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GENERAL NOTICE

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General Notice

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GENERAL NOTICE

NOTICE 459 OF 2006

DEPARTMENT OF TRADE AND INDUSTRY CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988

I, Mandisi Mphahla, Minister of Trade and Industry, by virtue of the powers vested in me by section 12(6) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988), having considered a report by the Consumer Affairs Committee in relation to an investigation of which notice was given in Notice 2137 of 2004 published in Government Gazette No 26833 of 23 September 2004, which report and proposed notice were published in Notice 203 and 204 of 2006 respectively, in Government Gazette No. 28496 dated 10 February 2006, and being of the opinion that an unfair business practice exists which is not justified in the public interest, do hereby exercise my powers in terms of section 12(1)(b) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No.71 of 1988), as set out in the schedule.

SCHEDULE

1. In this notice, unless the context indicates otherwise-

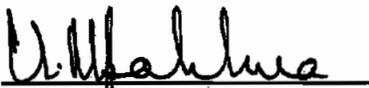
1.1 **“business practice”** means:

- a) the business practice whereby the prescribed information, in part or otherwise, as stipulated in Annexure “A” is withheld by promoters or their representatives from investors or potential investors in public property syndication schemes; and or
- b) any term, condition or provision in the disclosure document that excludes, limits or purports to exclude or limit the legal liability of the syndication promoter towards the investor in respect of any malicious, intentional, fraudulent, reckless or a grossly negligent act of the syndication promoter, his employees, representatives, contractors or subcontractors or any other person used by the syndication promoter or recommended by him to the investor.

- 1.2 **“prescribed information”** means the prescribed information as stipulated in annexure marked “A”.
- 1.3 **“public property syndication scheme”** means the assembly of a group of investors invited, by word of mouth or through the use of electronic and print media, *inter alia*, radio, television, telephone, newspaper and magazine advertising, brochures and direct mail, to participate in such schemes by investing in entities, which could be companies, close corporations, trusts, partnerships or individuals, whose sole asset(s) are commercial, retail, industrial or residential properties, and where investors share in the profits and losses in these properties and or enjoy the benefits of net rental growth therefrom through proportionate share of income.
- 1.4 **“promoter”** means a company and its directors, close corporation and its members, partnership and its partners, trust and its trustees and all other persons who are actively involved in the forming and establishment of a public property syndication scheme. A reference to a company and its directors also refers to a close corporation and its members, or to a trust and its trustees, or to a partnership and its partners or to a sole proprietorship.
2. Promoters shall make available the prescribed information to investors who invest in or intends investing in public property syndication schemes. The prescribed information shall be made available to investors and or potential investors in a disclosure document, the details of which are set out in annexure “A”.
3. Any person who does not comply with these requirements commits a criminal offence and shall be liable on conviction, to a fine not exceeding R200 000 or to imprisonment for a period not exceeding five years or to both that fine and that imprisonment.
4. The business practice is hereby declared unlawful and persons are hereby directed to:

- (a) refrain from applying the unfair business practice;
 - (b) refrain at any time from applying the unfair business practice.
5. This Notice shall come into operation upon date of publication hereof.
6. On the recommendation of the Consumer Affairs Committee I may, in a particular case, in terms of section 12(6)(c) of the act, grant exemption from a condition or requirement contemplated in this notice to such an extent and for such period and subject to such conditions as may be specified in the exemption. Such application for exemption must be directed to:

The Chief Director
Office of Consumer Protection
Consumer Affairs Committee
Private Bag X84
Pretoria
0001
For Att: Mr N Kuljeeth
Tel: 012 3941515
Fax: 012 3942515
E mail- nkuljeeth@thedti.gov.za ”



MANDISI MPAHLWA, MP

Minister of Trade and Industry

ANNEXURE A**REQUIREMENTS: MINIMUM INFORMATION TO BE CONTAINED IN A PROPERTY SYNDICATION DISCLOSURE DOCUMENT****1. Underlying principles regarding the disclosure document**

- (a) Statements, presentations and descriptions shall not convey false or misleading information about public property syndication schemes and/or omit material information during the public offer of shares. Material information is information which an investor needs in order to make an informed decision.
- (b) Investors shall be informed in writing that:
 - (i) public property syndication is a long-term investment, usually not less than five years;
 - (ii) there is a substantial risk, in that the investor may not be able to sell his shares should he wish to do so in the future;
 - (iii) it is not the function of the promoter to find a buyer should the investor wish to sell his shares and that it is the investor's responsibility to find his own buyer.

2. Investor protection

- (a) Investors shall be informed, in writing, that all funds received from them prior to transfer/finalisation shall be deposited into the trust account of a registered estate agent, a legal practitioner or a certified chartered accountant and provided that such trust account is protected by legislation. Individual investors are to be given written confirmation thereof. It shall be clearly stated who controls the withdrawal of funds from that account. Such an account shall be designated "XYZ Attorneys/auditors/estate agents Trust Account- the xyz syndication". In the event of investors paying by cheque, promoters shall ensure that the name of the payee is printed in bold on the application forms.
- (b) Funds shall only be withdrawn from the trust account in the event of registration of transfer of the property into the syndication vehicle; or

underwriting by a disclosed underwriter with details of the underwriter; or repayment to an investor in the event of the syndication not proceeding.

- (c) It shall be disclosed whether the property has been bought conditionally or by option, and in either or both cases full details of any condition and or option on which the property was purchased must be disclosed together with the effective date of commencement of the syndication.
- (d) Any direct or indirect interest, which a promoter and or any of his/her family member or any other person who is actively involved in the promotion of that syndication has in the property to be purchased, shall be disclosed.
- (e) It shall be disclosed how any capital shortfall will be dealt with.
- (f) The method of raising the necessary capital to fund the acquisition of the property and the syndication and how any disbursements will be dealt with prior to transfer, shall be disclosed.
- (g) Provision shall be made for interest earned to be paid on investors' funds deposited as per 2 (a) prior to the effective date of the transfer of the property.

3. Promoter

- (a) Full details of the promoter of the syndication scheme, such as name, registered company or close corporation number, directors, addresses, telephone and fax numbers and e-mail address shall be given.
- (b) Full disclosure shall be made whether the promoter is acting as a principal in the scheme or as an agent for someone else. If the promoter is acting as an agent, he shall provide full details of the principal.
- (c) The disclosure document, which is to be dated and signed by the promoter, shall contain a statement of proper due diligence (commercially and legally) with regard to the property and its tenants prior to the unconditional purchase

thereof and he/she shall state that this was done and that he/she is satisfied with the results thereof.

4. Management

- (a) Full details of the syndication vehicle shall be disclosed, including the names and addresses, telephone and fax numbers and the e-mail addresses of the property manager, the company secretary, the board of directors, the auditor, the attorney and the valuer (see paragraph 10 for valuer).
- (b) In addition full disclosure shall be made of the fee structure of the management company or manager(s) and any appointments or contracts relating to the syndication.

5. Company description and structure

- (a) Full disclosure shall be made of the type of company structure to be used for the syndication scheme and reference shall be made to the legislation governing the company structure chosen. Reference shall be made to the company registration number, or advising that the company is still to be formed, the Memorandum, the Articles of Association, the Shareholder's Agreement, and where applicable, the Partnership Agreement, a Deed of Trust and the Founding Statement. The disclosure shall state whether a shareholders' agreement exists or not. If such an agreement exists then it shall be attached as an annex to the disclosure document.
- (b) Full details shall be given of: the financial year end; the shares to be issued; the shares to be issued in future; control over unissued shares; shareholders' loans and or debentures; a pro-forma balance sheet on acquisition (or in the case of new developments, on completion); the income distribution plan; minimum and maximum shareholders/participation quota; any special voting rights; gearing, existing and or planned; borrowing powers and how they are to be exercised; external borrowing facilities available to investors to finance the acquisition of shares in the investment company; the amount provided in the syndication structure for working capital and reserves.

6. Property investment**(a) Details shall be given of:**

- (i) the title deed and its number.
- (ii) material servitudes or encumbrances if further development is considered with regard to the property.
- (iii) zoning and the relevant town planning regulations insofar as further development is intended with regard to the property.
- (iv) additional development potential.
- (v) the buildings erected or dates of original erection with dates of improvements (including lifts, air conditioning and roof structure) thereto, if available.
- (vi) the physical address, locality and site area, including a map of the area.
- (vii) insurance cover, for example, insurer, types of risks covered, amounts covered, policy due date and policy number.

(b) In addition there shall be a statement which sets out the following:

The cost of the property to the promoter or the syndication company including acquisition price, cost of renovations, conversion or enhancement including details of any new leases or lease renegotiations which enhance value, marketing and promotional cost fees and the promoter's entrepreneurial mark up, giving rise to the shareholding offer price in the company as at the offer date.

and

The valuation of the property as at a date, which shall be not more than three calendar months before date of the offer, undertaken by a valuer, in accordance with paragraph 10 of these requirements.

(c) the following details shall be disclosed if the land is to be encumbered by a mortgage bond after the closing date of the offer:

- (i) the outstanding balance owing by the mortgagor in terms of the mortgage bond including: the rate of interest, the loan repayment period and whether the bond is first ranking or otherwise;
- (ii) the maximum amount secured by the mortgage bond;
- (iii) the terms of the mortgage bond;

- (iv) the identity of the mortgagee; and
- (v) a statement to the effect that the taking up of such a loan will not be in contravention of the memorandum and/or articles of association of the company, close corporation, trust deed of the trust, partnership agreement of a partnership or the constitution of the public property syndication vehicle.

7. Tenants

Full details shall be given of:

- (a) any head lease agreement and subleases together with the quantum and location of any vacant space covered by such head lease and subleases. Quantum refers to the square meterage and the value involved.
- (b) any gross or net rental guarantees supplied by the vendor of the property.
- (c) actual leases concluded with full details of space let, duration of leases, rentals, escalation rates for the leases, tenant names and security for leases, expenses recovered from tenants, lease renewal options, rental review periods and vacant space.

8. Income and expenditure

The income and expenditure statement shall provide:

- (a) a detailed pro-forma income statement which shall detail all projected expenses, contractual expenses and fees payable, gross rentals, recoveries, and projected net income for the syndicating company;
- (b) a statement as to the long-term vacancy rate with full motivation thereof. A nil rate is unacceptable; and
- (c) a statement as to the extent of provision for future maintenance, with full details where applicable.

9. Projections

Full details shall be provided of:

- (a) the basis used to calculate projections with regard to net income growth. These shall be based upon rental income derived from leases and or market rental growth, less specified and disclosed, as well as reasonably expected expense projections;
- (b) the basis used to calculate projections on capital value. These may be stated in rands as estimates, provided they are accompanied by stated, specific assumptions showing how those values are determined. Specific projections as to capital growth are not permissible, bearing in mind the many variables influencing property values; and
- (c) whether the validity of the assumptions used in determining projections is based on fact or opinion.
- (d) Should a specific return be projected, it should be calculated with reference to the syndication value.

10. Valuer and pro-forma valuation

- (a) A valuer is a professional valuer or professional associated valuer registered in terms of section 20(a) of the Property Valuers Profession Act, 2000 with at least five years' experience in the field of attending to valuations of properties (hereafter called a valuer).
- (b) The name of the valuer and his/her qualifications and experience shall be disclosed.
- (c) The valuer shall take cognisance of the state of repair/condition of buildings and improvements.
- (d) A letter from a valuer shall incorporate the following information:
 - (i) An introduction, stating that the valuer has been instructed by the promoter or whoever and that such valuer has a valid professional indemnity policy. The amount of such cover shall be stated.

(ii) The valuation undertaken by the valuer. This valuation shall be either an open market value or syndication value

(A) **Open market value.** This means the best price at which the property might reasonably be expected to have been sold unconditionally for a cash consideration on the date of valuation assuming:

(aa) a willing and informed seller and a willing and informed buyer who are not connected persons as defined in Section 1 of the Value- Added Tax Act No. 89 of 1991; and

(bb) that, prior to the date of valuation, there has been a reasonable period (having regard to the nature of the property and the state of the market) for the proper marketing of the interest, for the agreement of price and terms and for the completion of the sale; and

(cc) that no account is taken of any additional bid by a purchaser with a special interest.

or

(B) **Syndication value.** This is the aggregate sum of the shareholders' total interest in the syndication vehicle in terms of the disclosure document, recognising that this sum includes an appropriate premium over and above the open market value of the property asset. The quantum of the premium is to be stated.

(iii) **Title deed description**

(iv) **Municipal information** such as town planning regulations and the municipal valuation of the land and improvements

(v) **Location** of the property

- (vi) **Brief description** of the building, such as the method of construction, materials, type, grade and size.
- (vii) **Insurance replacement cost** of the building in accordance with the following definition: The estimated cost of replacing the asset, as it exists, as if new, at prices applicable on the valuation date, inclusive of professional fees, but exclusive of any finance charges, demolition costs or emergency services costs.
- (viii) **Tenancy details**, including names of tenants, rentable areas occupied and or vacant, rental escalations, and lease expiry dates.
- (ix) **Expenses** such as the level of anticipated initial annual operating expenses and the rate of collection/commission.
- (x) **The net income.** The anticipated net rental income in the first year and comment on any unusual growth or anticipated vacancies in the next 3 years, and what assumptions are made as to the re-letting of space over which leases are expiring or are vacant, including anticipated re-letting commission and tenant installation costs.
- (xi) **The capitalisation rate.** The appropriate rate at which the market net income is capitalised, and evidence to this effect.
- (xii) **Valuations of the property** as at a date, which shall be not more than three calendar months before date of the offer, stating whether the open market value or syndication value has been used. Two valuations shall be submitted and shall be undertaken and signed by the valuers.
- (xiii) **Full details about previous transactions** regarding the property:
 - (aa) In the case of a new development, the total cost thereof, including the market value of the land. The contractor or

contractors are to confirm in an affidavit the total costs, including the costs of any improvements;

(bb) The sales history of the property for the past ten years. The following information shall be stated:

(1) The various legal entities who owned the property according to the title deeds and the selling price of the property with each change of ownership and the relevant dates.

(2) If one or more legal entities owned the property according to the title deeds, any changes in the ownership of the legal entities, the selling price of the property with each change of ownership and the relevant dates.

(e) The fees for valuations shall not be dependent upon the amount of the valuation.
