

Managing property properly

DEALING WITH EXCLUSIVE USE AREAS CAN CAUSE HEADACHES

We have been requested to furnish comment on a dispute concerning allocation of common property parking bays.

The facts are as follow:

A Body Corporate comprises of ten units, i.e. five garages and five parking bays. Five garages were sold, allocated and registered for the exclusive use of five of the units with establishment of the Body Corporate (The EUA parking). The remaining five parking bays, which are part of the common property, are utilised by the other five units (The CP parking). The trustees have resolved to allocate three CP parking bays to specific units for their exclusive use and to keep two CP parking bays as for visitors' parking.

Implementation of the trustees' resolution will have the result that two units have no allocated parking and must therefore use the visitors' parking.

Questions:

1. Is the conduct of the trustees appropriate and lawful?
2. What process must the trustees follow for implementation?
3. Is there merit in the objection by the two units without allocated parking?
4. Can the trustees allocate the five CP parking bays for the exclusive use of the five units without garages as a result that there will be no visitors' parking?

Discussion:

Common property areas such as the five CP parking bays can be allocated to members of specific units for their exclusive use.

In terms of Section 10(7), A Body Corporate is entitled to determine management or conduct rules which confer rights of exclusive use and enjoyment of parts of the common property upon members of a Body Corporate.

Trustees are therefore entitled to propose management and/or conduct rules for creation of exclusive use areas, but depending whether these exclusive use areas are created in terms of the management or conduct rules, same must be authorised by the members by unanimous and/or special resolution respectively.

The prerequisites for a special resolution and/or unanimous resolution, as defined in Section 1 of the STSM Act (the definitions), must be adhered to.

For the trustees to implement their proposed resolution in terms of the management rules, eight (8) of the ten (10) members must be present or represented by proxy at a general

meeting (80% quorum), and all present must approve the resolution or alternatively all the members must agree thereto in writing.

If it is intended to create the exclusive use areas in terms of the conduct rules, then 75% of the members (calculated in value and number) present or represented at a general meeting (4 members constitutes a quorum), must consent, alternatively the resolution can be adopted in writing by members holding at least 75% of the voting rights in value and number.

If it is intended to create exclusive use areas in terms of the management rules, it is theoretically possible for the resolution to be approved if all members excluding the two (2) objecting members are in attendance and all members vote in favour of the resolution. It is also theoretically possible to implement the trustees' proposed resolution in terms of the conduct rules if the two objecting members do not attend the meeting and provided that there is a quorum present (four members). At least three of those members present must vote in favour of the resolution (75%). MR20(9) stipulates that if the resolution is passed with less than 50% of the total value of members' votes then the trustees may not implement the resolution for a period of one week and members holding 25% of the total votes may demand within 7 days a general meeting for reconsideration of the resolution.

Therefore, the answers to the questions, given the aforesaid facts and information, are as follows:

1. Yes, theoretically, the proposal can be implemented;
2. Exclusive use areas can be created in terms of the management and/or conduct rules;
3. Yes. The two units without garages can object to the proposed resolution and they can also, by participating in the resolution, ensure that the resolution is defeated by objecting thereto. Should they, however, abstain from participating or voting, then the proposed resolutions can be carried;
4. If all five CP parking bays are allocated to the five units without garages, then there will be no visitors' parking. There is no obligation on trustees or on a Body Corporate to provide visitors' parking. Common property is primarily for the use of members and not for visitors.

Conclusion

Even if the two objecting members do not participate in the resolutions and should the resolutions be approved and implemented, we believe that the two unit owners will still be in a position to object to the creation of the exclusive use areas and allocation for visitors' parking as common property is primarily for the use and enjoyment by owners and where they should have equal use and enjoyment of the common property. Where three members, who are allocated exclusive use areas, benefit and the other two members have to rely on visitors' parking, such action can definitely be considered unfair. Furthermore, common property is owned in undivided shares by all members of the Body Corporate and implementation of the proposed trustee resolution would as such interfere with the proprietary rights those two members hold in the common property. Circumstances may also permit implementation of MR 20(9).

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