SPLUMA QUESTIONS AND ANSWERS

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Link to Tshwane by-law:
http://www.gpwonline.co.za/Gazettes/Gazettes/72_2-3-2016_GautSeparate.pdf

Question 1 – Approved ito Ordinance – 5 year period

1. I have a consolidation approved under Ordinance 15 of 1986 on 19 July 2013.The consolidation was approved subject to conditions mainly relating to the payment of engineering services. Is the 5 year period in SPLUMA relevant to this consolidation?

   No, legislation cannot be applied retrospectively, however you will have problems when registering the consolidation if it contains contributions since although a Regulation 38 is not required in terms of the Ordinance, the Registrar usually does not allow the registration of the consolidation without the Municipality confirming that the conditions of consolidation have been complied with, even more so where there are contributions payable and depending on the condition it may even be escalated in terms of the condition itself. It would be to your benefit to register.

2. I note that the consolidation plan has been registered in the Surveyor General Office on 13 September 2013 BUT the conveyancing i.e. previous regulation 38 Certificate and registration of consolidated erf are still outstanding.

   As per the above there is no such thing as a Regulation 38 for a consolidation, but if there are conditions to be complied with then the Registrar will require confirmation that the conditions were complied with before registering.

3. I am not sure whether I should apply the 5 year period alternatively the fact that the consolidation has been approved and that the plan is endorsed by the Surveyor General entitles me to do the conveyancing at any given time in the future?

The 5 years come from SPLUMA section 43(2) and although the Act was published in 2013 it only came into operation on 1 July 2015, therefore your consolidation was approved way before the date of the enactment of SPLUMA. Section 43(2) relies on the date on which you were notified of the "conditional approval", it follows that if this notification was done almost 2 years before SPLUMA was enacted that it should not apply.

Question 2 – Plot of conditions

1. As Conveyancers we shall have to plot conditions when we deal with land and changing the extent of properties. However, where do we go at Council to establish what conditions are relevant to a township and a particular erf?

   To City Planning since it is a matter that will be dealt with as part of the Condition of Establishment as contemplated in section 16(4)(g) of the Land Use Management By-law.

2. Is the Deeds Office Info not sufficient?

   No, because it will be affected by the extent of the township development on the property on which it is to be established. You need to look at the layout plan otherwise you will not be able to determine which new erf or for that matter whether the township shall be affected. You should be guided by the Land Surveyors Land Audit which also forms part of a township application requirement in terms of the By-law.

3. If not, isn't the info available on a website?

   No, this is part of the application that your client submits.

Question 3 – Eskom structures and servitudes

1. Eskom was previously exempt from the provisions of most of the provincial ordinances and we are thus unsure about the applicability of SPLUMA and the by-laws.
   In light of the fact that the definition of a land development application is so wide and can be applicable to buildings erected on land, the question arises if a development application is needed for any building structure to be erected and that this erection of buildings need to comply with the land use scheme applicable to that specific erf?

   I am not sure what the question or comments are with regard to the above. However, I may point out that the definition of land use in relation to the erection of buildings and structures has not changed if compared to the existing Town Planning Scheme 2008 (Revision 2014) and previous schemes not only applicable in the City of Tshwane. The answer lies in the type of building or structure to be erected. If it is regarded as infrastructure it may not require a land development application to be submitted. However, in instances where the infrastructure has the result of the substantive land use either being unable to be exercised as a result of the

construction of infrastructure it may be necessary to rezone the property to align it with the use as being "infrastructure" as contemplated in the Town Planning Scheme. Of interest to the person who posed the question may be the recent constitutional court case being City *of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* [2015] ZACC 29, wherein it was debated what constitutes infrastructure and where infrastructure is governed through other legislation and it being servient to still complying with other laws and By-laws being administered by a Municipality.

2. Apparently there is a difference of opinion regarding the removal of servitudes by the municipality between Tshwane and Cape Town. Eskom is in agreement with the City of Tshwane, but Cape Town is of the opinion that the municipality does have the authority to remove servitudes although SPLUMA's definition of restrictive conditions does not include servitudes.

You need to remember that Cape Town dealt with the National Removal of Restrictions Act, 1969, while Gauteng worked with the Gauteng Removal of Restrictions Act, 1996. In so far as the definition of a "restrictive condition" is concerned we amplified through our By-law the fact that we will not remove servitudes, which in the absence of a clear and unambiguous provision in SPLUMA may prevail. Be that as it may, the above court case quoted also confirms the rights conferred through servitudes and we doubt that the opinion held by Cape Town can survive in view of the extensive explanation of the Constitutional Court with regard to servitudes for services.

Question 4 – Rejection note in deeds office on townships

What document needs to be lodged in the Pretoria deeds office to prevent a rejection note: "Please lodge proof that the conditions of SPLUMA has been complied with" (with regards to township establishment)?

I am not sure what the rejection notes says, but I presume that the intention is that reference be made to the two provisions of section 43 of SPLUMA in that:

1) the applicant has complied with the conditions of approval contained in section 43(1) i.e. the section 101 certificate (in the Land Use Management By-law the equivalent is Section 16(7)) and it
2) can refer similarly to SPLUMA section 43(2) with regard to the validity of the application in terms of extension of time not going beyond the 5 year period. The only other provision in SPLUMA that makes any reference to the Registrar is Section 53 with regard to registration transaction, but it would be dangerous to issue a section 53 certificate since this will not only relate to a registration transaction as it relates to a township register but also transfer so we believe although section 53 is a vague provision relating to all registration or transfer transactions, the interim provisions of the By-law or the Ordinance can be dealt with and equate the section 53 rather with a section 82 or Regulation 38 in terms of the Ordinance.

- Suzette, is however of the opinion that a normal letter, issued by the legal department of the municipality will suffice, stating that the particular township is

pre 1 July 2015 (thus it followed the procedures as set out in the Ordinance or DFA) or if post 1 July 2015 (said application is compliant with SPLUMA and the Ordinance).

Question 5 – Township lodged after 1 July 2015 but approved ito Ordinance

1. In the case where the application for township establishment is lodged **AFTER 1 July 2015** at the municipality, but the township is approved in terms of the Ordinance, how do we proof to the Deeds Office that the SPLUMA conditions have been complied with and what SPLUMA conditions need to be complied with?

   We believe that a Section 101 must still be issued but the section 101 can refer to section 53 for the opening of the township register plus a confirmation in terms of section 43 that the application is still valid and that conditions have been complied with for the conditional approval in so far as it must be done as part of the opening of the township register.

2. What are the conditions that needs to be fulfilled in case of township establishment done in terms of the Ordinance, but the application was done AFTER 1 July 2015?

   For the proclamation of the township section 103 will still be used unless you want to finalise in terms of the By-law and you will still be required to obtain a section 82 certificate but reference should be made to section 53 in the Section 82 Certificate.

3. With whom do we liaise at the municipality to obtain these additional letters which is necessary to lodge in the deeds office?

   Legal Services, 14th floor Saambou Building corner of Pretorius and Thabo Sehume, Pretoria.

Question 6 – Servitudes

We were made aware that servitudes may not be removed using SPLUMA or the Tshwane by-law, so in terms of what procedure do we need to remove same?

This depends on whether the servitude is obviously a personal or praedial servitude and in favour of whom it was registered and the purpose for the servitude. I am sure you will know the common law relating to real rights. The one which we will be involved with would be servitudes in favour of the general public for public places in terms of section 63 of the Local Government Ordinance, 17 of 1939 or where it was registered in favour of the Municipality but not as public servitudes. Public servitudes are subject to closures in terms of section 67 and 68 if it falls within the ambit of section 63, which after closure can be cancelled by agreement between the Municipality and the servient tenement. Similarly the servitudes in favour of the Municipality can be cancelled by agreement.

- Suzette advised that a section 68(1) application may be utilised and a section 68(2) with a bilateral notarial deed of cancellation.

Question 7 – Act 21 of 1940

The municipality has the authority to provide consent in terms of Act 21 of 1940, but must a separate consent be lodged at the deeds office from the Department?

I do not believe that there is a requirement for a separate consent from the department. SPLUMA makes the Municipality the Controlling Authority for all legislation which imposes conditions in title deeds as per the definition of restrictive conditions. What we will require is that you obtain comments from either SANRAL or Gautrans depending whether the road administration was delegated before we will remove the condition. I may point out that this was already the arrangements with regard to the Gauteng Removal of Restrictions Act, 1996 except that instead of comments you had to obtain consent with reference to section 2(3) of the Gauteng Removal Act.

Question 8 – Consents vs public participation process

What type of conditions are restrictive conditions that may be removed in terms of the Tshwane By-law and what type of conditions only requires consent from the municipality (thus no public participation necessary)?

The restrictive condition will give an indication of whether it is a removal, amendment or suspension in terms of section 16(2) of the By-law. I.e. a land development application or whether consent can be granted IN TERMS of the condition itself. Where the condition e.g. says the property "may not be subdivided.", it means there is no part of the condition that allows the Municipality or any other body to grant consent in terms of the condition to subdivide the property.

Where the condition reads that the property "may not be subdivided without the consent of the townships board…" or other functionaries Municipalities gave consent in terms of section 2 of the Gauteng Removal of Restrictions Act, 1996 through the substitution of authority clause to act in the place and stead of a list of functionaries. This was now simplified in SPLUMA but comes down to the same thing in that where consent is required from functionaries in terms of restrictive conditions the Municipality shall now grant the said consent.

In order to obtain the consent, the By-law allows for a short procedure to obtain the consent in terms of section 16(2)(d).

Question 9 Restrictive condition – removal in title deed

Die titelakte vir Gedeelte 16 van Erf 534 Rietvalleirand Uitbr. 43 (Titelakte T55265/2014, afskrif hierby aangeheg) bevat die volgende titelvoorwaarde op bladsy 4 daarvan:

C. ***Subject to the following further conditions laid down by the City of Tshwane Metropolitan Municipality in terms of the provisions of the Town Planning and Townships Ordinance 15 of 1986:***

(a) ….(contents of clause (a) not relevant for purposes of this email)…

(b) The property held hereunder shall be transferred to a third party only with the consent of the Acting Chief: Building Control once the dwelling house / dwelling unit has been completed in accordance with the approved site development plan and after a Certificate of Occupation has been issued in terms of the applicable legislation.

(c) In addition to the general restriction of alienation to a third party without the prior consent of the City of Tshwane Metropolitan Municipality, the within mentioned property shall furthermore not be alienated to a third party without the prior written consent of the City of Tshwane Metropolitan Municipality's Acting Chief: Building Control certifying that the road and ablution/store facility have been constructed and completed to the satisfaction of the City of Tshwane Metropolitan Municipality within the development after a Certificate of Occupation has been issued in terms of the applicable legislation.

'n Woning is reeds op die betrokke eiendom opgerig en 'n Okkupasiesertifikaat is reeds uitgereik.

Ek het dus die nodige toestemming tot transport bekom van Mnr IM Kaywitz ("Building Control Officer: Tshwane") (afskrif hierby aangeheg vir kennisname).

Mnr Kaywitz vermeld verder in bogemelde toestemming tot transport dat: "the restrictive conditions in paragraphs C.(b) and (c) **may be excluded** from the Deed of Transfer, as the conditions have been met".

Wanneer ons die eiendom transporteer, het ons in die verlede dan bloot Mnr Kaywitz se toestemming ingedien by die Aktekantoor tesame met 'n Aansoek i.t.v. Reg 68(1) van die Akteswet ten einde die betrokke titelvoorwaarde te skrap gelyktydig met die transportering van die eiendom.

My vraag aan u is of SPLUMA toegepas moet word in die geval waar ek titelvoorwaarde C.(b) en (c) op grond van Mnr Kaywitz se dokument wil verwyder/skrap uit die bestaande titelakte?

Ons sien hierdie voorwaardes nie as beperkende voorwaardes nie maar eerder "persoonlike serwitute" ten gunste van die raad welke serwitute by ooreenkoms verwyder kan word en wat nie soos 'n algemene voorwaarde afdwingbaar deur die munisipaliteit in belang van die algemene publiek in die titels voorkom nie wat grondgebruiks voorwaardes is nie bv. die grond mag nie onderverdeel word nie. Hierdie voorwaardes is baie spesifiek iets wat die municipaliteit ten gunste van homself ingesit het. Dit lyk of dit vervreemdings voorwaardes was wat nie voortspruit uit 'n grondgebruiks aansoek soos in SPLUMA vervat nie.

SPLUMA se beperkende voorwaardes sluit serwitute uit.

Julle kan ook met regsafdeling praat indien julle 'n regsopinie wil het. Daar is ook 'n baie onlangse CC saak wat baie mooi verduidelik die verpligtinge ingevolge serwitute en voorwaardes.

Link na hofsaak:
http://www.saflii.org/za/cases/ZACC/2015/29.html

- **Suzette's comment:** This is not covered ito Sec 41 of SPLUMA and it has no effect on change of land as per the definition of land development application. They should proceed as in the past. Section 68(1) application with proof of compliance.

Question 10 – Sectional title scheme and section 28(9) of the By-law

With the opening of a sectional title scheme, before the development is started, must the developer first obtain consent from the municipality to open the sectional title scheme?

No, we cannot rewrite the Sectional Titles Act, but we can state that all Sectional Title Schemes that are being opened has to comply with the Town Planning Scheme in operation. This is something that has been problematic in the past. We included section 28(9) stating the above. You will see that it goes further under (b) that we will not approve building plans or SDP's that do not comply with the land use rights.

It is in your client's interest to obtain confirmation that the sectional title scheme complies with the town planning scheme before opening the sectional title register and not only rely on the certification by the Land Surveyor when he submits the sectional plan for approval with the Surveyor General, since after the register is opened and the applicant applies for the approval of the SDP and the Building Plan he will not be able to obtain said consent from the municipality and the sectional title scheme would have been opened without being able to develop the property at all, especially where he has sold or transferred sections.

Question 11 – Servitudes to be registered in general

Must all servitudes that are now registered in general (thus servitudes which are not the result or part of a subdivision, consolidation or township establishment) be approved by the municipality because "it affects the use of the land"?

No, it does not mean that all servitudes must be approved by a Municipality, you will note that we qualify the type of servitudes which we have problems with in that where the servitude is such that the rights on the land cannot be executed or where the intention is to alter the erf size, you will have to obtain permission from the Municipality. This must also be read with the provision which states that access to a property in terms of section 16(5) is within the decision making authority of a Municipality and cannot be altered through e.g. a right of way servitude. If you have

examples of the type of servitudes you are talking about you may send this to us and we will look at whether you will require our permission.

Question 12 – Limpopo removal of conditions

The Limpopo delegates wanted to know in terms of what legislation they need to remove restrictive conditions because of the repeal of the national Removal of Restrictions Act by SPLUMA (and they do not have a Gauteng Removal of Restrictions Act)?

In terms of Regulation 14(a) of SPLUMA they may determine a procedure whereby land development applications are to be dealt with and Regulation 14 gives guidance. Remember the determination of a procedure need not necessarily be determined through a By-law so in the absence of the By-law they need to just determine a procedure and relate the procedure to Section 47 and Regulation 14. They can even use the provision of the application in terms of section 16(2) and the Schedules of our By-law and then use that as the process determined in terms of Regulation 14(a) until they have promulgated their By-laws. If they want to discuss you are welcome to give my telephone number and I will assist them.

Question 13– Section 31 OTP consents from municipality

Please provide the contact person and contact details where consents may be obtained for the approval of offers to purchase pre-proclamation of a township regarding full title properties in terms of section 31 of the by-law?

Niel Louw, Legal Services, Niell@tshwane.gov.za

Question 14 – Legal strength of RC's & CRC's

What is the legal strength of RC's and CRC's?

Although this question is outside the scope of the seminar I want to highlight Section 3(1)(z) of the Deeds Registries Act: "The registrar shall, subject to the provisions of this Act implement practice and procedure directives that are issued from time to time by the chief registrar of deeds."

The circulars issued in terms of SPLUMA sets out the practical application of the Act in the deeds office.

Question 15 – when is it safe for OTP in sectional title marketing?

Section 31 of the By-law is not applicable to sectional title OTP's, but section 28(9) deals with sectional titles – when is it safe to sign an OTP for a sectional title unit being sold off plan?

Section 31 relates to agreements where the rights have not yet come into operation in terms of the By-laws. If agreements are being signed and the rights do not come into operation especially in view of section 43 of SPLUMA which states that the conditions of approval have to be complied with within 5 years, the possibility exists that the developer does not comply but the agreements were entered into and deposits were paid and the rights lapse, hence the inclusion of section 31. The sectional title will typically only be opened once the rights are in place and we have confirmed that the sectional title is in line with the provisions of the town planning scheme. I would suggest that rather than availing yourself of section 31, rather wait until the rights are in operation in terms of the relevant provisions of section 16 of the By-law and then only enter into the agreements of sale even if the said is done prior to the opening of the township register. Also typically the agreements can only be dealt with once the Site Development Plans are approved which pre-supposes that the rights must be in place and it has to be approved in terms of section 28(9) before the sectional title register is opened. The reason being that the developers sell of plan and usually this means the Site Development Plan is approved and presented to potential purchasers to identify the sections that will be sold.

The above may require a further discussion.

Question 16 –DFA matter

1. Persoon A wil ‘n eiendom (plaas) koop waarop daar reeds in terme van die DFA ‘n dorp/ontwikkelingsgebied gestig is.

   How far did the Land Development Area proceed (not really a township yet, it will be a subdivisional register in terms of section 38 of the DFA)?
   Was the section 33(4) done to bring it into operation and was it done before or after the register, because both will apply?

2. Een van die voorwaardes in die DFA goedkeuring bepaal dat die grond nie meer onder jurisdiksie van Wet 70/1970 val nie.

   When was this decision taken because the High Court, SCA and the CC stated that you could not suspend the operation of any Act as implied by Section 33 of the DFA. The question would be whether it could have and was it validly suspended? See the judgments

3. Volgens ons aanname en die plaaslike munisipaliteit se aanbeveling, is daardie grond dus nou onderhewig aan Ordonnansie 20 van 1986 (Ord. op Verdeling van Grond), wat onder die plaaslike munisipaliteit se jurisduksie val.

   This will depend on how far the land development application proceeded. Whether the subdivisional register was opened, whether the section 33(4) was done or whether transfers took place as a result of a section 38?

4. Die koper wil die totale eiendom (met ±85 onderverdeelde erwe) konsolideer en terug soneer na landbou, aangesien hy op die grond wil boer, en nie wil ontwikkel vir residensiële en lodge doeleindes nie.

   It may be possible to cancel the DFA but will depend on the progress thereof, but in reading the next question, it seems that the DFA application may be capable of being cancelled which will allow the land use rights to revert to agricultural which may not necessitate a rezoning and then do a division. However, the division may be problematic since if Act 70 of 70 cannot be suspended, clarity from Agriculture as to whether they believe they have jurisdiction would be required and if not a division application in terms of section 16(12) of the By-law can be submitted.

5. 'n Deel van een van die erwe (±4.7 ha) is egter reeds in 2014 verdeel en verkoop aan dieselfde voornemende koper (wat direk aangrensend boer), maar registrasie het nog nie plaasgevind nie weens 'n dispuut met die plaaslike bestuur m.b.t uitstaande eiendomsbelasting.

   See the above

6. Sekere van die ander erwe is ook reeds gekonsolideer.

   Question would be how far these things went, was it just an approval or was it a registration, keep in mind that if the consolidation was approved but not registered it can be cancelled in terms of section 92(4) of the Ordinance, that may apply despite the original approval having been granted in terms of the DFA, but again it will depend on the status of the application.

7. Die DFA dorp is in 2008 geopen en die LG Plan oor die hele stuk grond geregistreer. Daarna is een van die gedeeltes, Gedeelte 144 (middelste gedeelte van ongeveer 124 hektaar) oorgedra na dieselfde koper wat nou gaan koop. Gedeelte 144 is inderdaad getransporteer en is dit ons advies dat die LG Plan nie net gekanselleer kan word nie.

   As per the above there are other matters to consider, i.e. the section 38 what it said and the Section 33(4) notices.

8. Gedeelte 144 is egter steeds weens die grote as Landbou gesoneer terwyl die ander kleiner eenhede as "rural residential" geklassifiseer is by die stadsraad. Kan die DFA dorp in sy totaliteit gekanselleer word. Hoe moet ons handel om die oordrag en sonering af te handel? Sien plan aangeheg vir maklike verwysing. (30 OV plan V1)

   Having read the explanation I cannot give a definitive answer unless the status is clarified. We allow for partial cancellations of general plans in terms of our By-laws so we cannot give you an answer unless we have all the facts on the status of the application. I am not sure whether it falls within our jurisdiction and if it does you are welcome to come and discuss the application with us. If not you need to obtain the opinion of the Municipality within which jurisdiction it falls and if they require assistance then they are welcome to discuss it with us.

Question 17 - Sectional titles in Jhb but lodged in Pta deeds office.

I refer you to RC 3 of 2016 and in particular paragraph 12.4.2 which requires a Municipality to lodge a certificate that all requirements and conditions for approval have been applied with, in all cases where an opening of a scheme is lodged in terms of section 11(1) of the Sectional Titles Act.

Please obtain clarity from the Deeds Office, confirming that such a certificate is at this stage only required where the scheme lies within the jurisdiction of the Tshwane Municipality (as Tshwane have promulgated their by-laws under SPLUMA), but that such a certificate is at this stage not required in respect of schemes lying within the jurisdiction of the City of Johannesburg Metropolitan Municipality.

> Although SPLUMA came into operation 1/07/2015, it is only framework legislation. JHB Municipality will not at this stage be able to lodge a certificate as they don't have anything in place yet.