



NATIONAL ASSOCIATION
OF MANAGING AGENTS
SHAPING OUR PROFESSION

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**CONVENYANCING TEAM OVERSIGHT
- BROWN BRAUDE & VLOK Inc.**



NAMA 2019 National Conference

MUNICIPAL VS SCHEME REQUIREMENTS

Running a Business / Working from Home

INTRODUCTION

The above is often cause of much unhappiness and unpleasantness between owners and the Body Corporate and the Trustees.

The Law relating to the essentials is fairly straight forward. How the facts are interpreted can however lead to a whole host of problems.

The begin the question to be posed is : What, if anything, is the difference between working from home (the unit) and running a business which may be against both scheme and Municipal regulations ?

The former does not constitute a change of use, while the latter does and consent will be required.

Answer this question at the end of the session:

An Accountant works from his 3 bed roomed residential unit. He has a study and computer, desk etc. (A home study)

He operates from home. He has no clients calling on him. There is no noise factor. He prepares financial statements and consults clients off site. Is this running a business or working from home? Is it any different to the student who uses the home study to research and complete assignments?

MUNICIPAL REQUIREMENTS

All land in South Africa is now incorporated under the various Municipalities. For purposes hereof I will be dealing with the Nelson Mandela Bay Metropolitan Municipality.

All Municipal areas have Zoning Scheme Regulations. These regulations dictate the use of land within their specific areas. They may be industrial, business and residential to name but a few.

I am confining this topic to land zoned for residential purposes.

The so called “Use Zones” of properties are indicated in the regulations by reference to a “Map”. This map reflects the Use Zone, Primary uses (in other words not requiring Municipal Consent), Secondary Uses (uses permitted with Councils consent) and prohibited uses. Examples would be for example Residential 1 - dwelling houses, secondary use would be places of worship, special uses and guest houses, prohibited use would be any other use.

Secondary Use means any building or use listed under Secondary Use which may be used with the Special Consent of Council.



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1 Use Zones	2 Primary uses (Uses permitted)	3 Secondary uses (Uses permitted with the Special Consent of the Council)	4 Prohibited uses
Residential 1	Dwelling houses	Places of Public Worship Places of Assembly Places of Instruction Institutions Special Uses Guest Houses [Introduced TPA 1106 (Amended 3) 2.10.92]	Uses other than those mentioned in Columns 2 and 3
Residential 2	Dwelling units	Places of Public Worship Place of Assembly Places of Instruction Institutions Special Uses Guest Houses [Introduced TPA 1106 (Amended 2) 2.10.92]	Uses other than those mentioned in Columns 2 and 3



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Residential 3	Dwelling units Residential Buildings Guest Houses [Introduced TPA 1106 (Amended 3) 2.10.92]	Licensed Hotels Medical Uses Places of Amusement Places of Public Worship Places of Assembly Places of Instruction Institutions Special Uses Parking	Uses other than those mentioned in Columns 2 and 3
Residential 4 [Introduced TPA 1106 (Amended 3) 2.10.92]	Dwelling units	Uses other than those mentioned in columns 2 and 4	Noxious uses Sex Shop, Brothel (TPA 1106 (A6))



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Business 1	Shops, Business Purposes Places of Public Worship Places of Assembly Places of Instruction Dwelling units Residential Buildings Public Garages Warehousing Funeral Parlours Parking Licensed Hotels Guest Houses [Introduced TPA 1106 (Amended 3) 2.10.92]	Uses other than those mentioned in Columns 2 and 4 Sex Shop, Brothel (TPA 1106 (A6)	Noxious Uses
Business 2	Shops Business purposes Dwelling units Parking	Uses other than those mentioned in Columns 2 and 4 Sex Shop, Brothel (TPA 1106 (A6)	Industries Noxious Uses



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Business 3	Offices Medical uses Dwelling units Residential Buildings	Restaurants for on-site consumption of food	Uses other than those mentioned in Columns 2 and 3
Industrial 1 [Deleted TPA 1106 (Amended 2) 10.7.92]			
Industrial 2	Funeral Parlours Industries Business purposes Public Garages Parking Warehousing, Shops Workshops Builders Yards Noxious uses subject to Regulation 3.15.2	Uses other than those mentioned in Columns 2 and 4 Sex Shop, Brothel (TPA 1106 (A6)	Uses other than those mentioned in Columns 2 and 3



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Undetermined	Dwelling houses Agricultural purposes	-	Uses other than those mentioned in Columns 2 and 3
Transportation 1	Streets and public Transportation	Shops, Business purpose Special Uses	Uses other than those mentioned in Columns 2 and 3
Transportation 2	Railways, Harbour, Airport	Shops, Business purposes Special Uses	Uses other than those mentioned in Columns 2 and 3
Public Open Space	Public Open Space	Shops, Business purposes Special Uses	Uses other than those mentioned in Columns 2 and 3
Private Open Space	Private Open Space	Special Uses	Uses other than those mentioned in Columns 2 and 3
Parking	Parking	Special Uses	Uses other than those mentioned in Columns 2 and 3



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Sectional Title Schemes are generally zoned Residential 2. This is your typical townhouse scheme. (Duets can be residential 1 and multiple storey buildings are normally Residential 3) All are however residential in nature. Any other use excluding those permitted would thus contravene the zoning conditions.

The definition of a “residential building” is, according to the scheme zoning by-law regulations, a building, other than a dwelling unit or multiple dwelling, used for human habitation, but excludes a licensed hotel and guest house.

The uses to which land units may be used are, as stated, set out in the Use Zones. Some land uses are always subject to Council’s Special Consent. These include inter alia, refuse tipping, sewage disposal, land fill and reclamation to mention but a few.

Business Purposes in terms of the regulations are limited to land or a building being used for the provision of a service for gain or reward such as an office , restaurant for onsite consumption of food, hairdresser, medical use or for other business purposes, but excludes certain activities. The property would thus have to be zoned Business 1. Sectional title schemes are not zoned for business generally.

So our prospective hairdresser would not be entitled to ply her trade without Municipal consent or a departure. Such a departure is granted on a temporary basis and attaches to the person (the applicant) and not to the property. In other words should the unit be sold, the consent granted would lapse.

It is possible that a scheme can be zoned for both residential and business uses, but I am confining this discussion to residential schemes.

So assuming that our hairdresser obtains Municipal consent she still has a further loop to jump through that being the actual scheme requirements.

SCHEME REQUIREMENTS

These requirements may be more difficult to get around.

Section 13(1) of the Sectional Titles Schemes Management Act, no 9 of 2011 states that an owner must:

- (g) *When the purpose for which a section or exclusive use area is intended to be used is shown expressly or by implication on or by a registered sectional plan, not use such nor permit such section or exclusive use area to be used for any other purpose: provided that with the written consent of all owners such section or exclusive use area may be used for that purpose.*

Section 13(2) states that any person who is of the opinion that any refusal of consent of another owner is in terms of the proviso to (1) (g) above is unfairly prejudicial, unjust or inequitable to him or her, may, within 6 weeks after the date of such refusal, make an application in terms of this subsection to an Ombud.

Prior to the Act the use of a unit was dictated by a similar provision contained in **Section 44(1)** of the Sectional Titles Act no 95 of 1986. The main difference was that should all the owners not consent the owner concerned had to approach Court and not the Ombud.

The authorities and examples referred to hereinafter, would thus have been based on the **provisions of Section 44(1)** of the Sectional Titles Act.

The Prescribed Management Rules also refer to the use of sections and exclusive use areas by owners.

Prescribed Management Rule 30 states that:

The body corporate must take all reasonable steps to ensure that a member or occupier of a section or exclusive use area does not:

(c) contravene the provisions of any:

- (i) by-law relating to the use of a section or exclusive use area, or;*
- (ii) Conditions of a license relating to the use of the building or common property, or of the carrying on of a business in the building;*
- (iii) Conditions of title applicable to sections of exclusive use areas.*

- (f) *Subject to the provisions of section 13(1)(g) of the Act, use a section or exclusive use area for a purpose other than it's intended use as:*
- (i) *shown expressly or by implication on a registered plan or approved building plan; or*
 - (ii) *Can reasonably be inferred from the provisions of the applicable town planning by-laws or the rules of the body corporate; or*
 - (ii) *is obvious from its construction, layout and available amenities.*

The Rules prescribed under the prior Act are very similar.

Initially and prior to dealing with case law relating to the granting of consent (in cases where the applicant cannot obtain 100% owner consent) it needs to be remembered that even where Municipal approval has been granted , this does not mean the owner concerned can commence trading. Body Corporate approval is still required.

It is also to be borne in mind that even if a property is zoned business 1 and hence, in terms of zoning the owner may trade, that they may still require Body Corporate of Home Owner consents.

To illustrate:

In the matter of **Vanilla Street Home Owners Association v B Ismail and N G Lewis** , an unreported appeal to the full bench of the **High Court of South Africa, Western Cape Division, under case no A345/2013** the Court was tasked with the issue of an owner using her unit as a hair salon.

The owner relied on the zoning of the property (on which the entire scheme was situate) in that it permitted *occupational practice* from the premises.

The Home Owners Association (HOA) Constitution and Conduct Rules stated that the properties within the scheme were to be used for residential purposes.

The owner asserted that the Constitution and Conduct Rules of the HOA could not alter the zoning of the property. The Court found that the Constitution and Conduct Rules prevailed over the zoning of the property, not in the sense that they altered the zoning, but on the basis that owners within the scheme had forfeited their rights that they may otherwise have had under the zoning scheme. (They had made themselves subject to the Constitution and the Rules by acquiring a property within the scheme) A clear distinction is thus made between zoning and the Constitution and Rules which govern the scheme.

The same principle would apply to a sectional title scheme.

Assuming that an owner wishes to run a business from his/her unit, and has obtained the requisite consent from the Municipality, he /she would require 100% written owner consent as well. This is difficult at the best of times. Assuming he/she does not obtain such consent he/she would have previously approached Court, now the Ombud.

To illustrate, the under mentioned cases where the Courts have been tasked with owners refusing to consent to a change of use.

In the matter of **Cuje-Jakoby and another v Kaschub and another 2007(3) SA 345 CPD** the Court was called upon to give consent where one owner refused to consent.

The facts briefly were that the applicants owned several units within a scheme, including garages. The respondent lived next door to them. Most of the units in the scheme were not occupied on a full time basis. Most owners let the units when not being occupied.

The applicants had for years been attending to the letting and cleaning of units and laundry of owners within the scheme and to this extent had converted some garages. They had obtained the approval of all excluding the respondent, to the change of use of the garages.

The Court reasoned that the words unfairly prejudicial, unjust or inequitable as stated in the Act denoted conduct which departed from the accepted standards of fair play, and that the word “unfairly” in the Act meant “unreasonably”

The Court went on to grant consent, stating that the respondent’s refusal to grant consent was unreasonable. The reason for this was due to inter alia her agreeing at an AGM but imposing conditions hence hedging her bets. Another important consideration was that many owners utilised the services of the applicants in letting out their units hence it fitted in perfectly into this background.

In the matter of **Bonthuys v Scheepers** , an unreported decision of the **High Court of South Africa , Eastern Cape Division CA 303/2006** the Court had to rule on owner refusal to a change of use of a unit. The respondent intended to and did in fact operate a hair salon from her unit. She had Municipal consent, but failed to obtain owner consent. When she belatedly applied many owners opposed the application on the basis that the change of use would detract from the residential nature of the scheme.

They also raised concerns regarding security (the owner has constructed her own entrance to the scheme), the fact that the salon may have an adverse effect on the values of the remaining owners and primarily that they had bought into the scheme with the knowledge that same was of a residential nature.

Prior to coming to its decision the Court held that insomuch as the applicant had commenced running the salon before requesting consent by the owners was sufficient grounds for dismissing the application.

The Court, referring to the Jacoby Judgment, accepted that the word “unfairly” should be interpreted as meaning “unreasonably”. It found that the applicants personal circumstances did not warrant a deviation from the established use of units within the scheme and that the refusal to consent by so many owners was indicative of the fact they same was not unreasonable

In essence, common sense should prevail.

If the change of use adds value to the scheme and there is no harm to other owners it should perhaps be granted.

The fact of the matter is that many people are driven by the economy to work from home. It could be the difference between being able to pay a mortgage bond and the levies in the scheme.

Factors that should be considered in making a decision in granting consent:

- 1) The personal circumstances of the owner concerned;
- 2) Whether the change of use will or will not affect the primary use of the unit;
- 3) That only a portion of the unit is used for another purpose;
- 4) That noise and pollution is not a factor;

- 5) That there is no signage and advertising excepting whatever owners may impose or consent to;
- 6) Access and security are not compromised by the change of use;
- 7) That it does not adversely affect neighbours;
- 8) Any other reasonable conditions the owners may wish to impose;
- 9) That traffic is not affected immediately outside the scheme

I am sure that there are many more dependent on the nature of the scheme.

I trust that the above has been informative.

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