

The difference between an HOA & a Body Corporate



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People often ask what the difference is between a homeowners' association (HOA) and a Body Corporate – or if they are similar.

Auren Freitas Dos Santos, legal and compliance officer and property manager for Pam Golding Property Management Services explains: “An HOA and a Body Corporate are certainly not the same. A Body Corporate is a legal entity created in terms of the Sectional Titles Act and managed in terms of the Sectional Titles Schemes Management Act. The fundamental principal behind a Body Corporate is the division of a property into parts that are exclusively owned by individual owners and other parts that are jointly owned in undivided shares, referred to as common property. The functions of a Body Corporate are strictly defined in terms of Section 3 of the Sectional Titles Schemes Management Act.

“An HOA on the other hand is not created in terms of any specific national legislation and the common property is usually transferred to and registered in the name of the HOA which exists as a legal entity separate from its members, none of whom shall in their personal capacities have any right, title or interest to or in the property, funds or assets of the HOA.

“The main functions of an HOA differ depending on the founding document of the HOA. Some HOAs are governed in terms of a Memorandum of Association while others are governed in terms of a Constitution. Irrespective of the type of founding document the most common functions of an HOA shall usually be the following:

- the control over all aspects of the design, aesthetics and maintenance of all buildings, improvements and landscaping within the development
- to ensure compliance with the estate rules
- the maintenance, control and management of the common areas within the development
- the promotion, advancement and protection of the communal and group interests of the members generally in regard to the development
- to enter into service agreements and other necessary agreements with the local authority or any other authority or supplier of services in connection with the development
- to generally do all such things as may be necessary or requisite to give effect to and implement the objects of the Association and to do all such things ancillary or incidental to the objects
- to ensure that all erven within the development are developed as soon as is reasonably possible
- to enforce the conditions of subdivision approval or management plans listed in the conditions registered with the local municipality.”

How is an HOA created?

Dos Santos says an HOA is usually created either as a non-profit company in terms of section 21 of the Companies Act or as a common law association. There are also provincial and/or municipal statutes which often govern the establishment of HOAs, for example, the City of Cape Town Municipal Planning By-Law, 2015.

“Irrespective of the law governing the establishment of an HOA, almost every HOA is created as a result of a condition of subdivision approval for a new development. In other words when a developer intends to subdivide a large piece of land into smaller separate pieces of land it is usually required by the local authority to create an HOA with the aim of managing and controlling the common property linked to that development. The HOA shall come into existence simultaneously with the registration in the Deeds Office of the first of the erven in the subdivision, whereafter each and every purchaser of an erf situated within the development, and their successors-in-title, shall automatically become members of the HOA,” he says.

“It is however possible to create an HOA subsequent to the establishment of a township/development. This usually occurs when a group of individual home owners band together to formally agree to the formation of an HOA. In such an instance it is an absolute requirement that each and every home owner agrees to the formation of the HOA before the founding document of the HOA is binding upon that owner.

“This will usually occur when a group of owners situated in a neighbourhood enclave of freestanding properties decide that it would be advantageous to establish a security perimeter around the enclave and to only have one access point into the enclave to control the entry to the area. In order to establish such an HOA all of the owners will be required to consent to the formation of such an HOA and in most instances the approval of the local Council will be required. Once the HOA is formed the members will contribute a monthly levy toward to HOA to cover the costs of managing the security. This is only one example of such a scenario.

“As a result, a property owner either automatically becomes a member of an HOA which is created as a condition of subdivision or the property owner must specifically consent and agree to the establishment of an HOA subsequent to the creation of a township/development. In both instances, however, the property owner shall only cease to be a member of the HOA when they cease to be the registered owner of the property.”

What kinds of properties fall under sectional title?

Dos Santos says technically any type of property can be registered as a sectional title property (or better referred to as a sectional title scheme), including a block of apartments or flats, a townhouse complex, an industrial park, a block of offices or a commercial retail building.

The qualifying factor which makes a development a sectional title scheme is the approval and registration of a sectional plan submitted to the Surveyor-General with the intention of establishing such a scheme. A sectional plan is a plan which shows the building or buildings and the land comprised in the scheme, as divided into two or more sections and common property respectively.

A sectional title scheme may relate to one or more buildings either already constructed or in the process of being constructed on the same piece of land, or on more than one piece of land, whether connected or not - provided that the building or buildings to be divided into sections must be situated only on one piece of land or on two or more such connected pieces of land which have been notarially tied once the sectional plan has been approved. It is therefore clear that a sectional title scheme will be need to be established when a development is to be situated on one piece of land or two or more notarially tied contiguous pieces of land.

Dos Santos emphasises that it's also important to understand what exactly constitutes a 'section' in the context of a sectional title scheme. "A section is that part of a sectional title scheme which an owner owns, whether it is an apartment, townhouse, office, shop or factory. Many people are confused by the difference between a section and a unit. In simple terms a section consists of the 'inner shell' of a building, such as a flat or townhouse, while a unit on the other hand is the collective reference to a section together with its undivided share in the common property.

"Common property is regarded as the entire area of the sectional title scheme that does not form part of any section and is owned by all owners in the scheme in undivided shares such as parking, roads, gardens, gates, corridors etc. In general terms the 'outer shell' of a section is also regarded as common property, including the roof and foundations of the building."

Dos Santos says while an HOA can apply to any type of development, generally, however, they are established when there is a certain amount of focus on the maintenance of large tracts of land which will be included in the boundaries of the HOA such as a golf course, parks, sensitive environmental areas, bodies of water etc. "It is not unusual to find an HOA which has one or more sectional title schemes situated within its borders and in fact we manage such an HOA comprising more than 800 erven and which has more than one sectional title scheme situated within its fence line.

"It is important to understand that a development can, for example, consist of 10 individual pieces of land and one of those pieces of land can be zoned as a general residential erf while the remaining nine pieces of land can be zoned as single residential erven. The erf zoned as a general residential erf must be used for the establishment of a sectional title scheme, while the erven zoned as single residential may only be used for freestanding properties. It is therefore crucial to understand the different zoning types that exist as this will play an important role when deciding on what type of property can be developed.

"Interestingly, there is no national legislation governing HOAs and the function and concept of HOAs can differ considerably depending on which province you find yourself in. Sectional title schemes on the other hand, are strictly regulated by the provisions of the Sectional Titles Act 95 of 1986 and the newly introduced Sectional Titles Schemes Management Act 8 of 2011. This fact is usually taken into account when deciding between the two types of developments as some people prefer the predictability of sectional titles schemes while others enjoy the perceived autonomy of HOAs."

Why would a sectional title development Body Corporate wish to form an HOA?

Explains Dos Santos: "Firstly, it is important to understand that a sectional title scheme will always be subject to the provisions of the Sectional Titles Act 95 of 1986 and the Sectional Titles Schemes Management Act 8 of 2011. Only the powers and functions of a sectional title scheme can be assigned to an HOA, in which case the governing document of the HOA (either a Constitution or Memorandum of Incorporation) will replace the Management and Conduct Rules as prescribed by the Sectional Titles Schemes Management Act 8 of 2011. It is important to note that the provisions of the HOA's governing document may not override or be in conflict with the provisions of Sectional Titles Act 95 of 1986 and the Sectional Titles Schemes Management Act 8 of 2011.

"The Body Corporate will therefore never fall away and the HOA will exist over and above the Body Corporate. A good example of such a development is an HOA which we manage in the Southern Cape region and which is registered as a sectional title scheme consisting of more than 270 sections. The powers and functions of the sectional title scheme have been assigned to the HOA. The fact that the HOA in question is governed by the provisions of a Memorandum of Incorporation this does not imply that the provisions of the Sectional Titles Act 95 of 1986 and the Sectional Titles Schemes Management Act 8 of 2011 are no longer applicable. These two Acts will always apply, irrespective of the provisions of the MOI."

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