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RAPTOR'S VIEW HOME OWNERS' ASSOCIATION NPC

RESPONSE TO COMMENTS RECEIVED FROM MEMBERS ON THE DRAFT MEMORANDUM OF INCORPORATION ("MOI")

Clause No.	Member	Comment	Response	Amendment to the MOI
1.1.12.3	Susan Tremeer	Ad hoc rules need to be ratified and voted on at a meeting of members.	In terms of the amendments to clause 24.2 of the MOI, the Architectural and Homeowners Rules (i.e. the fundamental rules) are required to be ratified at a meeting of members. It is proposed that the Board retains its authority to determine other rules such as Contractors rules.	The deletion of "by the Board" in clause 1.1.12.3.
2.2.3	Christopher Gregory	The purpose of Raptors is to manage a Wildlife Estate. This is its principal business, not speculative investment, as is inferred by this clause. Investment of excess funds (which is the only likely scenario) needs to be more carefully controlled. This should be undertaken by a specific clause in the MOI which limits the identification and management of excess funds to an investment sub-committee. The sub-committee should comprise one Board member (who reports back to the Board), and up to two other sub-committee individuals with appropriate knowledge/skills to make the recommendations. The objective of the Sub Committee should be to meet regularly (as required), and manage the excess funds after considering current cash flows, impending liabilities and appropriate available investments. Investments should be very	This clause does not relate to speculative investment but refers to powers which are given to the Association as a non-profit company in terms of item 1(2)(b) of Schedule 1 to the Companies Act. In principle, it is accepted that investment of excess fund should be carefully controlled. However, if the proposed clause were incorporated into the MOI, it would result in the Board abdicating its authority to a sub-committee because the authority to identify and manage excess funds is proposed to be limited to an investment sub-committee. The Board is not permitted to abdicate its authority in law. A proposed rule regarding the investment of excess funds is a governance rule (and not an Estate rule)	No change.

Clause No.	Member	Comment	Response	Amendment to the MOI
		clearly restricted to short and medium term deposits, categorised as Low or medium risk only. As it currently stands any Board member can go for any investment. Not a good idea.	which the Board can make in terms of the Companies Act and which must be ratified by an ordinary resolution at a meeting of members.	
3.1.1	Susan Tremeer	Any amendment has to go to a special resolution.	This is incorrect. In terms of the Companies Act, the MOI may be amended in compliance with court order by way of a resolution of the Board i.e. the Act specifically states that a special resolution is not required to amend the MOI in compliance with a court order.	No change.
5.2	Susan Tremeer	Remove this clause.	This clause refers to the legal powers and capacity of the Association to act as a whole *vis a vis* third parties, i.e. to contract with third parties and conduct business necessary or incidental to the collection of levies and the management of the Common Property.	No change.
6.3	Christopher Gregory	Does this mean that only the registered owner on the title deeds is able to be a member?	Yes, only a person registered as an owner of a Residential Portion can be a Member of the Association.	No change.
8	Jurgen Elbertse	Although sensitive matters affecting members' privacy should be shielded from general viewing, the Minutes of Board meetings should be made available to members for viewing. This is in the interest of transparency. In view of the fact that there is already a growing concern as to how certain decisions have been reached by the board, this would take away all speculation and would stop gossip.	Accepted in part. Members do not, in the normal course, have access to the minutes of board meetings in terms of the Companies Act. This is because proceedings at board meetings are confidential. Directors are under duty to maintain the confidentiality of information at board meetings and not to use this information to cause harm to the Association in terms of section 76(2)(a)(ii) of the Companies Act. Members owe no such duty. They can disclose any information to third parties which can be used to the detriment of the Association. Therefore, should a member require access it should be for a specific purpose and access should be properly regulated in accordance with the law. Any failure to do so could be detrimental to the Association as a whole. The proposal that minutes be removed or redacted does not give effect to transparency.	The insertion of a new clause 8.2.
	Don Scott	Agree with Mr Elberste's comments on minutes of directors meetings – example of a wording that has worked in other associations for such a clause is: *"The Board shall keep minutes of all meetings and members may, in writing, request copies of the minutes, provided that the Board shall be entitled, at its sole discretion, and at any stage, to remove any minutes, or portions thereof, which may be of a sensitive or privileged nature or where to provide or to distribute such minutes may be harmful to the Association. The Board may in its discretion and where practicalities permit from time to time, publish a record or summary of their meetings, provided that the Board shall be entitled in its discretion to omit or delete*		

Clause No.	Member	Comment	Response	Amendment to the MOI
		any content of a sensitive or privileged nature or where to provide or distribute such may be prejudicial to the Association."	Accordingly, clause 8 of the draft MOI has been amended to include a mechanism by which members can access minutes of Board meetings.	
9.4.4	Susan Tremeer	All notifications should be properly delivered to ALL members. This is a requirement of CIPC. This will have an effect on the validity of the meeting.	CIPC is the Companies and Intellectual Property Commission. It does not prescribe the requirements for notices of members meetings. These requirements are set out in section 62 of the Companies Act entitled "Notice of meetings". Section 62(6) states that "An immaterial defect in the form of giving notice of a shareholders meeting, or an accidental or inadvertent failure in the delivery of the notice to any particular shareholder to whom it was addressed, does not invalidate any action taken at the meeting." Therefore, even if clause 9.4.4 were deleted, section 62(6) will still apply to the Association.	No change.
9.6	Thomas Muller	25% attendance for a member meeting seems a bit low. Suggest to increase it and in order to enable members to participate it would be good to propose in advance 3 different dates to choose from.	The 25% threshold is in line with section 64 of the Companies Act (currently this threshold is 3 members). At present, the Estate includes a number of stands which are undeveloped. There are also owners which live elsewhere. If the requirement is raised too high, it becomes almost impossible to hold a shareholders meeting. In terms of a notice of a shareholders meeting, the Board is required to give a specific date. The provision of 3 dates would not constitute proper notice.	No change.
9.7.3	Susan Tremeer	No the chairman may not have a casting vote.	This clause was amended in the previous draft circulated to Members to provide that the chairperson shall not have a casting vote.	No change (effected in previous draft).
10.2	Thomas Muller	It would be democratic if only votes with min 51% majority at the meetings would be accepted and also to have the possibility to vote electronically if the subject is clear before the meeting takes place. Also a minimum number of 51% of the approx. 330 owner must be achieved before acceptance.	The clause already requires more than 50%. In practice, this would be 50% plus one vote and not 50%. This is the normal threshold in terms of the Companies Act. Practically, it would not be possible for the meeting to have regard to up to 330 votes submitted by members	No change.

Clause No.	Member	Comment	Response	Amendment to the MOI
			via electronic communication during the meeting. In terms of the MOI members can deliver a proxy to the Association indicating the manner in which they would like their voting right to be exercised prior to the meeting.	
14.1	Jurgen Elbertse	No non members should be able to become board members. If the board requires additional expertise then they can hire this on a consultancy bases. This would prevent any conflict of interest as one would always question the motivation why a non member would want to be a board member. Furthermore it would open the door to start paying board members (again why else would somebody want to be on a board of a HOA where he/or she has no interest in) what would straight away cause disparity between other member-board members. It has been proven that at all times members will stand up in order to make up a board if a crises might arise and there would be a requirement urgently for new board members.	The purpose of the amendment to clause 14.1 of the MOI was to restrict the categories of persons to be elected as directors to members and persons who are spouses, children or tenants of members. In revising the clause, the suggestion was made to extend this category to other persons to safeguard against instances in which the insufficient members (or spouses, children or tenants of members) were willing to put themselves forward for election as directors. If a sufficient number of members will always put themselves forward for election, then members will never be entitled to elect a person who is not a members or spouse, child or tenant of a member in any event. Accordingly, this additional category of persons has been deleted from the clause. In order to address the comment regarding the motivation of spouses, children or tenants to be elected as directors, this clause has been amended to provide that they must reside on the Estate. As residents, they will have a vested interest in the manner in which the Estate is managed.	The deletion of *"if the minimum number of Directors as per clause 14.1.1 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."* and the replacement thereof with *"such spouse, child or tenant resides on the Estate"*.
14.2.2	Keith Hartshorne	The insertion of the following at the end of the clause: *"unless he/ she has served 4 consecutive years as a Director, in which case he/she shall be ineligible to continue to serve as a Director for a period of 2 years before re-election."*	In practice, such an amendment will reduce the number of Members eligible to be directors. Moreover, if Members wish a director to be re-elected and continue in office for more than 4 years, they should not be precluded from doing so.	No change.
14.3	Keith Hartshorne	Should we not make allowance for email voting in advance of the meeting as is our custom (and voting at the meeting if any members prefer that)?	The Companies Act only permits 2 forms of voting by Members, namely at a Members meeting or by round robin resolution in terms of section 60. The Act does not permit a hybrid solution, i.e. where the resolution is submitted to Members for voting in terms of section 60	No change.

Clause No.	Member	Comment	Response	Amendment to the MOI
			and is then voted on again at a Members meeting. However, Members who are not attending may submit a proxy setting out how their voting right is to be exercised in relation to the election of directors.	
14.6	Jurgen Elbertse	IMPORTANT In addition to the above, a clause must be added whereby a member, or his family, who derives a direct income out business conducted on the Estate or business conducted on behalf of the RVHOA can never be a Board member. This in order to avoid conflicts of interest or cloud the issue on accountability. This was decided a few years ago already during and AGM (with strong support from the current Chairperson) but has slowly been pushed to background. It is inevitable that this must become a formal clause in the MOI. Examples would be owners of security companies, contractors, real estate agents etc. Unless of course such members, for the duration of their board membership, would cease all such businesses.	There is no need to disqualify members or their families. Section 75 of the Companies Act sets out the legal position in respect of directors' personal financial interests (and persons related to them e.g. families). If a director of a company acquires a personal financial interest in any agreement or matter in which the company has a material interest, or knows that a related person has acquired a personal financial interest in the matter, the director must promptly disclose the nature and extent of the interest, and the material circumstances relating to the director or related person's acquisition of that interest. The transaction or agreement in which the director or related person has a personal financial interest will only be valid if it was approved following disclosure of that interest, or despite not having been approved without disclosure of that interest, it has subsequently been ratified by an ordinary resolution of shareholders following disclosure of that interest or if it is declared to be valid by a court. Moreover, if a director has a personal financial interest in a matter to be considered at a board meeting, then the director is required, after disclosing any material information known to him or her and/or any pertinent insights if so requested, to leave the meeting and will not be entitled to vote on the proposed resolutions.	No change.
	Don Scott	I would propose adding a clause which is worded something along the lines of: *"A person shall not be eligible to be a Director if:* *The person is employed by, is a director of, or is the owner of any real estate agency or property sale, or rental, agency which sells, rents, or in any other way transacts in properties that form part of the Estate."* *The person is employed by, is a director of, or is the owner of any residential or commercial building contractor business which builds, or seeks to build, residences or infrastructure in the estate."*		
	Thomas Muller	In order to avoid a conflict of interest a director or other manager of the estate should not be involved in other private business activities in the estate.		
14.8.1	Susan Tremeer	All directors are appointed on a voluntary basis! Traveling and accommodation expenses as well as expenses incurred during their performance of duty is not acceptable. It would be more acceptable to pay each director a nominal salary for their efforts. Currently at Mooikloof we are paid R3225.00 each per	The underlying principle of the Association has always been that Directors are not entitled to remuneration for their services as such. Moreover, out of pocket expenses in attending board meetings would cost the	The deletion of *"for travelling, hotel and other"* and the replacement thereof with *"out of pocket"*.

Clause No.	Member	Comment	Response	Amendment to the MOI
		month.	Association far less than the nominal salary proposed. It is important to note that the out of pocket expenses concerned have to be properly incurred by Directors in the performance of their duties as such. Naturally, these expenses would be accounted for in the Association's annual financial statements which are circulated to Members.	
14.8.2	Susan Tremeer	No.	Accepted, this clause has been deleted.	The deletion of this clause in its entirety.
	Don Scott	I do not believe that this should be allowed. This opens the door for Directors to be paid and allowing the board to decide on same is opening the way to possible abuse.		
15.5.3	Jurgen Elbertse	Casting vote for the Chairperson. The chairperson should never have a casting vote in a HOA. If there is equality in the votes, and therefore clearly great concern about a decision, the board should re-investigate the matter or bring it up for discussion with the members. Never should one person have more power than another one.	Accepted, subject to the following comments: Giving the chairperson a casting vote is the most expeditious and cost effective manner of avoiding deadlocks There should not be a "dead end" provision which simply says that the resolution is defeated. Nor should the deadlock be referred to dispute resolution as this can be time consuming or costly to the Association. It is proposed that the decision be referred to members.	The insertion of: • the word *"not"* after *"the chairperson of the Board shall"*; and • *"and the matter shall be referred to a meeting of Members for decision by ordinary resolution"* at the end of the clause.
	Keith Hartshorne	I don't believe the Chairman should have a casting vote – he is only there to ensure proper conduct of the meeting not to be the final say. If there is a deadlock between the Directors and they cannot agree on a decision by discussion, it should be referred for dispute resolution or postponed for more research / thought.		
	Don Scott	The chairperson must NEVER have a deciding vote. No association that I know of allows for this.	The Waterstone Estate Homeowners Association MOI (clause 15.3), Olifantsfontein North Game Reserve Share Block MOI (clause 20.5) are examples where the chairperson has a casting vote at board meetings.	
18.1.1.6	Christopher Gregory	How is the relationship defined? Son, daughter, auntie, uncle.	Related in this clause refers to the defined term in the Companies Act by virtue of clause 1.2 of the MOI. In terms the Companies Act: • an individual will be related to another individual if they are married, live together in a relationship similar to a marriage or are separated by no more than two degrees of natural or adopted	No change.

Clause No.	Member	Comment	Response	Amendment to the MOI
			consanguinity or affinity (i.e. son, daughter, auntie and uncle); and • an individual will be related to a juristic person if the individual directly or indirectly controls the juristic person.	
18.1.3	Christopher Gregory	Consideration should be given to revolving the auditors every three years, to ensure best value, and new insight into the changes in legislation/best practice.	Accepted. However, the period has been extended to 5 years in order to minimise the frequency of any additional costs that the Association may incur as a result of briefing new auditors.	The insertion of a new clause 18.3 entitled *"Rotation of Auditors"*.
20.1.1	Susan Tremeer	Any expenses related to litigation must be agreed by members in a meeting.	No director will accept an appointment without an indemnity regarding the costs of defending litigation properly incurred in the course and scope of service the director's service to the Association. If the expenses are not approved, then the director will be liable for these expenses notwithstanding that he is sued purely in a representative capacity. If the director is found to have contravened section 77(3)(a)(b) or (c) of the Companies Act or is guilty of willful misconduct or breach of trust or any fine imposed on a director as a consequence of him being convicted of an offence, then the Association would be able to claim restitution from that director of any money paid on behalf of him or her.	No change.
20.3.2.2	Christopher Gregory	Who manages this on behalf of the incumbent? When is this decision made?	The Board would manage this process. The decision can be made at any time.	
20.4	Susan Tremeer	Definite no. Remove this clause.	No person will agree to being appointed as a director without this indemnity. This indemnity does not include any intentional action which causes harm.	No change.
21.1.1.2	Hugh Preston	I think that the MOI should include a clause explaining the rationale behind the suretyship document – and stating whether or not existing owners with properties in such legal entities will also be required to sign guarantee as soon as the MOI is adopted.	The rationale behind the suretyship document is to address levy defaulters who have bought undeveloped sites in Raptors View through juristic persons such as a companies and then those companies fail to pay their levies. In most cases, the sole asset held by the company is the property in the Estate, which is subject to a bond, and the company has no other assets with which to satisfy the debt. The suretyship seeks to ensure that, in these cases, the Association can	The insertion of a footnote to this clause containing the rationale.

Clause No.	Member	Comment	Response	Amendment to the MOI
			collect the arrear levies from the individual for whose benefit the property was acquired. The intention is that this provisions will strengthen the Association's ability to collect unpaid levies so that other members do not have to pick up the tab for defaulters. Existing owners will not be required to sign a suretyship once the MOI is adopted. It cannot be applied retrospectively.	
21.4	Keith Hartshorne	Suggested rewording for accuracy: *"No Residential Portions shall:* *a) be consolidated without the Board's prior written approval thereof or;* b) *be sub-divided under any circumstances."*	Comment accepted, this clause has been amended accordingly.	This clause has been amended to read as follows: *"No Residential Portions shall be:* *21.4.1 consolidated without the Board's prior written approval; or* *21.4.2 sub-divided under any circumstances."*
21.5	Christopher Gregory	Authority should be given to the Board to dispose of any plot in the event that Members consistently don't pay their levies. For example, more than one year.	In law the Association (represented by the Board) cannot dispose of a defaulting member's plot in the absence of a court judgment. The only mechanism through which the Association can dispose of a plot in these circumstances is by issuing summons against the member concerned, obtaining a judgment, obtaining a warrant of execution against the member's movable property first and then if the debt cannot be satisfied from the proceeds of that movable property, then the Association can apply to court to attach and sell the member's immovable property in execution.	No change.
22.4	Keith Hartshorne	Suggested reword for accuracy: *"No Member shall let a Residential Portion of which it is the registered owner for a period of less than 30 (thirty) consecutive days without the prior written approval of the Association unless as a visitor accompanied by the Member for the entire lesser period involved"*	Accepted.	The deletion of *"unaccompanied by the Member concerned"* after "Consecutive days" and the insertion of *"unless the tenant is accompanied by the Member concerned"* at the end of the clause.
24.2	Susan	Any changes to rules must be agreed by the required majority	Accepted, subject to the following:	The combination of clauses

Clause No.	Member	Comment	Response	Amendment to the MOI
	Tremeer	of members at a meeting.	• The rules affecting Members' lifestyles and investment are set out in the Homeowners Rules and the Architectural Rules. The authority of the Board to amend these rules has been limited by requiring the amendments to be ratified by Members. • The difficulty with requiring such amendments to be subject to the prior approval of Members is that it would limit the Board's ability to address any urgent problems or issues that may arise. However, a new provision requiring the rules be delivered to Members and stating that such rules will only come into effect 10 days thereafter has been included. Should Members object to the amendments, they can request a Members meeting in accordance with clause 9.2 of the MOI for the purposes of approving or rejecting the amendments of which 10 days written notice is required to be given. • The new clauses also preclude the Board from making new rules which relate to the subject matter of the Homeowner or Architectural Rules as this would constitute an amendment.	24.1.2 and 24.2.2, the insertion of a new paragraph after the old 24.2.2 and clauses 24.2.1.8 and 24.2.1.9.
24.2.1 & 24.2.2	Jurgen Elbertse	Board members in their own right should never be allowed at any time to change the rules. The rules define how RV operates and what it stands for. Any change not voted for by the members will affect the life style of the members and their investment. This was further discussed on request of the board after the information meeting and the Chairman and BW agreed that i.e. Architectural Guidelines and the General Rules should only be changed in a voting process as I mentioned in this email under General. An exception could be the Contractor rules (with reluctance) as this might require direct action on an operational level from the managent. However this still should go though a proper information proces and not ad-hoc. All in the interest of transparency.		
	Don Scott	I agree with Mr Elbertse that the board cannot make rules which affect the members without input and agreement from the members at a members meeting using a vote as stipulated in this MOI. The board is only mandated to apply the rules that are already in place.		
	David Spencer	That a paragraph be added into the MOI that protects the founding principles that the creation of RV was based upon. Namely, no pets, the 15 and 20 metre building circles, the height restrictions to prevent visual pollution (houses, lighting and lightening conductors) and the choice of building materials to give the "Game Lodge" appearance and feel to the estate.	Accepted in part. The founding principles are contained in the Homeowners and Architectural rules. The proposed amendments to clause 24.2 seek to protect these principles by requiring any amendments to the Homeowners and Architectural rules to be ratified by Members.	
	Keith Hartshorne	Add word "protection": *"Subject to any restriction imposed or direction given at a Members' meeting of the Association, in addition to the rules contemplated in clause 24.1, the Board may, from time to time, make rules in regard to the use, protection and enjoyment of the Common Property and any conduct on the Common Property and the Residential Portions."*	Accepted.	The insertion of the word *"protection"* after the word *"use"*.

Clause No.	Member	Comment	Response	Amendment to the MOI
24.2.2.1	Susan Tremeer	No this estate does not yet have wildlife status. All properties are still held in title as agricultural holdings.	The purpose of this provision is not to describe the zoning of the property. It describes the concept of the Estate.	No change
24.2.2.2	Susan Tremeer	Therefore contentious.	The keeping of animals, reptiles, fish or birds can have an adverse effect on the wildlife on the Estate. It is therefore necessary to make rules in relation thereto.	No change
24.2.2.4	Susan Tremeer	All need to be prescribed and agreed on in the rules.	All companies are governed and controlled by their boards of directors. Consequently, the Board is tasked with the implementation and enforcement of the rules, including the imposition of fines.	No change
24.2.4	Howard Wilson	No person can be held responsible for the actions of another casual visitor to the estate. For example, if a visitor is caught speeding / poaching or committing whatever offence, any damages need to be pursued by RV directly with that individual, not the home owner he/she happened to visit. For example if a visiting courier is caught speeding on his way out, how do you expect the homeowner to be responsible for that person's actions.	The purpose of this clause is to address the practical difficulty that the Association would have in trying to enforce the homeowners rules against third parties with whom it has no contractual relationship. The rules are not binding on casual visitors. In order to make the rules binding on a casual visitor, a copy thereof would have to be provided to such visitor upon entry to the Estate and he or she would have to sign them. This is impractical. However, as in any other homeowners association, members need to take some measure of responsibility for their guests. Therefore, clause 24.2.4 seeks to ensure that the homeowner, who is bound by the rules, seeks to ensure that his or her guests comply with them. In the absence of this clause, third parties will be able to breach the rules with impunity, whilst the Association can do nothing to stop them. Naturally, before exercising its discretion to impose a penalty on a member, the Board should consider the nature of the transgression and the relationship between the member and the visitor i.e. is the visitor a visiting family member or a courier.	No change.
24.2.5	Susan Tremeer	Communication with the affected party is a far better tool than continuous threats of costs.	The purpose of this clause is to empower the Board to take effective action in the event of a breach of the rules. Naturally, the Board will communicate with the	No change.

Clause No.	Member	Comment	Response	Amendment to the MOI
			Member concerned prior to taking any action.	
24.2.6	Susan Tremeer	Remove whole clause.	Directors are bound by fiduciary duties in favour of the Association, requiring them at all times to act independently and in the best interests of the Association. Members do not owe these duties to the Association. It is for this reason that the dispute is referred to Directors appointed by the Board and not to Members. To the extent that a Director has an interest in the dispute, clause 24.2.6.1 states that he or she cannot be appointed to the committee which is to determine the dispute. Therefore, there will not be directors on the committee who have a vested interest in the dispute. This ensures that the role of those responsible for determining the dispute is clearly distinguished from any subjective personal relationship they may have with any particular Member. The purpose of the committee is to call for and consider evidence from the Member regarding the dispute. It is essentially a review of the decision of the Board having regard to the Member's evidence rather than the Member versus the Board. The courts have held that a committee comprised of board members to determine a dispute must comply with the natural justice requirements of legality, procedural fairness and reasonableness (the latter in the sense of a rational connection between the facts presented and the considerations applied in reaching the conclusion). Members cannot be expected to fund independent arbitration every time a member disagrees with the decision of the committee which is taken within its powers. Moreover, any liability arising from the enforcement of the rules rests with the Board (who is indemnified by the Association). Members are not indemnified and may attract personal liability in respect of other Members who are disgruntled with the decision.	No change.
24.2.6.1	Don Scott	The board cannot be judge, jury and executioner. I would propose a more fair process as used in other associations, where an Appeal Committee consists of 3 Members of the association, who have had no interest of whatsoever nature in the matter or who have not been part of the decision or deliberations of the Board. Further to this there should still be a provision for a member to submit a matter for independent arbitration. All of this is to protect members from being unreasonably punished without a recourse to independent review.		
	Jurgen Elbertse	Appointment of a committee. A committee that has to decide on a matter of dispute between a member and the board can by definition not be a board member. This should be formed from independent members not related to a board member or related to the member who has a complaint.		
24.2.7	Susan Tremeer	Remove.	The purpose of this clause is to ensure that none of the rules are applied arbitrarily or in a manner that	No change.

Clause No.	Member	Comment	Response	Amendment to the MOI
			offends public policy or the constitution. An example would be the rule against pets in the case of a guide dog for a blind person.	