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CONSENT TO TRANSFER WHERE THERE IS NO HOMEOWNERS' ASSOCIATION

Cluster Developments are usually approved in terms of the Municipal Planning By-Laws of the Local Authority in question with a condition that an Owner's Association (hereafter "OA") must be established. In addition, there must be a matching condition in the title deeds of the properties in such development that transfer cannot take place without the written consent of such duly established OA and that the subsequent owners become members of the OA. Local Authorities have however no control over whether this condition is fulfilled and maintained by the OA after granting the developer its clearance for transfer of the subdivided properties in the Deeds Office as the OA is only established later. As a result, many of these OA's are not formed or ceased to function at some stage. The condition however remains in the title deeds and needs to be complied with, which causes a problem if the OA is not operational as there is no one to give such consent to transfer in the absence of such OA.

Until recently the Deeds Office used to accept a letter from the relevant Local Authority confirming that the OA was never formed, instead of a written consent. It is also common practice to request a neighbor to sign such a consent. The Registrar of the Cape Town Deeds Office has passed a Circular providing guidance in the event where a title deed condition prevents the transfer of a property without the written consent of the OA, especially where the particular OA was not established or has ceased to function for whatever reason. The Deeds Office circular provides that; *"consent must be obtained from a duly established Home Owners' Association, failing which the matter must be referred to court for permission to transfer without the consent. The condition must be brought forward in the title deed, unless the court provides otherwise"*. Conveyancers therefore no longer have the option to lodge such letter issued by the Local Authority instead of the consent, without the risk of having the transfer rejected.

Obtaining a court order is a lengthy and costly exercise with many respondents due to the number of properties in the development as well as the bond holders that need to be notified. This is usually not an option due to time constraints. It would however not be impossible for the seller of a property to obtain a written consent as provided for in the condition of the title deed of the particular property. In each instance the relevant planning by-law must be considered to determine the procedure to be followed to obtain such a consent. For properties within the municipal area of the City of Cape Town, *Section 63(7) of the Municipal Planning By-Law 2015*, reads as follows:

In the event that the owners' association has ceased to function and its constitution does not provide for an owner who wishes to transfer a land unit in that event, the owner must obtain the consent of at least 60% of the members of the association, which consent is deemed to be the consent of the owners' association unless the constitution provides for another procedure.

This means, where there is no functional OA or a duly appointed owner to issue a written consent, that an owner who wants to sell and transfer his/her property must get written consent from 60% of the registered owners of the properties in such development, which consents are deemed as the written consent required to register transfer in the Deeds Office. It should also be noted that should provision have been made in the specific OA Constitution for another procedure, this procedure should be followed.

The fact that any consent obtained in contravention of the stipulations of the relevant by-law does not constitute a duly issued consent, means that one cannot use such "consent". For this reason the procedures laid down must be followed to protect all parties involved, including the Conveyancing Firm and whoever signed such consent without the relevant authority, against any legal action. The best permanent solution will be to re-establish the OA so that future transfers are not faced with similar challenges, particularly in light of the fact that the Deeds Office will be aware of this problem and therefore will raise notes when consents are lodged.

This newsflash has been prepared for information purposes only and does not constitute legal advice, or a legal opinion, the practical application of the provisions of this newsflash will vary depending on the facts of each case.

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