

USE OF SECTIONAL TITLE COMMON PROPERTY DURING LOCKDOWN

The debate about whether the common property in a sectional title scheme can be used by residents during the COVID-19 lockdown has become extremely heated.

Auren Freitas dos Santos and I, both lawyers and full-time community scheme management specialists, have expressed the opinion, after reading the Disaster Management regulations carefully, that they do not apply to the common property within sectional title schemes. This is because the Disaster Management Regulations confine people to their "place of residence". In sectional title, you own a section and a share of common property, for residential purposes. This means that owners can use common property for access and recreation. And under the Sectional Titles Schemes Management Act trustees are not entitled to make rules confining owners to their sections.

Marina Conostas and Alan Levy, also sectional title specialists, have expressed a different opinion, both indicating that the situation is not clear. They take the view that the restriction could be interpreted so as to confine residents to their sections, but in light of what they consider uncertainty, the safest route is to confine all owners to their sections, and that the trustees are entitled to do this.

People have complained that these apparently conflicting legal views cause confusion, and demanded a single answer that avoids any "mixed message". The reality is that each sectional title scheme is different. In some of them the common property can be used safely during the lockdown, in some it cannot. Where it can, different routines and strategies will be required for different schemes. Demanding a single, easily understood answer to a set of different problems is not sensible.

Adding to the confusion is a Community Schemes Ombud Service Directive. It says that less than 100 owners may choose to have a meeting at a venue, but suggests caution. It directs that common areas frequented by residents, including recreational clubs and common rooms, must be kept sanitised, otherwise they must be closed. In the final text, contradicting the advice already referred to, it states: "This means that walking in Common Areas, jogging, walking dogs, group playing golf is prohibited as these are not included in the President's directive and the Disaster Management Act: Regulations to address, prevent and combat the spread of Coronavirus COVID-19: Amendment". It makes no sense that you can go to a meeting in the scheme, use the clubhouse and common rooms, but you can't walk over the common property to get there.

The South African Police Service has, in response to enquiries, stated that: "The Regulations... meaning no walking, jogging or walking of pets within closed estates/complexes is allowed". Today SAPS has said that private security guards will be urged to give information wherever residents are found to be ignoring the strict lockdown measures. This suggests that when complaints are made, the SAPS will demand access

to the scheme to come and arrest people who have breached the lockdown regulations - but the regulations in regard to the restriction of movement do not apply to private property as found in any gated village, only to places or premises normally open to the public. As the regulations stand, I consider the SAPS opinion to be wrong, and the idea that SAPS and the defence forces will divert their energies from patrolling public spaces to come into schemes to arrest people for using their own property without putting others at risk makes no sense to me. If the Minister wishes to deal specifically with restricting resident movement in the private property in community schemes, she can amend the regulations to do so.

If you take the view that residents in schemes are basically untrustworthy, need to be tightly controlled and, for the most part, will not be able to use the common property safely if given the opportunity, the logical conclusion is that residents should not be allowed to walk their dogs or go for a run during the lockdown. So you will probably prefer Marina and Alan's view. However, if you take the view that people are basically well-intentioned, do understand the seriousness of the COVID-19 threat, and, for the most part, will be able to use the common property safely, you will probably prefer the view expressed by Auren and myself.

I encourage scheme trustees not to take this important decision without first getting input from the owners and residents who will be affected, and hearing their views. If the majority of them are keen to remain in their sections, let them make this decision. In that case, it is likely that they will be happy to endure the lockdown on this basis. But if the majority believe that they can use the common property safely and want to do so, please take their wishes into consideration and allow them to design a sharing programme, including hygiene and social distancing arrangements, so that those residents who want to use what is, after all, their property, can do so.

If sectional title trustees deal democratically with this problem, as well as the financial and other challenges that no doubt will face them during and after the lockdown, I expect their schemes and communities will grow in spirit and manage much better than they have in the past. If they do not, they invite resident disobedience, ongoing dispute and long term resentment that could wreak havoc with the finances and the spirit of the community.

Let us treat this as a complex problem that each residential complex must deal with individually, and accept that at the moment there is no "one size fits all" solution, attractive as that may sound. In the spirit of democracy and Ubuntu, each scheme should look to find a solution that is appropriate to its circumstances.

Graham Paddock
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