



INSIDE THE MIXED-USE SECTIONAL TITLE SCHEMES PROPERTY: THE APPLICATION OF RULES TO PROMOTE GOOD GOVERNANCE¹

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Abstract. *The role of sectional title scheme properties in assisting the South African government in addressing housing challenges is beyond contest. Nonetheless, the Act that governs these schemes has some problems, particularly in managing mixed-use sectional title schemes. One of the failures of this Act is that it grants developers broad authority to define rules for schemes without the input of local governments or corporate corporations. The aim of this article was to provide a complete understanding of rule application within mixed-use or two-tier schemes designed to foster good governance. Additionally, a global comparative analysis of similar schemes will be conducted to evaluate the rule execution and management of these mixed-use plans. Rules violations by both trustees and managing agents were cited as the common causes of poor management of the sectional title schemes; however, what still needs to be answered is the application of rules under the current mixed-use schemes. The current study built on this gap and examined how rules are implemented under mixed-use or two-tier schemes. However, little attention was given to the mixed-use scheme of sectional title scheme properties and the practical application of the rules under this new framework. This study aimed to examine the application of regulations in mixed-use schemes and their impact on the governance of the schemes. A practical recommendation was made on the possibilities of closing the expectation gap encountered with the current mixed-use governance framework.*

Keywords: *Mixed-Used Sectional Title Scheme, Application of Rules, Conflict of Interest, Participation Quota, Good Governance.*

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1. Introduction

According to recent property data estimates, South Africa now has 66,000 commercial and residential registered sectional title systems since its adoption in 1971 (Grobber, 2022). Based on this statistical report, one can be quite certain that the sectional title scheme plays a substantial role in addressing the housing challenges in the country. However, despite these benefits that came with the introduction of the sectional title scheme in the country, there was an outcry from property owners regarding the scheme's governance. According to Randles Attorney (2019a), one of the main problems in sectional title scheme governance is that the original format of the sectional title scheme was designed to provide for vertical property ownership within the high-rise building, and the statutory rules for the scheme's governance and regulations were written with this high-rise building model in mind, not a mixed-use scheme. But, due to land scarcity, market property prices, and a lack of regulation, the developers saw an opportunity to design a mixed-use scheme. According to Van der Merwe (2018), developers and business people have reaped considerable benefits from building a well-designed and methodically implemented mixed-use sectional title system in the country and transitioning from its initial vertical structure to a horizontal format. The developers designed mixed-use schemes because their concern was about profit without considering the people who would buy into those properties. Therefore, these benefits for developers come at a cost to many property owners because the establishment of mixed-use structures occurred without amending the Act governing the schemes. This omission makes it challenging for residential property owners to enforce the single-use structure rule within a two-tiered system. The fact that all forms of sectional title schemes in South Africa are required by law to form one body corporate exacerbated the problems of the implementation of rules to ensure that there's good governance within mixed use schemes.

2. The Research Methodology

In this study, secondary data and content analysis were used to analyse qualitative data. In this study, secondary data and content analysis were used to analyse qualitative data. The researcher used content analysis since it is a flexible method for examining text data (Smith and Marx, 2021). The search for secondary data in this study started from academic libraries at Tshwane University of Technology. The research specialist from the Tshwane University of Technology was used to assist in searching for relevant academic sources and archives from the university libraries. The secondary data for this paper were obtained from sources around the world such as scholarly journal articles, dissertations, thesis, and Google Scholar. Other

institutional publications, such as Community Schemes Ombud Services and the National Management Agent Association, were also used to obtain relevant data about the regulations and application of sectional title scheme rules and the current governance framework of these schemes. However, in this study, the secondary data used was for the period between 2015 and 2024.

Furthermore, the data collected from various sources was consolidated to ensure similarities in formats. Then, all secondary data collected findings were compared with other sources regarding governance issues across different studies of the sectional title schemes. The researcher analyses the trend in rule implementation by both trustees and managing agents under a mixed-used scheme and its impact on the governance practices of the schemes.

3. Literature review

3.1. Definition of mixed-used sectional title schemes.

A mixed-use sectional title scheme is defined by Van der Merwe (2018) as a design that consists of a combination of residential and commercial units, while the word can also refer to a mix of residential units and office units or a mix of residential, commercial, and office units. According to Van der Merwe and Paddock (2017), a mixed-use development is one that includes residential and commercial space in the same building or consists of numerous buildings under the same concept. Techakumphu (2015:3) describes a mixed-use condominium as a layout that incorporates many sorts of units, such as retail, office, and residential units, all of which are housed in the same structure. Based on the assumption, regardless of how they approach the topic, all authors agree on the same definition.

Furthermore, a mixed-use scheme is governed by regulations that specify how much each co-owner will contribute to the upkeep of the common property. Çağdaş et al. (2018) they asserted that each condominium unit owner's voting power in the condominium's management, as well as their proportionate share of the condominium's common expenses and earnings, is determined by their co-ownership share. According to Van der Merwe (2018), when the building is designed to minimize shared areas, services, and interaction between commercial and residential users, potential disruptions and disputes regarding common expense allocation, maintenance, and management are avoided or at least mitigated in a mixed-use scheme.

3.2. The establishment of the sectional title scheme property

According to the Sectional Title Schemes Management Act of 2011, a developer who forms a sectional title scheme prior to the establishment of a body corporate is obligated to establish rules that attribute a separate value to any section owner's vote or responsibility. Given the above premise, it is presumed that a developer has a model for what the plan should consist of. According to Van der Merwe (2020) there is no legal framework plan in a mixed-use scheme, so the developer has complete discretion to allocate quotas to each residential section of the scheme and a portion of the total participation quotas to the non-residential component. The origin of mixed-use sectional title schemes in South Africa were primarily framed with residential apartments in mind and that's why the scheme regulation is unsuitable in the governance of the scheme (Van der Merwe, 2016). As a result, this, the lack of a legal regulatory framework model for forming a mixed-use sectional title section in South Africa, as well as the Act for a provision of a mixed-use scheme, unit owners may find it difficult to apply the scheme rules properly. According to Van der Merwe (2018) the ability of the developer and unit owners' corporations to meet their conflicting needs of the various components of the mixed-use strata title scheme is critical to the success of a mixed-use scheme. Since there are no governance guidelines for mixed-use schemes, the success of implementing sectional title scheme rules is jeopardized, because the model used by developers is unknown to all stakeholders. According to Izanda, Samsudin and Zainuddin (2020), the lack of uniform rules and regulations led to some developers abusing the situation and delaying strata title registration to impose any rules and additional fees on the building management system, which in turn caused dissatisfaction among unit owners with the scheme's governing rules.

In additionally, the absence of a formal framework for two-tier or mixed-use sectional title scheme management structures gives developers the opportunity to select any type of management structure, perhaps leading to the variety of models that are currently in use (Van der Merwe and Paddock, 2017). Because the developers of this scheme did not adhere to any regulatory framework in place, unlike the single structure mode, the current Sectional Title Scheme Act's lack of mixed system regulation results in instability with the governance of the scheme. Van der Merwe (2018) asserts that in a correctly planned mixed-use scheme that adheres to the Act's statutory structure, each component will be essentially self-sufficient, and conflicts will be avoided because the scheme can offer a separate service to each of the user components.

According to Van der Merwe and Paddock (2017), one of the most common methods used by developers in South Africa to achieve a mixed-use or two-tier scheme governance structure is to use attorneys and land surveyors to assist them in manipulating the management and conduct rules of mixed-use and larger schemes when submitting their applications for sectional plan registration for monetary reward and opening a sectional title register. Because there was no legal procedure followed in developing the mixed-use scheme, and since the commercial and residential components are not distinct, the scheme's management and conduct rules are against the current Sectional Title Scheme Act. Van der Merwe (2018) argues that to prevent issues of conflict rules and interest among owners, it is better for commercial and residential units in a mixed-use development to be separated and each be given autonomy to govern its affairs in order to improve its governance. This claim was backed up by Techakumphu (2015), who argues that since the scheme consists of various people with different needs, a lack of clear provisions for governance structures more specific to the common property in the Act may result in conflict between owners of the various types of units. Considering this, all sectional title property owners as well as other parties with an interest in the scheme, such as financial institutions, place a high priority on the good management of the mixed-use scheme. So, one of the obstacles to effective governance and the proper implementation of regulations within the scheme is the absence of a legislative framework for the development of this scheme in South Africa.

According to Van der Merwe and Paddock (2017), developers and advisers who intended to create a sound governance framework for mixed-use scheme systems frequently failed to do so, resulting in a system that does not function properly or has inadequate governance. Based on the aforementioned statement, the separation of mixed-use schemes and establishment of regulatory frameworks is critical for good governance of this type of scheme. One of the common problems with the mixed-use sectional title scheme is the maintenance of common property and participation quotas, which are linked to the voting power of each member within the scheme. In South Africa, the participation quota formula for residential units is an area based on the size of the unit, but for non-residential sections, the developers are solely responsible for determining their co-ownership share or quota of that section without being questioned, or the formula is known by themselves only (Çağdaş, et al, 2018). In accordance with the sectional title scheme Act 8 of 2011, the developer has sole discretion of effect of quotas guided by section 3(1)a, which determines the liability of payment of the debt to body corporate and the value of their vote in the scheme. In a mixed--use scheme which consists of

different interest groups, a potential dispute concerning common expense allocation and management can be avoided or diminished if the total designer of the scheme is isolated with minimum shared management and area, services and interaction between commercial and residential users (Van der Merwe,2018). Providing a separation of services within this kind of scheme has always been challenging in South Africa due to the lack of a legislative framework for mixed-use schemes and a provision in the Sectional Title Scheme Act that would permit them.

3.3. A brief overview of mixed-use sectional title schemes around the world

In South Africa, sectional title scheme property is managed through a single management structure comprised of four fundamental documents: the sectional title scheme plan, which depicts how the building is divided into the common property and exclusive use rights; the management and conduct by-laws (rules), and the general function and responsibilities of all scheme arms. According to Van der Merwe (2018), a single management structure is common in South African sectional title schemes, which comprise a mix of residential and commercial components with unequal voting rights. Van der Merwe and Paddock (2017) affirm this allegation regarding the single management structure utilized in South Africa, noting that the existing statutory governance structure for sectional title schemes only allows the formation of one body corporate for each sectional title scheme. As a result, in South Africa, the governance of mixed-use sectional title schemes has been a recurring issue. One major issue is that the existing Act only allows for a single structure management scheme; thus, all owners, collectively known as body corporate, are responsible for the management, administration, and control of their scheme (Dlamini and Boshoff, 2017). Therefore, the scheme's current rules do not support good governance in mixed-used schemes because they were implemented in the wrong structure.

According to Van der Merwe and Paddock (2017), the mixed-used sectional title scheme in South Africa was modelled from Singapore because the legal situation of South Africa and Singapore is identical. However, the implementation of the governance structure between Singapore and South Africa is not the same. The previous statutes in both countries were based on the complex New South Wales Strata Titles Act of 1961. However, because the laws governing sectional title schemes in Singapore and South Africa are derived from the same tree, both countries should treat mixed-use schemes similarly. Van der Merwe (2018) agreed with this argument but added that when management is not isolated inside a mixed-use association structure, it can lead to several challenges due to a conflict of interest between the owners of

residential and commercial components. In addition, one of Singapore's primary reasons for developing a two-tier structure was to improve scheme governance through the proper application of rules and the segregation of duties, as well as to allow flexible management of scheme developments within the scheme's clearly distinct interest groups and the clearly visible physical delineation of common properties. As a result, the South African sectional title scheme model should be designed similarly to that of Singapore, as they are similar and adopted from the same country in Australia, New South Wales.

Furthermore, because the South African Sectional Title Scheme Act only allows for a single management structure, regardless of the size or shape of the scheme, it is not possible to establish a mixed-use governance system like that of Singapore unless you change the regulations. This is one of the main causes of poor governance because the current scheme rules are not applicable under the current Act. According to Van der Merwe and Paddock (2018), there was a suggestion that it would be necessary to modify the regulations issued under the Act to give developers in South Africa the chance to implement a two-tier governance structure. These regulations could be modified by the addition of a sub regulation under regulation 30. However, the South African policymakers who drafted the Sectional Title Scheme Act, have turned a deaf ear to these ideas because nothing happened even today.

A country like Thailand has promulgated the Condominium Act B.E. 2522 and had the latest amendment in B.E. 2551 with the view that to manage the living of co-owners in the condominium, the aforementioned Act is somewhat outdated because it was promulgated mainly to serve single purpose condominium and further it creates a loophole in relation to the management of common property in the mixed-use condominium where there are different types of units located in the same building (Techakumphu,2015).The lack of provision in the Sectional Title Scheme Management Act is the main hindering factor that prevents the creation of a two-tier scheme, even though this scheme is currently operational in the country. This concurred by Van der Merwe (2016) Unlike various condominium or strata title laws worldwide, the Sectional Titles Act in South Africa does not explicitly provide for the establishment of subsidiary management committees within mixed-use schemes. In Malaysia strata management Act 2013, (Act 757) was introduced the establishment of subsidiary management committees in the mixed-used scheme in order to help to resolve the issues of managing the different types of users in the mixed used schemes (Vern, Choon, Ujang, Liang, Azri, Seng and Chin,2023). The establishment of subsidiary committees makes sense because it is impractical to apply the same conduct rules to both commercial and residential properties

equally within a mixed scheme in South Africa. However, the current Act requires that the rules be applied equally to both residential and commercial sectional title scheme properties. The establishment of a subsidiary management corporation is crucial for the independent management of the subsidiary corporation, enabling it to maintain and manage its limited common property (Choon, Vern, Seng, Chin and Kathitasapathy, 2022). This approach helps address unfair management practices, ensuring that property owners are not required to pay maintenance fees for limited common property from which they do not derive exclusive benefit or enjoyment.

According to Van der Merwe (2018), a mixed-use scheme in Singapore is managed or governed by subsidiary management corporations or bodies corporate and are indicated on the strata or condominium plans as limited common property allocated to the owners of the component of the building governed by subsidiary condominium association concerned. This was supported by Van der Merwe and Paddock (2017) when they revealed that the Singapore Act further provides for the subsidiary management corporations to elect an executive committee and to hold general meetings and pass resolutions in the same way as the main management corporations. The Singapore Act is advanced compared to the current sectional title scheme Act in South Africa because it has a provision in their Act to allow the creation of subsidiary management to improve the governance of their mixed-use scheme, unlike in South Africa.

According to Technakumphu (2015), in terms of Section 46 of the Condominium Act of Singapore stipulates that in a situation where the rules of the scheme require that some co-owners have to pay for costs for a particular purpose, only those co-owners responsible shall have the right to vote for resolution pertaining to the costs for that purpose, and each person has a number of votes pursuant to the ratio as stipulated in the provision of Section 18 paragraph one. However, this is different in the South African Sectional Title Act because all owners are subjected to voting even if the matter pertaining to exclusive areas doesn't concern them. As a result, the participation quota gives the majority owners the power to oppress the minority, even if they don't have any interest in the project at hand. The participation quota has a huge impact on the governance of mixed-use schemes.

Furthermore, the South African mixed-use management structure is governed by the Sectional Title Management Act, which prescribes the body corporate to govern the affairs of common property areas within their scheme by contributing towards management and repair

(Kambarani, Gambo and Musakwa, 2021). This statement is supported by the Sectional Title Scheme Management Act n0.8 of 2011, which corporate indicates that the owners of the corporate body have a duty to repair and maintain their common property or exclusive use, as it is now common knowledge to keep it clean and neat. Techakumhu (2015) revealed that under the old Condominium Act Section 48, the resolution of the common property or exclusive area required the votes of not less than half of the total votes of all joint owners of the condominium. This is like a sectional title scheme where a special resolution requires 75% of members present to vote in number or value for a special levy used for the maintenance of their common property in their respective scheme.

However, Singapore has opted to repeal this Section 48 regulation due to its flaws by enacting Section 46, which mandates that, unlike before, only the responsible owners of common property must vote on the costs of maintaining their common property. Because mixed-use scheme properties include a variety of interest groups and it can be difficult to allocate costs to members, the inclusion of Section 46 has thus been successful in resolving disagreement. The decision of developers to initially submit their plan before they register the scheme itself at the deeds office still has an impact on the South African sectional title scheme, notwithstanding this significant improvement in the Singapore mixed scheme. They omitted to make clear who should be responsible for maintaining which common property area and the common property area itself was never explicitly outlined in their scheme plan. In support of this assertion, Randles Attorney (2019b) asserted that the sectional title scheme's first legislative requirements were developed to oversee and control high-rise structures. The developers decided to broaden this rule into a hybrid two-tier system, even though the Act that governs the scheme is not meant for this new development. As a result, many property owners have long struggled with the governance of this scheme.

3.4. The rules of the sectional title scheme in South Africa

All sectional title scheme property in South Africa is mandated by the Sectional Title Schemes Act from the date of establishment of their body corporate that it must be regulated and managed by the rules. The sectional title scheme rules must be differentiated from the registration conditions of the scheme, which include servitudes and other real rights that are burdens imposed on sectional property and serve to restrict owners when they deal with their units. Hence, the rules of the scheme bind all body corporate owners, including the tenants of that scheme. In other words, rules are the laws that the body corporate uses to manage its own affairs within its schemes. In terms of Section 10(2) of the Act, the body corporate has the power to

amend or alter both the management and conduct rules of the scheme with a special resolution. Section 10(2) of STSMA indicates that the rules of the scheme provide for the regulation, management, use, and enjoyment of sections and common property.

The sectional title scheme comprises two types of rules, such as management and conduct rules. In terms of Sectional Title Scheme Act No. 8 of 2011, the management or conduct rules contemplated in subsection (2) prescribe that these rules must be applied equally to all owners of the units or scheme. The STSMA sections 12.1 and 13.1 explain the difference between these two rules: the prescribed management rule regulates the operations of the body corporate and its members, while the prescribed conduct rule of the scheme regulates the behavior of the owners and occupiers in their use of the common property, an exclusive use area, and their sections in relation to the scheme size and type.

One of the main challenges with the governance of the sectional title schemes is the participation quota rules of the mixed-use sectional title. Van der Merwe (2020) claims that the developers have complete discretion over how much of the total participation quotas to allocate to the non-residential component of the scheme as well as how much to allocate to the scheme's residential portion. One issue with this provision is that the developer is not required by the Act to reveal the formula used to allocate participation quota to the non-residential portion of the scheme. Therefore, a developer is not permitted to reveal the formulas used for non-residential property poses a challenge to the governance of the scheme (Van der Merwe and Habdas, 2016). However, government intervention is required since they will be able to draft statutory rules that will result in an equal and fair participation quota for all owners from both residential and commercial properties. According to Van Schalkwyk and Van der Merwe (2018), the diminished role of local authorities as guardians of the public interest presents a chance for developers to take advantage of owners by abusing this process. In addition, the fact that developers are permitted to amend their management rule while submitting the application for the opening of the scheme at the deeds office under section 35(2) (a) of the STA caused a lot of problems. Additionally, the developers are free to add special rules that allow them to use a different formula to calculate the relative contribution to common expenses and the value of votes (van Schalkwyk and Van der Merwe, 2018). As a result, these special rules give developers the chance to reduce the participation quota because they design the regulations to meet their own requirements without considering the interests of the unit owner. Again, the requirement that a scheme be completed first before a plan can be submitted to the register causes a problem with quota distribution because developers have already manipulated the

entire process with special rules. Therefore, the viability of a mixed-use strata title scheme depends on the ability of the developers and the unit owner's body corporate to accommodate the frequently competing interests of the unit owners in the various components (Van der Merwe, 2018).

Furthermore, one of the main sources of conflict within the sectional title scheme is common property maintenance, and when the participation quota is not well established within the scheme. According to Van der Merwe (2020), one of the problems with the maintenance of common property is that the STA has adopted a unique method for the allocation of participation quotas for mixed-use schemes that have both residential and non-residential sections. For example, under STA, the participation quota for residential sections is based on the floor area of a section proportionate to the total floor area of all the sections in the residential components of the scheme, while for non-residential sections, the developers have unfettered discretion to determine the quotas for each non-residential section in the scheme as well as the percentage that must be allocated to the residential component of the scheme. The difficulty with the Act, according to Van Schalkwy and Van der Merwe (2018), is that it leaves the determination of participation quotas for non-residential units to the developer's sole discretion.

The participation quota in the mixed-use for non-residential units of the scheme poses a huge challenge to the governance of the scheme. According to Techakumphu (2015), a section that is allocated more rights can exercise their rights to make the minority units pay a higher fee for maintenance which they do not have to contribute anything. Van der Merwe (2020) backed up this claim by stating that, in South Africa, the developers should be required to provide additional information in a mixed-use scheme on how he or she determined the percentage allocated to non-residential units because, in the absence of restrictions on the developer's discretion to disclose the formula used, we would be unable to determine what percentage was allocated to particular units should the participation quota need to be adjusted. According to Van der Merwe (2020) under the United States Uniform Common Ownership Interest Act (UCIOA Section 2-107(a) developer are compelled to disclose their formula used for allocating quotas to non-residential units, and this means that individual units within the scheme could challenge unfair allocation of quota on the ground of unfairness or inequity. However, in South Africa, this is not the case because the participation quota of non-residential units within the mixed-use scheme remains a secret of the developers forever.

3.5. Voting rights within the sectional title scheme property in South Africa

In accordance with Section 32(1) read with section 11(c) of the STSMA, two additional aspects of the participation quota are the weight of a sectional title owner's vote and the levy contributions for the scheme's operating costs, including the sectional owner's proportionate liability for the body corporate's debts (Van der Merwe, 2018). In the South African Sectional Title Schemes Act, any corporate resolution is decided by one of two types of voting processes, such as unanimous or special resolution. However, as required by STSMA, the difference between these two types of resolutions is that a unanimous resolution is used to amend or repeal management rules, which calls for 85% of votes cast by body corporate members in favour of the resolution, which must be calculated in both value and numbers of members present. But, about special resolutions, the votes that are used to amend or repeal the conduct rules call for 75% of the members present, with the votes' calculated in both value and numbers. However, a crucial aspect of this voting system is that it is also used when trustees propose a special leave and when decisions regarding the upkeep of common property are made because these kinds of schemes call for joint ownership shares. According to section 4(e) of the Act, bodies corporate has the authority to borrow money for schemes, although such a decision requires special resolution. Since South Africa has a single management structure despite that the schemes can have a variety of structures, this provision of the Act may be problematic in terms of voting system which based on value of vote. For example, in mixed use schemes the members those who have more voting power will always out vote the minority. Since the Act requires all members to vote for any decision taken by body corporates. Therefore, under this Act, the governance of the scheme is under threat.

As indicated before that the voting rights are determined by the participation quota section 32(1) and 11(a) of the Act, which was enacted by the developers when they established the scheme. According to Van Schalkwk and Van der Merwe (2018), it is unfortunate that the determination of the quota is left to the sole discretion of the developer without an independent authority considering whether his allotment is equitable, and this has a negative impact on the voting process within the scheme. Although, the Section 10(a) of STSMA, gives the body corporate the power to amend or repeal rules made by the developer after the establishment of the body corporate through unanimous or special resolution. But the fact that, all body corporate decisions are pass by resolutions, which are adopted through voting. Therefore, participation quota has negative impact on the governance of the mixed-use schemes because owners with higher quota will always try to advance their interest at the expenses of minority. The

participation quota has impact on conflict resolution because members with higher participation quota will always try to protect each other based on their voting rights. Van der Merwe and Paddock (2017) supported this claim by indicating that, when a sectional owner in the mixed-use scheme votes for any resolution, various interest groups will normally vote by class, and the class with the majority of votes will try to advance its own interests as far as possible.

According to Techakumphu (2015), Singapore had a similar challenge with Section 48 of the Condominium Act, which required that a resolution on matters of common property contribution need the votes of not less than half of the total votes of the joint owners in the condominium. In addition, this rule in Singapore for mixed use schemes has been substituted by Section 46 of the condominium law, which bars the owners of common property not allocated to them from voting on things that are not in their own interests. In South Africa sectional title scheme Act, the process of amending the management rules is quite challenging, because owners need to obtain 85% to pass unanimous resolutions. According to Van der Merwe and Habdas (2016), this would prove extremely difficult in practice since one or more owners would always be disadvantaged by such a resolution or amendment in share value and would not consent to such proposal because it will disadvantage them.

Furthermore, it is quite challenging for residential owners of mixed-use scheme to change the regulations because of participation quota. According to Van der Merwe and Paddock (2018), the only way to achieve a fair and equitable distribution of expenses among the owners of units within a mixed-use scheme is to make rules that allow only the representative of owners of units affected by maintenance to vote while excluding the other owners who are not affected by such expenses. However, with the current sectional title scheme Act in South Africa, there is no provision in the Act to bar other owners from voting on the expense of exclusive areas. One of the main obstacles to applying this approach is that the current South African Act is based on the single management structure not the mixed-use scheme. In contrast, Singapore has adopted Section 46 of the Condominium Act, which makes it easier for their mixed-use scheme to introduce subsidiary sections within the scheme to improve its governance and bar other members of the scheme who are not of interest from voting on matters that do not concern them in common property. Hofmeryr (2023) revealed that the voting rights issue is important, but in South Africa there are assumptions that, when owners buy property in a mixed-use scheme, they ought to know what they are buying into, and no one compelled them to buy property in that scheme but chose to do so. As a result, the decision-makers ignore this crucial component

of the scheme since they assumed everyone would be aware of the problems with voting rights, which also influence the way their scheme is governed.

Furthermore, in terms of section 7(1) of STSMA, the functions and powers of the body corporate have been delegated to be performed and exercised by the trustees of the body corporate holding the offices in terms of the rules. In mixed use schemes, the owners of the mixed-use scheme with higher participation quota will always have more trustees elected in the body corporates which can affect the governance of the schemes. According to Rule 14(1) (b), trustee resolutions are adopted by a majority of the trustees present and voting. In this instance, when the trustees vote on the proposed budget to be presented at the AGM, the trustees with more voting power will always outvote minority and their decision whether is bad or not will always be adopted. However, these voting systems deprive scheme consensus agreement in any decision made for scheme operation.

In terms of prescribed conduct rule 30(b) of the STSMA, the owners or occupiers of a section must not create noise that is likely to interfere with the peaceful enjoyment of another section or another person's peaceful enjoyment of the common property. The rule enforcement under a mixed-use scheme can be quite challenging considering the various needs between the commercial and residential owners regarding conduct rules. According to Van der Merwe (2018), the needs of owners in the commercial component must be balanced with the reasonable expectations of the owners in the residential component of the scheme. Based on the aforementioned statement, balancing the need for both the commercial and residential sides in the mixed-use scheme is impossible because of their various interest. It doesn't make sense for a shopping center to be classified as an owner's apartment since it is not intended for residential use. The introduction of sectional title schemes worldwide was aimed at addressing housing challenges, not commercial purposes. According to Techakumphu (2015), the Singapore government has rectified this situation in their mixed-use scheme by introducing Section 17/1 under the Reform Condominium Act (No. 4) B.E. 2551 that promote the formation of subsidiary committee within one body corporate, which protects the owners residing in other units in the same building and prevents other owners from conducting business which can disturb the peacefulness of the joint owners. The current Act's lack of protection for other members of mixed-use sectional title schemes in South Africa, in comparison to other nations, and this poses serious governance challenges of the scheme in application of rules.

4. Governance of sectional title scheme property

The Sectional Titles Schemes Management Act No. 8 of 2011 (STSMA) and the Community Schemes Ombud Services Act No. 9 of 2011 (CSOSA), were established by government in 2016 to provide dispute resolution mechanisms for sectional titles and to improve the governance of the schemes (Steenkamp and Lubbe, 2017). Despite this intervention by government to mitigate the governance challenges within section, but the crisis persists. According to Alabdullah and Kanaan (2022), the only way the mixed used sectional title scheme body corporate can improve is through proper governance structure which can enable for proper application of rules and procedures that can enable this scheme to achieve its objectives. As a result, internal control mechanisms are critical in removing or mitigating difficulties related to principal-agent relationships or conflicts of interest among stakeholders that affect scheme governance.

According to De Villiers and Dimes (2021), corporate governance mechanisms within a firm are the set of rules, processes, and procedures that enable the board of directors to govern by creating a monitoring strategy that encourages proper reporting, accountability, and transparency. Nevertheless, poor corporate governance can lead to fraud, fines, and reputation damage. As a result, robust internal control mechanisms for the sectional title scheme's body corporate are critical for strengthening the scheme's governance by increasing its performance, sustainability, and management. This argument is supported by FoEh, Permatasari and Singa (2022), who explain that the corporate governance framework is important for any organization because it protects the investment, stability, and growth of the organization by promoting transparency, accountability, and trust.

Furthermore, according to Van der Merwe (2018), the rising popularity of mixed-use residential and commercial schemes strata title residences in South Africa has resulted in a surge in governance difficulties. However, the lack of internal control mechanisms within the mixed-used sectional title schemes has exacerbated poor corporate governance. One of the major issues with the governance of mixed-use sectional title schemes in South Africa are the fact this development has it been applied without regulation changes which accommodate this specific structure. According to Madsen, Paasch and Sorensen (2022), with the current framework, the success of the mixed-use scheme in South Africa will be determined by the ability of developers and unit owners within the body corporate to accommodate other unit owners' often clashing interests in the various components of the scheme. This issue between several unit owners from

different components of the scheme was caused by the fact that the scheme's Act is insufficient to encompass the extent of the mixed-use scheme.

Even though the current sectional title scheme Act has some shortcomings. The South African government has opted to follow the lead of other developed countries by incorporating the mixed-use program into a single structure management framework unlike Singapore and Denmark. Despite the fact that this mixed-use concept needs regulations changes, the government did not alter its regulations to accommodate this initiative, as other countries such as Denmark and Singapore did. A researcher is of view that, a successful mixed-use scheme in South Africa will also necessitate rule adjustments to accommodate a new governance structure, because this new structure has a detrimental impact on the scheme's governance. According to Madsen et al. (2022), Denmark has implemented a mixed-use scheme because one of the main characteristics of this type of scheme is that members of this scheme do not benefit equally from common property as opposed to single structure developments, which is the main cause of poor governance and conflicting interests. However, the same applies to the mixed schemes in South Africa between the residential and commercial properties owners has a different benefit towards the schemes and that's why rules enforcement can be quite challenging's under one body corporates. In contrast, Van der Merwe (2018) revealed that, to improve its governance, a governing document for a mixed-use scheme, where the facilities or amenities will be shared by different users, it must specify how costs will be allocated and responsibility for managing and maintaining the shared-use areas. In South Africa, for example, the mixed-use sectional title system was integrated under the prior Act, which mandates a single management structure scheme, and this could be the main reason for inadequate governance inside the scheme.

Furthermore, the South African government's failure to provide a regulatory framework for developers to follow when establishing a mixed-use scheme jeopardizes the scheme's governance. Based on the above-mentioned statement, the government of South Africa is still applying the old method of vertical and single management structure within mixed use scheme which is the main problems that causes poor governance of the scheme. However, the introduction of mixed-use schemes in the country necessitates structural and regulatory changes to accommodate this new initiative and for proper governance of the scheme. This was supported by Spencer (2022) when he explained that the Act is one-sided because the needs of different sections of mixed-use schemes are unequal, so there is a need to have governance rules that will balance all the needs of various stakeholders within the scheme. As a result, a

regulation amendment to South Africa's Sectional Title Scheme Act is required, as the current Act is insufficient to meet the scope of a mixed-use scheme because it was not meant for it in the first place. That is why, under the current Act, proper implementation of regulations that promote good governance will never be realized.

According to FoEh, Permatasari and Sinaga (2022) the corporate governance framework encourages shareholder activism by exercising voting rights and influencing company decisions by exercising their rights because it empowers them to act as catalysts by creating value for corporate growth by influencing management on the governance mechanism. According to Section 7(1), the trustees of the corporates holding office must perform and exercise all functions of the body corporate in accordance with the rules. Spencer (2022) stated that property owners are dissatisfied with the STSMA because it does not promote good governance, as there is nothing in the Act that prevents trustees who default on their levies or have previously been convicted of fraud from not being re-elected again. The scheme's governance has been jeopardized because a fraudster stands to be elected to be a trustee of a body. FoEh, Permatasari and Sinaga (2022) backed up this claim by stating that, in recent years, the level and frequency of fraud have increased quickly due to governance policy failures. Therefore, to protect and govern any organization properly, good corporate governance, which is based on rules of law, is highly necessary. This assertion was supported by Steenkamp and Lubbe (2017) when they explained that with the current sectional act, there are still numerous shortcomings in the legislation and that many new amendments are ambiguous. As a result, the South African government's failure to follow the lead of Singapore, Denmark, and any other country around the world that decided to change their policies to allow for a mixed-use governance structure is the primary cause of poor application of the scheme's rules and poor governance.

Furthermore, one of the key principles of corporate governance is transparency, independence, and accountability, which serve as the foundation for the organizations' rules and policies. According to Boshoff and Dlamini (2017), in a sectional title scheme, once trustees are elected, they do whatever they want with the body corporate's funds because there are no financial control measures in place and no consequences for them if they misuse the corporate funds, which leads to the body corporate's bankruptcy. However, the unequal distribution of power in the mixed-used scheme might promote bad behavior of trustees. According to Pasape, Anderson and Lindi (2015), excellent corporate governance guarantees that corruption is minimized, minorities' perspectives are considered, and vulnerable groups' voices are heard when decisions are made. One of the primary causes of poor corporate governance in this sort

of scheme is a lack of transparency and accountability, as well as a weak internal control mechanism and consequences management. However, poor governance of the sectional title scheme occurred despite rule 39(1)(c) of the STSMA regulations requiring trustees to use body corporate funds in accordance with budgets approved by the body corporate at the annual general meeting. One of the primary causes of poor corporate governance in these types of schemes in South Africa is a lack of legislation that can improve internal control mechanisms to criminalize illegal financial spending by trustees' body corporate funds. The fact that South Africa's mixed-use or two-tier system is too large necessitates a separate governance model to ensure that openness and accountability are enforced by the body corporate. Good corporate governance is highly unlikely to prevail with the current single management structure management model, particularly with the various interest groups under one body corporates.

According to STSMA Rule 26(c), there is no formal financial accounting reporting framework that the body corporate must apply when producing their annual financial statements. Based on the aforementioned declaration, there is no transparency with the financial information of the corporate body due to a lack of internal control mechanisms that promote adequate disclosure. As a result, if the governance of the mixed-use plan is to be strengthened, a prescribed financial reporting system is required. According to the research, the provisions in STSMA do not encourage good governance since body corporates lack the capacity to compel openness on how certain items are recorded in the body corporate's annual financial statements. According to Madsen et al. (2022), in a mixed-use scheme in Denmark, proper disclosure of financial information is achieved by designing reciprocal legally transparent binding agreements in the by-law, easements, and by forming various management structures or bodies corporates that will be responsible for their own affairs rather than focusing on the entire scheme with various interest groups that may be problematic.

Furthermore, one of the major challenges with the governance of the current South African mixed-use scheme is the use of a single management structure rather than a management structure that is appropriate for the scheme. The participation quota imposed by the developers in constructing the scheme through special regulations, for example, is one of the key difficulties that produce bad governance of the scheme, because this rule results in unequal power distribution among owners. According to Van der Merwe (2018), to strengthen the governance of mixed-use schemes in South Africa, the government must ensure that the scheme governance document attempts to balance the varying operations of the scheme's different components. This can be accomplished by following the Singapore mixed-use model, which is

administered by multiple subsidiaries managing corporations or bodies corporate. As a result, these various corporate bodies fail under a master condominium that contains equal members of all the corporate bodies who are there to balance the needs of various interest groups and avoid conflict among them by catering only to common property that is inclusive of all bodies' corporates. Again, it is critical to understand that all subsidiary structures have common properties that are exclusive to them, and they are also responsible for managing them.

Since the subsidiary body corporate of the mixed-use scheme is made up of owners who all have a vested interest in their investment, good corporate governance can thrive because conflicts of interest are minimised. However, to achieve good governance within this scheme, a governance framework that allows for proper rule application is required, and the governance documents must consider the issue of participation quota and common property, which must be delineated from the start in the sectional plan submitted by developers to the register of deeds. This viewpoint is reinforced by Techakumphu (2015), who adds that without clear regulations governing the management of common property, it might lead to conflict among owners of various types of units. In South Africa, there's no regulations or documents controlling common property, which is one of the main reasons of conflict between owners and the abuse of participation quota rules. Due to the conflicting interests of various groups of owners within the scheme, proper good governance is impossible under the current single management structure scheme, and there is no protection of minority shareholder rights through participation quotas, which leads to corruption and a lack of transparency with body corporate financial information.

With the current Act in South Africa's mixed-use scheme, a corporate governance framework that protects minority rights is required. Because South Africa continues to use a one-size-fits-all single structure model, regulatory changes are required to improve the governance of mixed-use scheme properties. According to techakumphu (2015), one solution to improve the governance of mixed-use schemes and proper rule application is that the governing documents must be carefully tailored to reflect the building side and which users are responsible for which common property within the scheme, which will aid in resolving conflict among owners of this large scheme. For example, Singapore and other countries across the world have recognized that their prior legislation used to regulate their property were incorrect and have amended their Condominium Act B.E 2522, which was a brave move to strengthen the governance of the mixed-use plan. Again, this aids them in the consistent execution of the scheme's regulations in accordance with the scheme governance framework, as well as in minimizing the influence of participation quota restrictions, which allow a majority the authority to vote to do whatever

they want. Therefore, to address participation system issues, many governments throughout the world have decided to divide their mixed-use scheme by introducing a subsidiary committee to strengthen governance. With establishment of subsidiary committee, the management of financial accounts will be more transparent, and the building services and facilities are better managed (Edge-Prop, 2019).

According to Van der Merwe (2018), mixed-use schemes in Singapore are governed by subsidiary management corporations (bodies Corporate) as indicated in the sectional plans, which also indicate the common property and which section is responsible for that section, and the entire building common properties are governed by master condominium association, which consists of equal members from each scheme. By doing so, all mixed use schemes will be governed by their own subsidiary corporations, ensuring that the interests of all members are catered for, as opposed to the current sectional title scheme in South Africa's single management structure. Then, by granting autonomy to subsidiary corporations, the application of rules within the sectional title scheme will improve because the regulatory framework that governs this type of scheme will be established in the country, as opposed to now. As a result, each scheme will have its own set of rules that will be simple to implement in an effort by organizations to strengthen their corporate governance. As previously stated, the problem with the current mixed-use scheme in South Africa is the lack of a legal statutory framework for mixed-use management structures to be created, which can allow developers the freedom to create this model, and this can assist the body corporate to improve the scheme's governance. Instead, the South African government consistently employs a hybrid scheme under a single structure, which is the root cause of all governance issues. The establishment of a subsidiary management corporation and limited common property is crucial for owners of mixed-use schemes to ensure their exclusive benefits, uphold their rights and obligations, and address the unequal application of rules (Vern, Choon, Jaafar, Liang and Chin,Ujang,2019).

Table 1. Overview of the management structure of mixed-use sectional title scheme around the world compare to South Africa

	Single management structure	Two-tier (Subsidiary) management structure
Management structure	South Africa	Singapore, Thailand, Denmark, Malaysia, Australia, Canada, New Zealand, United Kingdom and United Arab Emirates.
Voting structure	All body corporate members vote inclusive	Each subsidiary vote for their respective allocated share expenses
Rules amendment	All body corporate members must agree in amending rules	Each subsidiary has right to amend their respective rules which must be aligned to the Act.

In light of Table 1 above, South Africa, compared to other countries around the world, is still applying a single management structure into mixed-use developments, which might be a cause of poor governance in these properties. In South Africa, there is an unequal distribution of expenses among sectional title owners in mixed-use schemes due to the lack of a system that assigns liability for each component and the absence of separate voting on expenses related to specific parts of the scheme. This issue arises from the use of a single management structure, which differs from practices in other countries. To address this problem, the South African government must adopt Singapore's model for mixed-use schemes, which involves subsidiary components with their own voting rights, as this approach has been successfully implemented in Singapore.

The lack of a statutory framework for a two-tier management structure in South Africa has allowed developers to establish directive frameworks, where rules are added inconsistently in an attempt to address the unique governance needs of the various components within mixed-use systems. This approach has led to greater difficulties in implementing the rules effectively because the existing rules for sectional title schemes are designed to accommodate residential properties rather than commercial ones. This creates governance challenges, as shopping

centers are intended for business activities, making it impractical to apply the same conduct rules to them as to residential properties. Therefore, the South African government should take inspiration from countries like Denmark, Malaysia, and Singapore by establishing subsidiaries to enhance the mixed-use system, since their approach has been able to address the needs and interests of diverse stakeholders in mixed-use schemes.

Table 2. The advantages and disadvantages of establishing subsidiary management corporations in two tier system

Advantages	Disadvantages
Explicitly outline the boundaries and rights to guarantee that each subsidiary management corporation is protected from the liabilities of other subsidiary management committees	There is an increase in administrative tasks due to the need for additional accounts, audits, committee meetings, and general meetings for both the management corporation and the subsidiary management corporation.
Well-crafted and enforceable conduct rules should be designed to apply to each subsidiary management corporation and address the specific needs of the scheme. This is especially crucial in mixed schemes that include both residential and commercial properties	Non-compliance to both management and conduct rules
Each manager of the subsidiary will ensure fairness in the management of property for the owners	More trustees will be needed due to the management committee and subsidiary management committees
Each subsidiary will manage its own reserve funds without interference and mitigate the impact of inequitable share allocation	There is potential for conflict when multiple management entities are involved in administering the body corporate

There will be less potential for conflicts of interest because each subsidiary is responsible for managing its own affairs	Communication breakdown with multiple committees.
It will be easy to amend both management and conduct rules because voting rights will be allocated to each subsidiary based on their interests. This will give them the opportunity to make decisions about their investments without interference from those who have no stake in them	
Easy to make decision and hold trustees accountable	

In Table 2 above shows that the advantages of forming a subsidiary management committees outweigh the disadvantages in mixed-use schemes. The results indicate that establishing a subsidiary committee could be an ideal solution for ensuring good governance of mixed-use schemes in South Africa. The establishment of a subsidiary committee can address the issue of unequal voting rights and rule enforcement within the two-tier system, as voting rights will be allocated to the various subsidiary components of the scheme based on their interests. The benefit of establishing subsidiary management committees in South Africa would be to clearly define the interests of division owners who have exclusive rights to certain properties. This would help eliminate the unfair management and use of common property, allowing proper implementation of the rules. It is recommended that a statutory framework specifically for a two-tier system be created in South Africa to avoid the issue of developers attempting to manipulate the rules of the scheme into a single management structure to fit mixed-use system in order to register their sectional title schemes. The South African government must amend the Sectional Title Schemes regulations and Act to simplify the process of establishing subsidiary management committees for mixed-use systems. Since the Sectional Title Scheme in South Africa was adopted from countries like Singapore, it is important for the government to adopt

Singapore's mixed-use system, which introduces subsidiary committees to improve the governance of such schemes.

5. Conclusion

There is no doubt that a proper application of rules within the mixed-use scheme in South Africa remain a challenge in promoting good governance. This literature review has outlined many obstacles faced by property owners in relation to the application of rules within a mixed-use scheme in South Africa compared to other countries around the world. The study has demonstrated that lack of involvement of local authorities in establishment of the scheme has impact on its governance, because it gives a developer a power to insert a special rule which results into unequally share distribution cost in maintenance of the common property. In a mixed-use sectional title scheme which consist of residential and commercial properties there's a need to separate both sections in order to achieve fair allocation of participation quota which determine allocation cost and voting power within the scheme. In this type of scheme there is no reason why both schemes should fall under one corporate, if the developers is serious about its governance and the proper application of rules within it. The literature review has showed that the countries like Singapore and Denmark, for example, have managed to improve the governance of their mixed-use scheme by separating the two units of this scheme to allow subsidiary corporations to be formed within the scheme. In South Africa's mixed-use scheme, the voting system under the single management structure is not fair because of the unequal participation quota allocated by the developers when they establish the scheme.

The literature review has demonstrated that main problem with the poor governance of the mixed-use sectional title scheme in South Africa is that the current rules of the schemes are designed for a single use structure, therefore, it is not applicable to a mixed-use structure. According to the literature review, corruptions and fraud are sources of poor governance framework which is not aligned to the scheme's operations, and it is the main causes of non-compliance and rules violations by both trustees and managing agents. With the current mixed-use structures, the literature reviews showed that there's a lack of internal control mechanisms and that is the main cause of non-adherence to the rules by both trustees and managing agents. The literature study has revealed that even the previous convicted owners can stand as trustees because there's no venting process at place. The study has showed that there is a need for separating the mixed-use scheme from one body corporates to ensure that good governance is achieved. The separation or division of the mixed-use scheme can assist the policymakers to

craft a regulatory framework that can curb the abuse of power by both trustees and managing agents and promote good governance.

Furthermore, the introduction of the legal regulatory framework meant specifically for mixed use schemes can also help with the delineation of the sectional plan when it is established. The delineation of a sectional plan will also help with the allocation of responsibility for each subsidiary section within the scheme. However, one of the issues with the current mixed-used sectional title scheme plan is that it is unclear which section is responsible for what, and most of the times minorities in terms of participation quota are always oppressed. Hence, property owners are upset with the scheme's regulations and governance because the current framework is ineffective for them. So, adopting Singapore mixed –used plan and other countries model can help to ensure that, the needs of different owners are allocated according to their interest and conflict among owners will be minimized.

In addition, if South African government is serious about improving governance within the sectional title scheme mixed use plan, it must abandon the single management structure rules. By shifting away from this management model, the governance of these types of systems can improve, as seen in Singapore. Then, by doing so, all the unfair rules inserted by developers at its inception will be taken away as it has become extremely difficult to amend by resolution. The fact that management rules that promote good governance within the scheme must be abolished or altered by unanimous decision has proven difficult to obtain because of participation quota rules. For example, amending the rules in a mixed-use plan with distinct interest groups will be impossible unless the scheme is divided, as in Singapore. However, with mixed use model adopted by Denmark and Singapore where there is division within the scheme, all subsidiary makes their rules, and it is easy to amend rules because all owners have a similar interest about the management of their schemes. As result, the rules of the scheme will be applied correctly, and good governance can prevail.

In light of the above findings, it is proposed that South African authorities to create legislation that allow the implementation of mixed-use schemes in country, the same way like country such as Singapore and Denmark. According to this literature review, it is essentially difficult to apply the mixed-use scheme within the present Act because it is designed for single structures. As a result, the trustees and management agents they do whatever they want with the scheme's funds because the current rules do not promote transparency and accountability under the mixed-use schemes.

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