SPLUMA and Enforcement

KZN SPLUM Forum

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rural development
& land reform
Department:
Rural Development and Land Reform
REPUBLIC OF SOUTH AFRICA

SPLUMA & Enforcement

1. SPLUM, Act 16 of 2013
2. National Building Regulation
3. Case No: 226/2017 in the High Court of South Africa, Eastern Cape Division, Grahamstown
4. Case Study – Leaky homes crisis in New Zealand

Introduction to SPLUMA

Points to highlight:

- to promote **greater consistency and uniformity** in the application procedures and decision-making by authorities responsible for land use decisions and development applications;
- to provide for the **establishment, functions and operations** of Municipal Planning Tribunals;
- to provide for the **facilitation and enforcement** of land use and development measures.

Preamble to the Act

Points to highlight:

- AND WHEREAS **informal and traditional** land use development processes are poorly **integrated into formal systems** of spatial planning and land use management;
- the **State's obligation** to realise the constitutional imperatives in:
  - section 24 of the Constitution, to have the **environment protected** for the benefit of present and future generations through reasonable legislative and other measures, which include **a land use planning system that is protective of the environment**;

Preamble to the Act

Points to highlight:

- AND WHEREAS the **State must respect, protect, promote and fulfil** the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities;
- AND WHEREAS it is necessary that:
  - a **uniform, recognisable and comprehensive** system of spatial planning and land use management be established throughout the Republic **to maintain economic unity, equal opportunity and equal access to government services**;

5 Principles to the Act

1. *SPATIAL JUSTICE*

– land use management systems **must include all areas** of a municipality and specifically include provisions that are **flexible and appropriate** for the management of disadvantaged areas, informal settlements and former homeland areas

5 Principles to the Act

2. *SPATIAL SUSTAINABILITY*

- ensure that special consideration is given to the **protection of prime and unique agricultural land**;
- promote land development in **locations** that are **sustainable** and **limit urban sprawl**.

5 Principles to the Act

3. *EFFICIENCY*

- land development **optimises the use of existing resources and infrastructure**;
- decision-making procedures are designed to **minimise negative financial, social, economic or environmental impacts**; and
- development application **procedures are efficient** and **streamlined** and **timeframes are adhered to** by all parties

5 Principles to the Act

4. SPATIAL RESILIENCE

– **flexibility** in spatial plans, policies and land use management systems are accommodated to ensure **sustainable livelihoods** in communities most likely to suffer the impacts of economic and environmental shocks

5 Principles to the Act

5. *GOOD ADMINISTRATION*

- the requirements of any law relating to land development and land use are met **timeously**;
- the preparation and amendment of spatial plans, policies, land use schemes as well as procedures for development applications, include transparent processes of public participation that **afford all parties the opportunity to provide inputs on matters affecting them**.

Record of amendments to land use scheme

Section 31 of SPLUM, Act 16 of 2013

31. (1) The **municipality must keep** and maintain a **written record of all applications submitted** and the **reasons for decisions** in respect of such applications for the amendment of its land use scheme.

(2) The written record referred to in subsection (1) must be **accessible to members of the public** during normal office hours at the municipality's publicly accessible office.

Enforcement of Land Use Scheme

Section 32 of SPLUM, Act 16 of 2013

32. (1) A municipality may pass **by-laws** aimed at enforcing its land use scheme;

KZN = 100%

Enforcement of Land Use Scheme

Section 32 of SPLUMA, Act 16 of 2013

32. (2) **A municipality may apply to a court for an order**—

*(*a) **interdicting** any person from using land in **contravention** of its land use scheme;

(b) **authorising** the **demolition** of any structure erected on land in contravention of its land use scheme, without any obligation on the municipality or the person carrying out the demolition to pay compensation; or

(c) directing **any other** appropriate **preventative or remedial measure**.

Enforcement of Land Use Scheme

Section 32 of SPLUM, Act 16 of 2013

- 32. (3) A municipality—
- *(*a) may designate a municipal official or appoint any other person as **an inspector to investigate any non-compliance with its land use scheme**;

Enforcement of Land Use Scheme

Section 32 of SPLUM, Act 16 of 2013

- 32. (10) An inspector may issue a **compliance notice** to the person who controls or manages the land or the owner or person in control of a private dwelling if a provision of this Act has not been complied with.

KZN Municipal By-laws

1. **Function of Municipal Planning Enforcement Officer**
   - A Municipal Planning Enforcement Officer must assist a Municipality with the enforcement of this By-law, the land use management scheme and the decisions of the Municipal Planning Approval Authority and Municipal Planning Appeal Authority.

KZN Municipal By-laws

2. **Offences and penalties in relation to municipal planning approval**
   - Offense: Chapter 7 (Enforcement) Section 86 (1) & (2)
   - Penalties: Chapter 7 (Enforcement) Section 87
     - Fines / Disconnection of Services
     - Court can sentence contravener to serve prison sentence.

National Building Regulation

- Section 24 of the Bill of Rights in the South African Constitution states that everybody has a right to: "**an environment that is not harmful to their health or well-being**".
  - So if our buildings aren't healthy, and aren't built with our health and welfare in mind, they are not in line with the constitutional.

National Building Regulation

- **Change since 2008 update** – certainly the one that will impact on both individuals and the building profession – is the fact that **all applications to build must now be accompanied by a declaration by a person registered in terms of a built-environment professional council**, as to how the applicable functional requirements are to be satisfied. All plans must also be submitted by a "**competent person**" who is professionally registered in terms of the Engineering Professions Act, the Architectural Professions Act, or the Natural Scientific Professions Act.
  - So unless one is a qualified architect, engineer, designer or somebody specifically with the required "education, training, experience and contextual knowledge" to judge whether a dwelling will meet the functional regulations, one is not categorised as a competent person!

National Building Regulation

During the building process there are a few inspections that most municipalities require. This will be of the building and the standard of work done:

1. When plans are first submitted the building inspector will do a site inspection to see if the **planned house will fit on the** site and if the **building will be within the allowed building lines**.
2. **Foundation trenches** must be inspected and approved before the concrete is placed.
3. When all the **walls** have been built up and have **reached roof height** the next inspection will be done; this could be combined with the next level - roof trusses.

National Building Regulation

4. The inspection of the **roof trusses** once erected and in place.
5. All **plumbing** fixtures and fittings as well as the **sewage connections** may be inspected, checked, tested and must be approved before the trenches are backfilled.
6. When the **final completion inspection** is done, an **occupation certificate** will be issued before the owner can move in and finish off the interior.

National Building Regulation

A25 General Enforcement

- **(1) No person shall use any building** or cause or permit any building to be used for a purpose **other than the purpose shown on the approved plans of such building**, or for a purpose which causes a change in the class of occupancy as contemplated in these Regulations, whether such plans were approved in terms of the Act or in terms of any law in force at any time before the date of commencement of the Act, unless such building is suitable, having regard to the requirements of these Regulations, for such first-mentioned purpose or for such changed class of occupancy.

A different type of enforcement – from the South African Courts to Municipalities

THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

Case No: 226/2017

Opening statements in the Judgement

- The questions raised in this review concern the rights of a property owner pertaining to rezoning and departure applications submitted by a neighbour and considered by an ‘authorised official’ or ‘Municipal Planning Tribunal’ in terms of planning and rezoning laws.

Opening statements in the Judgement

- These rights include the right to:
- (i) be afforded an opportunity to object to a contemplated rezoning;
- (ii) make submissions prior to a decision being taken;
- (ii) be furnished with reasons for an approval;
- (iii) have access to the full record of decision, and to;
- (iv) be availed appeal procedures.

Overview of Case

- **Ndlambe Local Municipality** – town of **Port Alfred, Eastern Cape**;
- An applicant **applied to rezone a property** to accommodate student;
- Reason given to regularise 2 dwellings on 1 Special Residential zoned property;
- Property to be zoned to General Residential;
- **Objection received**;
- The office of the **Municipal Manager did not acknowledge receipt** of the notice to object to the rezoning;
- **Authorised Officer approved rezoning as no MP**T in place at the time;

Overview of Case

- The Authorised Official **took the decision without**:
  - affording the applicant any **notice of the hearing**;
  - did not provide her an **opportunity to comment on the motivation** submitted by the internal municipal Town Planner;
  - did not advise applicant of second respondent's comments to her objection;
  - gave her no opportunity to comment on second respondent's architect's submission based on an "As Built Plan"; nor
  - was she enabled **to make submissions on the conditions of approval** and impact of the rezoning in general.
- The Authorised Official **failed to timeously provide the objector with full details of the approval**.
- The Authorised Official did not **sign the letter**.
- **Appeal Lodged**.

Overview of Case

- Appellant **not provided all the documentation** on which the decision was made;
- **No communication after the Notice to Appeal** was conveyed;
- The Appellant's attorneys made enquiries and were informed by the second respondent that applicants appeal had been dismissed by first respondent in late December 2016 (no date given);
- The Municipal official had acknowledged the objector's "rights *albeit* clearly with little intent to respect the afforded rights."
- The **site development plan** provided in the rezoning application was **not the intended development plan**.
  - The Judge says "that sketch-plan was appended to the application merely as a ruse intended to facilitate and justify an approval for a rezoning, the nature of which was other than that the stated intent."

Overview of Case

- **No advance notice** and communication informing the appellant **of the Tribunal hearing** convened to consider the application was conveyed.
- Based purely and only on the applicant's Notice of Appeal and without providing the appellant with a hearing, the 'appeal authority' dismissed the appeal.
- Applicant challenged the fairness of the Municipality's administrative decision to approve rezoning and departure applications submitted to it by the property owner in Port Alfred.
- **An Interdict was granted** in favour of the applicant ordering the stoppage of all building works already commenced on the property;
- **Only the Municipality opposes the relief sought**, and filed an answering affidavit and engaged Counsel to argue the matter.

Overview of Case

- The Judge said "**What was also clear was that no opportunity to present her case prior to the rezoning decision nor appeal rights had been afforded the applicant.**"
- The Judge's conclusion is enlightening said:
  - "The decision was consequently not only **procedurally unfair and illegal**, but also raised serious **concerns about the conduct of those connected with the motivation from Town Planning; processing the approval in light of the deficiencies outlined; and obstructing and denying applicant her rights to make submissions as well as to appeal.**"

Overview of Case

- The Judgement quotes Section 33(1) of the Constitution which states that:
  - “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.” and
- Section 33(2) provides that:
  - “Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”.

JDJ Properties CC and Another v Umngeni Local Municipality 2013(2) SA (SCA),

- Plasket AJA dealt with whether a nearby-by landowner and a lessee of property in the immediate vicinity of a rezoning and development , had the necessary standing and rights to enforce compliance with the Howick municipality scheme. The Court restated the trite acceptance that administrative law applies to decisions to either approve or refuse approval of building plans whether under the common law or the PAJA. The learned Judge commented that whether a litigant is clothed with standing must be determined in the light of the factual and legal context pertaining to a specific matter.

that Court found at para 34 that:

- *"… the nature of the interest involved is the right to enforcement of the Howick scheme. It is this interest that gives the **appellants standing**. They are part of the class of persons in whose interest the Howick scheme operates for three interlocking reasons: **first**, they are **an owner** … **within the area covered by the scheme** in a modestly sized town; **secondly**, their properties and businesses are **within the same use zone** as the development to which the building plans relate; and **thirdly**, their properties and business are in such **close proximity** to the second respondent's development, being across a road, that no question of them being too far removed from the second respondent's development can arise…"*

and at paragraph 35:

- *“The appellant’s interest as persons in whose favour the Howick scheme operates is a sufficient interest for purposes of s 38(a) of the Constitution to enable them to apply to court to vindicate their fundamental right to **just administrative action** entrenched in s 33(1) of the Constitution and given effect to by the PAJA…”*

The Judge further said:

- In the present matter all these observations apply with equal force. I wish to add that **nothing in the new legislation revokes the rights to standing** defined in the JDJ Properties decision. The Spatial Planning and Land Use Management Act, 2013 is legislation providing a broad framework for spatial planning and land use management within the whole of the Republic. It is legislation setting out a national spatial land use and land management planning system. The concept of a tension between national, provincial and local development interests is well documented in numerous decisions of our Courts.

The Judge further said: (97)

- Officials of municipalities as organs of state are expected when executing their daily functions to adhere to the well-meaning principles of '**Batho Pele' (people** first) when dealing with land owning ratepayers.
- Those principles are about placing **the interests of people before any other demands** and the end objective is the promotion of accountability and good governance.
- Section 195(1) of the Constitution invokes the principle that **public administration must be accountable**.
- What was done is contrary to these lofty aspirations of the Constitution, PAJA and SPLUMA expected of officials charged with the responsibility to manage the first respondent.

The Judge further said: (98)

l must point out that **flaws in the procedure** adopted in a municipality where planning functions are presided over by an **authorised official rather than a full municipal planning tribunal** are more easily likely to lead to indications of maladministration, bias, crooked conduct and even collusive activity. This erodes accountability exacted by the Constitution and ordinary South Africans. Each day, we are entreated to reports of officials abusing positions of authority for personal benefit. Our society yearns to see the day when less such litigation is a constant and citizens can trust those in the service of the state.

Case Study – New Zealand
Leaky homes crisis

- New Zealand has a problem – leaking buildings
- What is the common denominator:
  - An architectural design trend towards Mediterranean-style houses with complex roofs, plastered exterior walls, internal decks and small or no eaves.

Case Study – New Zealand
Leaky homes crisis

- The leaky homes crisis is an ongoing construction and legal crisis in New Zealand concerning a number of timber framed buildings constructed from 1994 to 2004 that suffered from **weather-tightness problems**.
- The problem was primarily related to the **decay of timber framing** which, in extreme cases, made buildings structurally unsound.
- Some buildings became unhealthy to live in due to moulds and spores developing within the damp timber framing.
- The **repairs and replacement costs** that may have been avoided were estimated in 2009 to be approximately NZ$11.3 billion (**R112 billion**).

Case Study – New Zealand
Leaky homes crisis

- Some local authorities were later found to have issued **Building Consents** based on insufficient documentation, **failed to carry out inspection** of the work during construction, and **issued code completion certificates** for buildings which were later found to have leaking problems.
- **Consequently** some councils now **share** significant **financial responsibilities** with the builders (which in many cases have closed or otherwise removed themselves from liability) and the owners.
- **Court cases** have generally assigned around one third of the financial responsibility to local authorities.

Case Study – New Zealand

Leaky homes crisis

- **What relevance to the South African situation**
- The National Building Regulations and Building Standards Act states that roofs must be designed and constructed safely so that they are not damaged by wind or any other natural force. The law also states that they must be waterproof, specifically:
  - Roofs must be durable and must not allow the penetration of rainwater or any other surface water to its interior.
  - Roofs must not allow the accumulation of any water on its surface.

In Summary

- Enforcement is set down in law;
- Municipalities have clear responsibilities to undertake;
- Records of actions need to be recorded so the proof of the actions can be provided;
- The general public have a right to view all processes and documentation.

Thank You
Dankie
Siyabonga