home” feature in New York and San Francisco. That feature prevents hosts from listing more than one entire home, reversing a long-held stance that self-policing would be cumbersome and logistically unrealistic. The company agreed in a deal with London and Amsterdam to ensure hosts meet local licensing requirements and to enforce caps on the number of days an entire apartment can be rented out each year. In October 2016 New York governor Cuomo signed into law a bill to make it illegal to advertise on Airbnb entire unoccupied apartments for less than 30 days. In February 2017 the city began fining people who ignored the ban. In Berlin it became illegal in 2016 for owners to rent out entire apartments to tourists without a permit from the city. The city council launched a website for anonymous tip-offs of illegal operators.

² According to GetSmarter “Short-term letting in residential sectional title schemes” (24-08-2009) at <https://www.facebook.com/notes/getsmarter/short-term-letting-in-residential-sectional-title-schemes/163820780560> (2-04-2018) there are apartments so stunning that they knock the socks off some of South Africa’s luxury hotel rooms, with art-deco style lofts in city centres and luxurious seaside apartments with views of the ocean that go on forever; “The appeal of Airbnb property investments - but know the rules” *Property24* (30-06-30 2017) <https://www.property24.com/articles/the-appeal-of-airbnb-property-investments-but-know-the-rules/26041> (2-04-2018) reports that many complexes close to the Cape Town Convention Centre and CBD, the sports stadia, V&A Waterfront and popular Atlantic Seaboard beaches make for excellent rental options for holidaymakers and business visitors.

holiday accommodation.³ Increasing numbers of condominium owners who bought into condominiums for the purpose of investment⁴ or as holiday or retirement accommodation⁵ are abandoning traditional long-term leasing in favour of private holiday letting. Owner occupiers and even tenants are also joining the party by letting out spare rooms and even couches to supplement their income.⁶ An increasing number of sectional owners prefer the high income generated quickly from short-term letting over the traditional forms of renting out their sections on longer-term leases. The higher income makes it easier for them to cope with any increases in mortgage interest rates and sectional title levies.⁷

Demand in the short-term rental market is also booming. Renting properties on a short-term basis is no longer sought-after only in popular tourism destinations, but is also increasing rapidly in business districts, student zones and in the vicinity of airports and conference centres. Many professionals around the world employed on fixed-term contracts will prefer to rent an apartment wherever their work takes them instead of finding accommodation in a hotel or guesthouse.⁸

In this article I shall begin by distinguishing briefly between short-term letting and longer-term letting and will then dwell on the negative face of short-term letting. I shall then consider the provisions in sectional title and other legislation that impact on short-term letting. I will conclude with an enumeration of the strict conditions under which short-term letting should (in my opinion) be permitted in sectional title schemes.

2 *Short-term letting v longer term leases*

A short-term letting of an apartment in a sectional title scheme differs from a longer-term letting of the same apartment in the following respects:

First, depending on the prescribed rules of a scheme, short-term letting usually applies to letting for less than six or three months, whereas longer-term leases are granted for longer periods of time.

Second, short-term letting will reduce the impact of troublesome tenants that are invariably encountered in longer-term lettings, especially where an effective managing agent is engaged to manage the scheme.

Third, in general, as short-term tenants will not be moving furniture in and out, painting the walls or changing the carpets, the apartment should require less heavy-duty maintenance.

³ “Short term rentals cause big problems in sectional title” *SA Real Estate Investor* (20-06-2016) <http://www.reimag.co.za/2016/06/20/short-term-rentals-cause-big-problems-sectional-title/> (2-04-2018).

⁴ According to “Landlords: short-term vs long-term lets” *Property24* (29-04-2015) <https://www.property24.com/articles/landlords-short-term-vs-long-term-lets/21912> (2-04-2018) investors consider factors such as the consistency of short-term letting demand in the area where the property is located, and the competition they might face from hospitality establishments in the same area, or even local homeowners with a room or two to let.

⁵ Kelly “Short term letting in holiday season” 2011:12 *Paddocks Press Newsletter* 1.

⁶ Suttie “The short-term letting stoush” *Nicholsons Solicitors* <http://loveownerscorporation.com.au/the-short-term-letting-stoush/> (2-04-2018).

⁷ “Tenants in sectional title schemes, whether short or long term, are bound by the rules” <https://propertywheel.co.za/2015/03/tenants-in-sectional-title-schemes-whether-short-or-long-term-are-bound-by-the-rules> March 2 2015 (2-04-2018).

⁸ *Property24* (n 4).

Fourth, in the case of short-term letting, the sectional owner will incur greater advertising, cleaning and management costs, which will be offset against the higher rental income.

Fifth, letting the apartment out on short-term arrangements during peak months probably means that the owner will be able to use the apartment himself or herself for at least a few weeks a year.

Sixth, in the case of longer-term tenants, it is easier to integrate the tenants into the scheme and the rules of the scheme regulating security and access. By contrast, in the case of short-term letting, where tenants usually stay for one or two days to two weeks on average, the tenants might cause serious disruptions in the close-knit community, and security and access are often major concerns for the remainder of the owners and other residents.⁹

However, as in other situations, there are pros and cons to short-term letting and it is not to say that a holidaymaker will cause any more damage or disruption in a unit than a longer-term tenant. Security issues might arise if there is constant turnaround of keys and access tags, but losing one's keys is not a mishap that is exclusive to short-term tenants and even long-term tenants can let in unsavoury characters!¹⁰

3 *Negatives of short-term letting*

In condominiums designed for short-term letting and boasting hotel facilities, the impact of a handful of owners operating their own short-term rentals is likely to have a minimal effect on unit owners and bodies corporate. The greatest impact is experienced in relatively small condominiums with permanent residents and no building manager. In these condominiums, dealing with the potential unplanned impact of short-term letting can be time consuming and frustrating for the members of the board of trustees and the unit owners and can prove expensive for the body corporate.¹¹

Problems encountered in practice with short-term letting include behavioural, economic and legal compliance issues. Behavioural concerns centre around increased noise and other forms of nuisance such as smoking, drinking, vomiting, urinating, littering, nudity, dropping objects from balconies, drunk tenants jumping from the roof onto balconies, damage to common property and more. Parking can become congested and there are often safety and security risks.¹² Economic concerns

⁹ *Property24* (n 4); "Short-term apartment lets in Cape Town could be illegal" *Property24* (6-10-2017) <https://www.property24.com/articles/short-term-apartment-lets-in-cape-town-could-be-illegal/26500> (2-04-2018).

¹⁰ "Short-term lets in sectional title can be problematic" *Property24* (24-05-2016) <https://www.property24.com/articles/short-term-lets-in-sectional-title-can-be-problematic/24111> (2-04-2018).

¹¹ Suttie (n 6).

¹² In a podcast of Farmer with Stiles "How short term letting led to an extra 1000 residents and 18 illegal brothels in one city building" *Your Strata Property* (27-03-2016) <https://www.yourstrataproperty.com.au/003-short-term-letting/> (2-04-2018) Stiles mentions a strata development in the central business district of Sydney that had one thousand extra people, various illegal brothels at an additional cost of 450 000 Australian dollars a year for administration, maintenance and the provision of water as a result of short-term letting. After the development had stopped short-term letting, it took them three years to clear up the mess. Jimmy Chow "Short-term rental platform regulations need overhauling, says Hong Kong legislator" *South China Morning Post* (16-03-2018) <http://www.scmp.com/special-reports/property/topics/weekend-property/article/2109258/short-term-rental-platform> (2-04-2018) reports that in August 2017, two young women in Stockholm, Sweden, who returned home from a month-long holiday were shocked to find that their apartment, also rented through Airbnb, had been used by Irish prostitutes as a temporary brothel.

include increased activity within the building causing increased wear and tear, the fact that all owners must finance repair works, the damage to a scheme's reputation and loss of amenity, all of which can adversely affect the value of the scheme and its units. Additionally, short-term letting may attract value-added tax (VAT) and income tax. Concerns around legal compliance relate to fire safety and other aspects of security. For example, access to pools and gymnasiums without proper induction may increase the risks involved and all this could give rise to unwanted liability. There is also a heightened risk of insurance policies being invalidated.¹³

Bodies corporate, sectional owners and longer-term tenants in condominium developments tend to regard short-term tenants as irritants. To name but a few typical complaints: they park in the wrong place, compromise the security of the scheme by leaving the front door open, bring in noisy children who track sea sand into the foyer and lifts, and above all else, engage in late night partying with no regard for decibel control!¹⁴ Short-term tenants tend to have different schedules to permanent residents, and often stay up and use facilities late at night, hang beach towels out to dry over their balconies or entertain more than usual, in so doing often disrupting the lives of those who need to stick to their daily routine.¹⁵ They breach the conduct rules, jeopardise the reputation, security and property value of the sectional title scheme and cause damage by excessive drinking and unruly behaviour, with permanent residents left to pick up the pieces and (in many cases) pay the price. The short-term tenants compromise the security of the complex, since, with such an influx of unfamiliar faces, opportunistic criminals can often stroll in past security undetected.¹⁶

Another negative impact of short-term letting is that the number of apartments available for longer-term rental is diminished. This causes a lack of affordable housing and leads to rising housing costs.¹⁷ In addition, short-term tenants can be more likely to default. As short-term tenants usually would not pay for municipal services such as water and electricity, furniture, appliances or linen, the landlord would need to budget for these, as well as regular cleaning and restocking. Finally, turn-over management needs the assistance of an experienced building manager or managing agent. It takes time and energy to look for a new tenant every few weeks or months, and ensure on a recurring basis that the property is clean, inventoried and ready for the next tenant.¹⁸

While it is inconclusive whether Airbnb and the home rental business merely complements hotels by attracting a different type of tourist,¹⁹ it is widely recognised that the entry of short-term letting into the marketplace stimulated direct price

¹³ Graham "Long term issues associated with short term letting: a comparative analysis" HWL Ebsworth Lawyers, Melbourne 3-6; Norman (n 1).

¹⁴ Kelly (n 5).

¹⁵ PropertyWheel (n 7).

¹⁶ Durham "Short-term letting in sectional title schemes" 2017:1 *Paddock Press Newsletter Blog*; "Short-term rentals often 'bad news' in complexes" *Property24* (2-06-2016) <https://www.property24.com/articles/short-term-rentals-often-bad-news-in-complexes/24144> (2-04-2018); *SA Real Estate Investor* (n 3); *Property24* (n 9); Wilkins (n 1).

¹⁷ Norman (n 1).

¹⁸ *Property24* (n 4).

¹⁹ Lawler "Airbnb: Our guests stay longer and spend more than hotel guests, contributing \$56m to the San Francisco economy" *TechCrunch* (9-11-2012) <https://techcrunch.com/2012/11/09/airbnb-research-data-dump/> (2-04-2018).

competition for the hotel industry, especially its most vulnerable sector, namely budget hotels.²⁰

4 *Laws applicable to short-term letting*

4.1 Applicable provisions of the Sectional Titles Act, the Sectional Titles Schemes Management Act and the Sectional Titles Schemes Management Regulations

The current sectional titles legislation²¹ contains no express provision on short-term letting.²² However, there are several provisions which impact on the potential for the management of a scheme to prohibit or at least regulate short-term letting.

The Sectional Titles Act provides that a sectional owner acquires *separate ownership* in a section.²³ This means that he or she acquires the most extensive rights in the section subject only to limitations imposed by law. To elaborate, he or she may use and enjoy the section and *dispose of* (which includes selling or letting) the section together with the undivided share in the common property subject to the limitations imposed in the Sectional Titles Act, the Sectional Titles Schemes Management Act and the prescribed management and conduct rules contained in Annexure 1 and 2 of the Sectional Titles Scheme Regulations.²⁴ From this it follows that an absolute prohibition on short-term letting of a section may in principle not be permissible, since it would limit an owner's freedom of disposal.²⁵

The Sectional Titles Schemes Management Act²⁶ provides that the prescribed management and conduct rules bind the body corporate and the owners of sections "*and any person occupying a section*". The term "occupier" is not defined in the Sectional Titles Act or Sectional Titles Schemes Management Act, but logic dictates that it must include short-term tenants. Owners as well as short-term tenants are therefore bound by the management and conduct rules of the scheme.²⁷

The Sectional Titles Schemes Management Act²⁸ imposes a duty on an owner to "notify the body corporate forthwith of any change of ownership *or occupancy in his or her section*". A short-term lease would qualify as a *change in occupancy* and the owner is therefore obliged to notify the body corporate once this occurs.

The Sectional Titles Schemes Management Act²⁹ provides that when the purpose for which a section is intended to be used is shown expressly on or can be implied by a registered sectional plan, an owner must not use nor permit such section to be

²⁰ See in general, Koh and King "Accommodating the sharing revolution: a qualitative evaluation of the impact of Airbnb on Singapore's budget hotels" 2017 *Tourism Recreation Research* 409-421.

²¹ Sectional Titles Act 95 of 1986, Sectional Titles Schemes Management Act 8 of 2011 and STSM Regs GNR 1231 GG 40335 (7-10-2016). The Sectional Titles Schemes Management Act and the Sectional Titles Schemes Management Regulations came into operation on 7-10-2016.

²² Durham (n 16).

²³ Act 95 of 1986 s 2(b).

²⁴ GNR 1231 GG 40335 (7-10-2016).

²⁵ Hall (n 1); Bauer "Sectional title schemes: the rules" *Private Property* (25-06-2012) <https://www.privateproperty.co.za/advice/property/articles/sectional-title-schemes-the-rules/524> (2-04-2018), Sectional Titles Act states that it could be argued that to restrict an owner's ability to maximise his return on his unit is an infringement of his proprietary rights. Many therefore feel that a ban on short-term lets is unfair; PropertyWheel (n 7) contends that many schemes, because of the disruption that holiday letting can create, would like to ban holiday letting altogether, but this would not be possible as it is restricting the rights of owners' full use and enjoyment of their properties.

²⁶ Act 8 of 2011 s 10(4).

²⁷ Durham (n 16).

²⁸ Act 8 of 2011 s 13(1)(f).

²⁹ Act 8 of 2011 s 13(1)(g).

used for any other purpose except with the written consent of all owners consenting to such other purpose. This is further clarified by prescribed management rule 30(f) in Annexure 1 of the Sectional Titles Schemes Management Regulations. This rule stipulates that the body corporate must take all reasonable steps to ensure that an owner or occupier must not use a section for a purpose other than for its intended use as (i) shown expressly on or implied by a registered sectional plan or an approved building plan; (ii) reasonably inferred from the provisions of the applicable town planning by-laws or the rules of the body corporate; or (iii) is obvious from its construction, layout and available amenities. In principle short-term letting in a residential sectional title scheme still qualifies as residential use.³⁰ It is only when it becomes a commercial activity that the body corporate is obliged to intervene. Short-term letting for holiday purposes may require that the scheme be zoned for hotel (resort) use or could depend on what proportion of sections in an ordinary residential scheme, are regularly let for short periods. This occurs, for example, when a large percentage of investment owners in a residential scheme pool their sections for short-term lettings by one letting agent.³¹

In terms of prescribed management rule 3(2) of Annexure 1 of the Sectional Titles Schemes Management Regulations, a member (owner) must take all reasonable steps to ensure compliance with the *conduct rules* in force in terms of the Sectional Titles Schemes Management Act by *any tenant* or other occupant of any section, including the member's employees, guests, visitors and family members. This section imposes a duty on owners to take reasonable steps to ensure that short-term tenants comply with the conduct rules of the scheme. A sectional owner, while not directly responsible for his tenant's behaviour, will be responsible for any fines issued from the body corporate for misconduct or breach of rules, and it will then be up to him or her to recoup these from the offending occupier.

Prescribed management rule 30 of Annexure 1 of the Sectional Titles Schemes Management Regulations, stipulates that the *body corporate* must take all reasonable steps to ensure that a member (owner) or *any other occupier* (including a short-term tenant) of a section does not³²

- (a) use the common property so as to unreasonably interfere with other persons lawfully on the premises, in breach of section 13(1)(d) of the Sectional Titles Schemes Management Act;
- (b) use a section or exclusive use area so as to cause a nuisance, in breach of section 13(1)(e) of the Sectional Titles Schemes Management Act;
- (c) contravene the provisions of any (i) law or by-law relating to the use of a section; or (ii) conditions of a licence relating to use of the building or the common property, or the carrying on of a business in the building; or (iii) conditions of title applicable to sections.³³

³⁰ In *O'Connor (Senior) v The Proprietors, Strata Plan No 51* 2017 UKPC 45 (21 Dec 2017) the judicial committee of the privy council decided in an appeal from the court of appeal of the Turks and Caicos Islands that short-term letting of an apartment conflicted with a special strata by-law that the apartment must be used as a *private residence of the proprietor or for accommodation of the proprietor's guests and visitors*. See Cordato Partners "Can a strata by-law restrict Airbnb style holiday lettings? A new legal decision is a game changer" (5-04-2018).

³¹ Kelly (n 5).

³² Compare the superseded (see s 21 of the Sectional Titles Schemes Management Act) prescribed management rule 68 of Annexure 1 of the Sectional Titles Regulations GN R664 GG 11245 (8-04-1988) as amended, which obliged an owner to behave in a certain manner.

³³ Annexure 1 rule 30(a)-(c).

In the event that short-term letting is permitted in terms of the scheme rules of a particular sectional titles scheme, the body corporate would be entitled to enforce these rules against short-term tenants.

Prescribed conduct rule 7 of Annexure 2 of the Sectional Titles Schemes Management Regulations contains several additional behavioural rules which bind both *owners and occupiers* and therefore also short-term tenants:

- (a) In terms of rule 7(1) the owner *or occupier* of a section must not create noise likely to interfere with the peaceful enjoyment of another section or another person's peaceful enjoyment of the common property.
- (b) Rule 7(2) stipulates that the owner *or occupier* of a section must not obstruct the lawful use of the common property by any other person.
- (c) Rule 7(3) provides that the owner *or occupier* of a section must take reasonable steps to ensure that the owner or occupier's visitors do not behave in a way likely to interfere with the peaceful enjoyment of another section or another person's peaceful enjoyment of the common property.
- (d) Finally, rule 7(4) states that the owner *or occupier* of a section is obliged to comply with these *conduct rules*, notwithstanding any provision to the contrary contained in any lease or any other grant of rights of occupancy.³⁴

From the above it is clear that a short-term tenant must comply with certain obligations in terms of the Sectional Titles Schemes Management Act and must also comply with the rules of the scheme. This tallies with the obligation of the body corporate in terms of the Sectional Titles Schemes Management Act³⁵ to deliver a copy of the rules to each person who becomes an owner or occupier of a section. This is confirmed by the Rental Housing Act,³⁶ which provides that the landlord must ensure that a *copy of any house rules* applicable to a *dwelling* must be attached as an annexure to the lease. The definition of "dwelling" in section 1 includes amongst other things a "flat" and an "apartment".

4.2 Rental Housing Act

Certain provisions of the Rental Housing Act³⁷ may also impact on short-term letting in sectional titles schemes. The Rental Housing Act regulates "rental housing", which is defined as including "one or more dwellings".³⁸ "Dwelling" is in turn defined so as to include amongst other things a *flat or an apartment*. This means that certain provisions of the Rental Housing Act are applicable to the short-

³⁴ The corresponding superseded prescribed conduct rule 10 of Annexure 8 of the Sectional Titles Regulations GN R664 GG 11245 (8-04-1988) as amended stipulated that all tenants of units and other persons granted rights of occupancy by any owner of the relevant unit are obliged to comply with these conduct rules, notwithstanding any provision to the contrary contained in any lease or any grant of rights of occupancy.

³⁵ Act 8 of 2011 s 10(6)(c).

³⁶ Act 50 of 1999 s 5(8) and (9).

³⁷ Act 50 of 1999 s 1.

³⁸ Act 50 of 1999 as amended by the Rental Housing Amendment Act 43 of 2007 and the Rental Housing Amendment Act 35 of 2014. The latter act is not yet in operation.

term letting of units in sectional titles schemes.³⁹ The most important provision of the Rental Housing Act for our purposes is, as already mentioned, that the landlord must attach a copy of any house rules to the lease. House rules are defined as rules relating to the control, management, administration, use and enjoyment of the rental housing property.⁴⁰

4.3 City of Cape Town Municipal Planning By-Law

In terms of the City of Cape Town Municipal Planning By-Law of 2015, apartment ownership buildings (*ie* blocks of flats) are zoned under “General Residential Subzonings (GR 2 to GR 6)”. These GR zonings promote higher-density residential development, including blocks of flats. Different development rules apply to different subzonings, particularly with regard to height and floor space, in order to accommodate variations of building styles. GR2 accommodates flats of relatively low height and floor space, GR3 and GR4 cater for flats of medium height and floor space, while GR5 and GR6 accommodate high-rise flats. The dominant use is intended to be residential, but limited mixed-use development is possible.⁴¹ Primary uses include, amongst other things, second homes, group housing, boarding houses, guest houses and flats.⁴² Consent uses include amongst other things shops, hotels, conference facilities and rooftop base telecommunication stations.⁴³

A Cape Town City councillor has opined that holiday letting in apartment blocks is not permitted in Cape Town in terms of the Cape Town City Municipal Planning By-Law together with its policies⁴⁴ and frameworks.⁴⁵ He takes the view that the relevant Municipal Planning By-Law and mechanisms provide control over holiday accommodation within the city. Whereas mechanisms exist for short-term rentals and bed-and-breakfast arrangements in dwelling houses, larger-scale holiday accommodation can take place in guest houses and in hotels, but not in a residential block of flats. In his view, any owner wishing to do short-term holiday letting from a block of flats, irrespective of the platform⁴⁶ facilitating such letting, must ensure that the property is appropriately zoned, and must apply for consent of use for that property from the city’s development management department. Therefore,

³⁹ Apart from the provisions that the landlord must attach a copy of any house rules to the lease, other important provisions are that in advertising a dwelling and in negotiating a lease, a landlord may not discriminate against such prospective tenants, members of his or her household or visitors on the grounds of amongst other things, race, gender, sex, pregnancy, marital status, sexual orientation, religion, culture and language (s 4(1)); that, if requested by the tenant, the lease must be reduced to writing (s 5(2)); that the apartment must be inspected jointly to ascertain any defects of damage therein before the tenant moves in and again three days prior to the expiration of the lease to ascertain the damage caused during the tenancy (s 5(3)(e), (f), (j), and (k)); that the lease must contain full information of amongst other things the tenant, the apartment, the rental, the deposit, the period of lease and the obligations of the landlord and tenant (s 5(6)).

⁴⁰ Rental Housing Act 50 of 1999 s 1 “house rules”. See Stott “Sectional Title – Tenants” <http://www.fouriestott.co.za/sectional-title-tenants/> (2-04-2018).

⁴¹ See explanation under part 2 General Residential Subzonings (GR 2 – GR 6), sch 3 of the City of Cape Town Municipal By-Law of 2015.

⁴² City of Cape Town Municipal By-Law of 2015 sch 3 item 40(a).

⁴³ City of Cape Town Municipal By-Law of 2015 sch 3 item 40(b).

⁴⁴ A policy plan is defined in City of Cape Town Municipal By-Law of 2015 sch 3 item 1 “policy plan” means a policy adopted by the city, or structure plan, spatial development framework or other plan as approved in terms of this By-Law.

⁴⁵ This refers to the municipal spatial development framework mentioned in City of Cape Town Municipal Planning By-Law, 2015 s 1 “spatial development framework”.

⁴⁶ Such as Airbnb or otherwise.

owners in a block of flats could decide to convert the block or part of it for holiday accommodation or to accommodate transient guests, but would first have to apply for a *consent use for a hotel* for that block or part of it from the city's development management department. An application document and workflow diagram is made available for the public, indicating the steps and timescales involved in the process. On account of the complexity of the matter, potential applicants are advised to request a pre-application consultation session with a land use planner. The city has implemented processes for the public to lodge formal complaints and the city will institute legal action against those who continue short-term letting in contravention of the law.⁴⁷ At present, none of the other municipalities, such as Durban and Nelson Mandela Bay (Port Elizabeth), seem to have similar municipal by-laws in place.

In my opinion it is debatable that the mere zoning of a flat under *General Residential Subzonings (GR 2 to GR 6)* can have such far-reaching consequences. From overseas experience, short-term letting can only be forbidden by way of an express prohibition by a local authority or by requiring a licence or registration to undertake short-term letting in order to maintain a degree of control and to safeguard against abuse by unfit landlords and tenants. A further question is whether once a block of flats or part of it has obtained a consent use for a hotel, that block of flats or the part of it in question must also comply with the strict operational requirements that apply to hotels.

5 *Conclusions with regard to short-term letting*

From the above review it is clear that in fact, in principle, apartment ownership carries with it the right to full use and enjoyment of one's section and the right to dispose of one's unit by renting it out on a longer- or shorter-term lease and so enjoy the civil fruits (rental) produced by one's property.

However, ownership of a section must be enjoyed subject to the law, which in this context means the applicable provisions of the Sectional Titles Schemes Management Act and the prescribed management and conduct rules. We have seen that in terms of the Sectional Titles Schemes Management Act and the prescribed management rules, an owner must not allow his or her section to be used in a manner that causes a nuisance or interferes with the use and enjoyment of sections or common property by other residents.⁴⁸ Ongoing nuisances perpetrated by short-term tenants that cause measurable disruption and disorder to the lives of the other sectional owners and occupiers are unacceptable.⁴⁹ If the behaviour of short-term tenants in one or more sections in a particular scheme becomes so intolerable that the other residents cannot be expected to put up with the nuisance any longer, a conduct rule prohibiting short-term letting would be appropriate for the scheme and thus incontestable. It must be shown that the adoption of a rule prohibiting short-term letting is a reasonable reaction to a material disadvantage caused by the prevalence of short-term letting.⁵⁰

The Sectional Titles Schemes Management Act and the prescribed management rules stipulate that sections may be used only for their intended purpose. Does short-term letting for holiday purposes qualify as residential use or is it a commercial activity? Holidaymaker tenants are residing in the sections, and the use of a section

⁴⁷ Wilkins (n 1).

⁴⁸ Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(g) and Sectional Titles Schemes Management Regulations Annexure 1 rule 30(f).

⁴⁹ Kelly (n 5).

⁵⁰ GetSmarter (n 2).

for the provision of holiday accommodation can be considered to be ancillary to the main use of the residential property, namely to provide living-in accommodation.⁵¹ In the event that it is conceded that an apartment leased for more than three months qualifies as residential use, is there really a strong enough argument to conclude that the same cannot be said for short-term letting? From case law on the interpretation of section 44(1)(g) in the Sectional Titles Act (re-enacted as s 13(1)(g) of the Sectional Titles Schemes Management Act),⁵² it is apparent that section 13(1)(g) applies only in cases where a section is put to a commercial or professional use. In *Cujè-Jakoby v Kaschub*,⁵³ the applicants conducted an in-house rental and cleaning service for the benefit of the other sectional owners in the scheme by converting three of their garages into ablution facilities and welfare, administration and ironing spaces for their staff and the gardener employed by the body corporate. In *Bonthuys v Scheepers*,⁵⁴ a unit owner was not allowed to turn a room in her section into a hair-dressing salon. In the case of short-term letting, the owners are not letting out their units on short term for anything but residential use.

In South Africa, there is no law prohibiting short-term letting in sectional titles schemes in general. However, each city is capable of adopting and enforcing by-laws and zoning regulations to address problems that can arise, as indeed has been evidenced by the approach taken in Cape Town. If this has not been done in a particular city, one must check whether the title conditions or special management and conduct rules of a particular scheme prohibit short-term letting or regulate it in a sufficient manner.⁵⁵

In the majority of sectional title schemes in South Africa, the special rules tend to specify that a short-term let is anything under three or six months, and that granting leases for such periods is not permitted. These special rules might have been a response to flagrant instances of nuisance and concerns over security and harmony in the scheme. Accordingly, such a conduct rule would be reasonable and incontestable.⁵⁶

On the other hand, we have established that the ownership of a sectional title unit in principle allows an owner to rent out his property on a long-term or short-term basis, that in general short-term letting does not amount to change of use from residential to commercial use, and that short-term letting is not expressly regulated in the Sectional Titles Schemes Management Act or the prescribed management rules of Annexures 1 and 2 of the Regulations. Therefore, I am of the opinion that in the event that a substantial majority of members of a particular sectional titles scheme are in favour of short-term letting, the members may adopt a special conduct rule permitting short-term letting under strict conditions designed to avoid the negative impacts of short-term letting. This must be accompanied by a separate set of strict rules applicable to the short-term tenants that will be residing in the scheme.

⁵¹ Kelly (n 5). See also the Holiday and Short Term Rental Code of Conduct – National Version 24 March 2015 of the Holiday Rental Industry Association of Australia: www.hria.com.au.

⁵² Sectional Titles Act 95 of 1986 s 44(1)(g) and (2).

⁵³ 2007 3 SA 345 (C).

⁵⁴ (CA 303/2006) 2007 ZAECHC (17 Sept 2007).

⁵⁵ Norman (n 1) states that the short-term nature of Airbnb is problematic in New York, San Francisco, Barcelona and Amsterdam. See also Hall (n 1).

⁵⁶ *Property24* (n 10).

6 *The content of a special conduct rule regulating short-term letting under strict conditions*

6.1 General

The Sectional Titles Schemes Management Act sets two requirements for the adoption of additional conduct rules to the prescribed rules of Annexure 1 and 2:

First, the additional rules must be reasonable and apply equally to all owners of units.⁵⁷ Second, on each occasion that the prescribed conduct rules are supplemented, the body corporate must lodge with the chief ombud a notification in the prescribed form for such additional conduct rules. The chief ombud must then examine the proposed addition to the conduct rules and must not approve it for filing unless he or she is satisfied that such addition is *reasonable and appropriate* to the scheme.⁵⁸

In my opinion, the ombud would be obliged to find that the additional conduct rule is reasonable and appropriate to the particular scheme if the proposed conduct rule curtails or neutralises most of the negative effects of short-term letting and 75% of the members of the body corporate of that particular scheme approve the conduct rule in question. In my opinion it would be possible to achieve such a majority in residential schemes that consist of a large percentage of investment owners or where a large proportion of the residential component of a mixed-use scheme consisting of commercial and residential sections has been purchased by investors.

6.2 Content of special conduct rule regulating short-term letting

To achieve this goal, the new conduct rule must allow for short-term letting for less than three consecutive months under the following conditions:⁵⁹

- (1) The body corporate must designate a managing agent or building manager to handle short-term letting issues for an agreed remuneration.
- (2) No short-term letting shall in any way release the owner from any of his or her obligations to the body corporate in terms of these rules and other rules made under the act. This applies in particular to prescribed management rule 3(2) of Annexure A, which stipulates that a member (owner) must take all reasonable steps to ensure compliance with the *conduct rules* in force in terms of the Sectional Titles Schemes Management Act by *any tenant* or other occupant of any section, including the member's employees, guests, visitors and family members.
- (3) At least 7 days prior to⁶⁰ making their sections available for short-term letting, the owner must provide a security deposit,⁶¹ which the body corporate can use

⁵⁷ Act 8 of 2011 s 10(3).

⁵⁸ Act 8 of 2011 s 10(5)(b).

⁵⁹ I am indebted to Amanda Farmer from *Your Strata Property*, who sent me a copy of a model special by-law on short-term accommodation. See also in general, Stott (n 40); *Property24* (n 10); Durham "How to short-term let your sectional title property, the right way" *Home Times Sectional Titles and Estates* (26-01-2017). hometimes.co.za/.../how-to-short-term-let-your-sectional-title-property-the-right-way (5-04-2018) and 2018:3 *Paddocks Press Newsletter*; *Property24* (n 2).

⁶⁰ Directly or indirectly through their letting agents. "Letting agent" means a person or agency which lets a section to a tenant on a short-term basis on behalf of an owner and which is registered with the Estate Agency Affairs Board.

⁶¹ "Security deposit" means a security deposit of between R2 000 and R10 000 depending on the period for which the letting was granted or any other amount of money determined by the trustees from time to time.

- for the repair of any damage caused by the tenant or his or her guests and visitors.
- (4) At least 7 days prior to using, operating, or directly or indirectly facilitating the use of a section for short-term letting, the owner through his or her letting agents must provide the following documents and information to the designated managing agent or building manager in respect of each short-term tenant: (a) the start date and end date of his or her stay; (b) his or her full name; (c) his or her contact details; and (d) a certified copy of his or her photographic identification.
 - (5) At the commencement of the short-term letting the designated managing agent or building manager must (a) provide the short-term tenant with a copy of this special conduct rule and the special conduct rules pertinent to short-term letting of the particular sectional titles scheme which are directly applicable to short-term tenants; (b) outline to tenants the consequences of failing to comply with the foregoing conduct rules and draw their attention to the severe sanctions that apply in case of non-compliance; and (c) provide his or her general, after hours and emergency telephone numbers to tenants and owners of sections not participating in short-term letting to contact in the event of a contravention of these conduct rules and the special conduct rules furnished to short-term tenants on arrival.
 - (6) At the conclusion of the short-term letting period, the owner must pay to the body corporate a certain percentage of the rent that he or she receives to allow for the additional wear and tear to the common property as a result of the more frequent change in occupation of his or her section.
 - (7) If the managing agent or building manager designated to handle short-term letting issues reasonably believes that a short-term tenant or his or her guests or visitors are using the section rented on a short-term letting basis in breach of this special conduct rule, or the conduct rules of the particular scheme directly applicable to short-term tenants and their guests, the designated managing agent or building manager may exercise the body corporate's legislative right to enforce these rules, and depending on the seriousness of the breach, may:
 - (a) enter any part of the section in question to carry out the investigation necessary to confirm the tenant's or his or her guests' compliance with this special conduct rule and the pertinent conduct rules applicable to short-term tenants of the particular sectional titles scheme;
 - (b) terminate the right to occupy the section, which may result in the forfeit of rent already paid;
 - (c) impose a fine on the short-term tenant, deductible from the security deposit paid by the tenant; and
 - (d) in cases of serious non-compliance with the foregoing conduct rules, deactivate the tenant's security keys⁶² with the result that he or she and their guests no longer have automatic access to the building or to the section in question.
 - (8) As the brief period of occupancy in terms of short-term letting necessitates an effective and swift enforcement measure, the remedy of deactivation of the tenant's security key should be available in cases of excessive noise, anti-

⁶² "Security keys" means a key, magnetic card, or other device or information used on the common property to: (i) open and close security gates, doors, gates, or locks; or (ii) operate alarms, security systems, or communication systems.

- social behaviour or partying in the section. The tenant and his or her guests and visitors should be deemed to have consented to such deactivation of the security keys by the designated managing agent or building manager on short notice.
- (9) Where the body corporate (through the designated managing agent or building manager) has incurred enforcement and/or other costs on behalf of an owner, the body corporate may deduct those costs from the security deposit paid by the owner.
 - (10) The owner must promptly ensure that any damage to any part of the common property caused directly or indirectly by the tenant's breach of this special conduct rule or the conduct rules of the particular scheme specifically applicable to short-term tenants is swiftly repaired.
 - (11) The security deposit will be applied by the body corporate towards the cost of rectifying any damage to any part of the common property directly or indirectly caused by the breach of this special conduct rule or the conduct rules specifically applicable to short-term letting by the tenant or his guests.
 - (12) Subject to 7, 9 and 11 above, the security deposit will be refunded to the owner at the conclusion of the short-term tenant's stay.
 - (13) If the costs under 12 above exceed the amount of the security deposit, the owner is deemed to consent to the balance being charged to the account of the owner of the section as a penalty.

6.3 Content of special conduct rule applicable to short-term tenants

In addition to the special conduct rules applicable to members letting their sections on short-term leases, the scheme must have a separate set of special conduct rules particularly aimed at short-term tenants.⁶³ In the preamble to these rules, short-term tenants must be requested to treat the section as their own, respect their neighbours and leave the section as they found it.

The set of rules may contain some or all of the following rules, depending on the unique characteristics of the particular scheme:

- (1) Tenants, their guests and visitors *must comply with* all conduct rules and instructions from the designated managing agent or building manager and security services during their stay, notwithstanding any provision to the contrary contained in the short-term letting contract. Tenants and their guests and visitors must notify the designated managing agent or building manager of any disputes or complaints from neighbours as soon as is practicable.
- (2) Excessive *noise, nuisance and anti-social behaviour* is prohibited. Noise offensive to neighbours is forbidden between 10 pm and 8 am and during arrival and departure. All television, radio and other appliances emitting sound, including musical instruments, must be used in such a manner as not to be heard in adjoining sections or on the common property. The horns of motor vehicles may not be sounded at any time on the common property, except as a warning of imminent danger in cases of emergency. Any anti-social behaviour may result in termination of the right to occupy the section, deactivation of magnetic access cards, loss of rent paid and extra charges for security and other expenses, which may be deducted from the security deposit which the tenant must pay in terms of the short-term letting contract.

⁶³ See in general PropertyWheel (n 7); Victoria Accommodation Industry Association *Holiday Rental Code of Conduct* (2012) part 3.

- (3) Tenants are *responsible for the conduct of their guests* and visitors and must ensure they comply with these special conduct rules for short-term tenants.
- (4) Tenants must ensure that the *number of persons* in occupation of the section at any time does not exceed more than two persons per bedroom.
- (5) The section is not a “party pad” and *late night parties* are strictly forbidden. Any gathering, celebration or entertainment permitted at a section must not conflict with residential comfort and amenity and must comply with all the other requirements.
- (6) Tenants, their guests and visitors must comply with all rules and conditions applicable to the operation of *parking areas* and show consideration to the parking requirements of neighbours. The tenant must use the parking space allocated to the owner of the section and visitors may park only in designated visitor parking spaces.
- (7) Tenants and their guests and visitors must dispose of *garbage and recycling* in the allocated bins, and excess rubbish must not be left on the common property. Tenants and their guests and visitors may not leave any rubbish, cigarette butts, food scraps or any other litter on the common property.
- (8) Tenants and their guests and visitors must at all times ensure that the *security and safety* of all owners, occupiers and their property are preserved and in particular must ensure that (a) upon entering and leaving, all security doors and gates are properly closed and (b) such doors and gates are never opened for persons other than their own guests or visitors. Whenever tenants or their guests are absent from the section, they must close all windows and doors to maintain security and prevent rain and water damage. The trustees reserve the right to admission to the scheme. The trustees have the right to deny access to any person, should they deem such action to be necessary to ensure the security and privacy of owners or occupiers of sections and compliance with the conduct rules.
- (9) Tenants, their guests and visitors may not leave any *obstructions* to the free flow of pedestrian or vehicular traffic on any part of the common property. In particular access to staircases, passages, landings and stairwells must be kept clean at all times and clear of suitcases, bicycles and other items.
- (10) Tenants shall be obliged to take all reasonable steps to keep the *balconies/terraces* of the section in a clean, neat and attractive condition and must refrain from smoking on the balconies/terraces. Tenants and their guests and visitors may not throw or dispose of any material or object over balcony walls or railings. Tenants and their guests and visitors may not hang any clothes, washing, linen or other items over balconies or in windows or corridors or any other place where they will be visible from outside the section.
- (11) Tenants and their guests and visitors must ensure that their *use of the common property* and all common service facilities and amenities available shall at all times be conducted with reasonable care and with due and proper consideration for the remaining owners and occupiers and in accordance with these special conduct rules for short-term tenants.
- (12) Tenants and their guests must abide by the limitation on the use of each section of the *Internet* and other conditions determined by the trustees.
- (13) Tenants must use the *cleaning personnel* provided by the owner for cleaning the section and may not request or instruct employees of the body corporate (including the caretaker) to perform any tasks during their working hours.

- (14) *No indulgence or relaxation* in respect of these rules shall constitute a *waiver or consent*, or prevent their enforcement by the designated managing agent or building manager at any time.
- (15) *Breach* of these special conduct rules pertaining to short-term tenants is a breach of (a) the terms and conditions of the short-term letting contract; and (b) the right to occupy the section in terms of the short-term lease. The owner and designated managing agent or building manager reserve the right, in accordance with law, to terminate the right to occupy the section and to deactivate the magnetic access cards of tenants, their guests or visitors who refuse to comply with these special conduct rules or who cause excessive nuisance.

Further special rules concerning, amongst other things, a swimming pool, barbeques, the allowance of pets, and special departure arrangements may also be included in line with the particular nature of the sectional titles scheme in question.

7 Conclusion

Short-term letting of apartments in sectional title schemes can make a positive sustainable contribution to local tourism and communities if strictly regulated so as to minimise any adverse social or environmental consequences. In my opinion such transactions should not be prohibited in schemes where a substantial majority of the members adopt a special conduct rule to allow short-term letting subject to the strict conditions set out above fortified by another special conduct rule restricting the behaviour of short-term tenants. This will, in my opinion, be sufficient to convince the chief ombud that these special conduct rules are reasonable and appropriate to the particular sectional title scheme in question. It is obvious that in the event that the chief ombud is confronted with a sectional titles scheme where one insurance company owns more than 60 percent of the units, she should not in my opinion allow short-term letting, as this company is in essence trying to change that particular scheme into a condo-hotel and potentially flouting the local planning restrictions.

SAMEVATTING

BEHOORT KORTTERMYNVERHURING TOEGELAAT TE WORD IN DEELTITELSKEMAS?

In Suid-Afrika raak korttermynverhuring van woonstelle in deeltitelgeboue toenemend gewild. Dit is veral omdat die huurinkomste by korttermynverhuring hoër is as by langertermynverhuring en omdat digitale verhuuringsplatforms soos Airbnb hoogs doeltreffend funksioneer. In die praktyk doen gerugte egter die rondte dat die onophoudelike instroming van vreemdelinge in residensiële deeltitelgeboue gepaardgaan met lawaai, rommelstrooiing, dronkenskap, naaktheid, bandelose partytjies op dakterasse en die afgooi van voorwerpe vanaf balkonne wat die reputasie, veiligheid, sekuriteit en uiteindelik die waarde van die skema en al die deeltiteleenhede daarin aantast. Voorts kan daar 'n behuisingstekort ontstaan omdat die langertermynverhuuringsmark verklein word en die handelsbelange van hotelle en gastehuse wat aan strengere vereistes moet voldoen, kan ook nadelig geraak word. As gevolg hiervan word korttermynverhuring van akkommodasie in deeltiteleenhede vir tydperke van minder as drie maande, deur verskeie plaaslike owerhede in die buiteland en ook in Kaapstad, verbied of drasties ingeperk.

In die bydrae word die mening gehuldig dat indien die titelvoorwaardes van 'n betrokke skema of die soneringsbepalings van 'n betrokke plaaslike owerheid nie reeds korttermynverhuring verbied nie, die lede van die deeltitelgemeenskap 'n spesiale gedragsreël ten opsigte van korttermynverhuring met 'n 75% meerderheid kan aanneem. Hierdie gedragsreël kan dan óf korttermynverhuring verbied op grond van 'n ondraaglike oorlast, óf korttermynverhuring toelaat onderworpe aan streng voorwaardes ten einde die negatiewe gevolge van die verskynsel teen te werk. Hierdie mening word onderskraag deur die beginsel dat 'n deeltiteleenaar die mees volledige genots- en beskikkingsbevoegdhede ten opsigte

van sy of haar woonstel geniet en dat 'n korttermynverhuring net so min as 'n langertermynverhuring in stryd is met die doel van 'n residensiële deeltiteleenheid. Daarom word twee stelle spesiale gedragsreëls voorgestel vir deeltitelskemas wat korttermynverhuring onder streng voorwaardes kan toelaat. Die een stel reëls geld vir deeltitelskemas waarin *eienaars* toegelaat word om hul woonstelle vir korter tydperke as drie maande te verhuur, en die ander stel reguleer die gedrag van korttermynhuurders wat vir vakansies in hierdie woonstelle intrek. Myns insiens voldoen hierdie gedragsreëls aan die redelikhedsvereiste en behoort die hoofombud die gedragsreëls as *gepas* te beskou in die geval van deeltitelskemas wat hoofsaaklik uit dele bestaan wat vir beleggingsdoeleindes aangekoop is.

CASUAL BUTCHERY OF LONG STANDING PRINCIPLES FROM THE ROMAN LAW ON THE BASIS OF FLIMSY RESEARCH IS DEPLORABLE AND ABHORRENT

“Whether or not a landlord should enjoy an advantage over other creditors is a matter of policy about which I hold no strong views. What I do object to is that an ancient right, originating in the Roman law, should have been subjected to such casual butchery on the basis of such flimsy research” Mcallister “The landlord’s hypothec: down but is it out?” 2010 *Juridical Review* 65 68.