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RAPTOR'S VIEW HOME OWNERS' ASSOCIATION NPC

EXPLANATORY MEMORANDUM TO MEMBERS ON THE DRAFT MEMORANDUM OF INCORPORATION ("MOI")

1 Introduction

- 1.1 On 18 June 2015 the board of directors of the Association held an information evening for Members. The board arranged for the Association's attorneys to attend the information evening in order to give a presentation on the draft MOI and to address any queries which Members may have on the document.
- 1.2 Several useful comments on the draft MOI were raised at the information evening. Accordingly, following the information evening a number of amendments to the draft MOI were effected. To this end, a copy of the draft MOI marked-up with the amendments is enclosed.
- 1.3 The purpose of this memorandum is to:
 - 1.3.1 provide those Members who did not attend the information evening with a brief explanation as to why it is necessary to amend the Association's existing memorandum and articles of association;
 - 1.3.2 set out the comments / queries raised at the information evening on the draft MOI as well as the responses thereto; and
 - 1.3.3 identify any other material amendments which have been made to the draft MOI.

2 The Need to Amend the Association's Existing Memorandum and Articles of Association

- 2.1 The new Companies Act, 71 of 2008 ("the Act") came into force in May 2011. In terms of the Act, the Association is now categorised as a non-profit company.

- 2.2 One of the purposes of the Act is to provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions. To this end, the Act has introduced a new concept of the memorandum of incorporation of a company (“the MOI”), which replaces the old concept of the memorandum and articles of association of a company.
- 2.3 The MOI provides a set of rules which companies may accept, change or supplement to suit their particular needs, provided that the provisions of the MOI are consistent with the provisions of the Act.
- 2.4 Although, strictly speaking, the Act does not nullify the Association’s existing memorandum and articles of association in their entirety, a provision will be void to the extent that it contravenes or is inconsistent with the Act. For example:
- 2.4.1 the indemnity in terms of clause 22 of the articles of association is far broader than the indemnity permitted in terms of the Act. Accordingly, the indemnity is void to the extent that it indemnifies a person for those acts for which a company cannot indemnify a person in terms of the Act.
- 2.4.2 clause 11.3.2 of the articles of association provides that a quorum for a meeting of members is three members personally present and entitled to vote. This is inconsistent with section 64 of the Act which specifies a quorum of persons present at the meeting to exercise, in aggregate, at least 25% of the voting rights that are entitled to be exercised. Although the percentage of 25% can be changed by specifying a lower or higher percentage, it cannot be a number of members.
- 2.4.3 in terms of the item 1(1)(b) of Schedule 1 of the Act, the memorandum of incorporation of a non-profit company must be consistent with the principles concerning non-profit companies set out in sub-items (2) to (9) of schedule 1 of the Act. The existing articles of association do not contain the requisite restrictions on the payment of the Association’s income or transfer of its assets to incorporators, directors or members of the company and the distribution of value of the company on its winding-up.
- 2.5 In view of the foregoing, the board of the Association was advised to amend the Association’s memorandum and its articles of association.

3 Comments / Queries on the draft MOI Raised at the Information Evening

3.1 The Documents for Member Approval

3.1.1 *Comment / Query*

Do Members have to vote on every document?

3.1.2 *Response*

The Members will only be required to approve the adoption of the MOI.

3.2 Clause 2.2.3 of the MOI

3.2.1 *Comment / Query*

Does the board have the right to speculate in another company?

3.2.2 *Response*

In terms of item 2 of Schedule 1 to the Act, the Association may, subject to the requirement that it must apply all of its assets and income however derived to advance its object:

3.2.2.1 acquire and hold securities issued by a profit company; or

3.2.2.2 directly or indirectly, alone or with any other person, carry on any business, trade or undertaking consistent with or ancillary to its objects.

The aforesaid provision has been incorporated into the MOI pursuant to item 1(b) of the Act, which requires the MOI to be consistent with the foregoing.

Accordingly, speculation by the board is only permissible in terms of the Act to the extent that the application of its assets and/or income to acquire securities of a profit company advances the object of managing the collective interest common to all of the Members of the Association.

3.3 Clause 8: Members' Right to Information

3.3.1 *Comment / Query*

Members should be allowed to inspect the minutes of meetings of the board.

3.3.2 *Response*

The principle is that proceedings at board meetings are confidential and no third party (including Members) may obtain information pertaining thereto, whether through inspection of the minutes or otherwise. Accordingly, Members do not have access to these minutes.

The confidentiality of board minutes enables directors to air, discuss and debate their views with one another honestly without the fear that such views will be circulated to Members. This is particularly important in the context of home owners' associations where a fellow member may also be that director's neighbour.

3.4 Clause 9.8.3 of the MO

3.4.1 *Comment / Query*

The percentage of voting rights of Members required to be present at a shareholders meeting for a matter to begin to be considered should correspond with the quorum requirements to continue the meeting or to consider the matter at the meeting.

3.4.2 *Response*

This proposal has been accepted. Clause 9.8.3 (quorum requirement for a meeting to continue or for matter to be considered) has been amended to align it with the requirements for a Members meeting to begin or for a matter to begin to be considered set out in clause 9.6, namely as follows:

After a quorum has been established for a Members meeting, or for a matter to be considered at that meeting, the meeting may continue or the matter may be considered, so long as at least sufficient persons are present at the meeting, in person or by proxy, to exercise, in aggregate, at least 25% (twenty five percent) of all of the voting rights entitled to be exercised at the meeting or on that matter.

3.5 Clause 14.1 of the MOI: Composition of the Board

3.5.1 *Comment / Query*

Only Members should be eligible to be elected as directors.

3.5.2 *Response*

The requirement that directors need not be Members has been carried over from clause 13.5 of the Association's existing articles of association.

Whilst the new MOI may limit the category of persons eligible to be elected as directors, one must be careful that the category is not made so narrow so as to give rise to a situation where the minimum number of directors required by the MOI cannot be satisfied from this category of persons.

Accordingly, clause 14.1 has been amended to provide that a Director shall be a Member or a spouse, child or tenant of a Member, provided that if the minimum number of Directors cannot be satisfied from the aforesaid category of persons, the Members shall be entitled to elect only such number of persons who are not Members or spouses, children or tenants of Members as a Director as may be necessary to bring the number of Directors up to the minimum number.

3.6 Clauses 24.2.1 and 24.2.2 of the MOI: The Board's Power to make Estate Rules

3.6.1 *Comment / Query*

There was a concern raised that the MOI gives the Board the power the right to change the Estate Rules, particularly the Home Owners Rules, without consultation with Members.

3.6.2 *Response*

3.6.2.1 The Board's power to make Estate Rules in terms of clauses 24.2.1 and 24.2.2 of the MOI is derived from clause 6.1 of the Association's existing articles of association. It is not a new provision. Clause 6.1 provides that "[s]ubject to any restriction imposed or direction given at a general meeting of the company, the directors may from time to time make and amend or add to, rules governing the company's property which is intended to be a wildlife estate. Such rules will be strict to ensure the proper preservation of the wildlife estate and the enjoyment and amenity of the members or their invitees."

3.6.2.2 The reason why the board is empowered to make rules is because the board is required to act in the best interests of the Association at all times. This means that, in deciding to amend the existing rules or make new rules, the board must ensure that such amendments or new rules are in the best interests of the Association. Members owe no such obligation to the Association and may at all times act in their own interests even if this is contrary to the interests of other members or to the interests of the Association as a whole.

3.7 Clause 27 of the new MOI: Winding-up or Dissolution

3.7.1 *Comment / Query*

Why, upon the winding-up or dissolution of the Association, must the entire net value of the Association be distributed to one or more non-profit companies?

3.7.2 *Response*

Item 1(4)(b) of Schedule 1 to the Act provides that, upon winding-up or dissolution, the entire net asset value of a non-profit company must be distributed to one or more non-profit companies carrying on activities in South Africa having objects similar to the Association's main object and as determined by its MOI, Members (if any) or directors at or immediately before the dissolution or, failing them, the court.

4 **Other Amendments to the Draft MOI**

Clause	Description	Amendment	Reason
1.1.8	Definition of Common Property	The insertion of the specific portions which comprise the common property.	To ensure that this definition correctly captures all of the portions of the common property.

1.1.11	Definition of the Estate	This clause has been amended to refer to the Estate comprising the Common Property and the Residential Portions rather than referring to the specific portions.	Both definitions of the Common Property and Residential Portions have been amended to refer to the specific portion numbers.
1.1.18	Residential Portions	The insertion of the specific portions which comprise the residential portions.	To ensure that this definition correctly captures all of the residential portions.
9.1.2.1	The Annual Members Meeting	The period within which the Association is required to hold an annual members meeting following the previous annual meeting has been extended from 6 to 9 months.	It was felt that the previous period of 6 months was too short.
15.5.3	Chairperson of the Board	This clause has been amended to give the chairperson of the Board the right to cast a deciding vote in the event of an equality of board votes.	This is to prevent the board from becoming deadlocked, particularly in view of the fact that there is presently an even number of directors on the board.
24.2.6.1	The Appointment of a Committee to Determine a Dispute of a Breach of any Estate Rules	The number of directors that the board may appoint to a committee to determine the dispute has been increased from 2 to 3 directors.	This is to safeguard against a deadlock in the committee.