

ORIGIN, PURPOSE AND IMPACTS OF THE LAND USE PLANNING ORDINANCE (NO. 15 OF 1985)

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Na 50 jaar was dit nodig om die ou Dorpeordonnansie te vervang omdat dit na talle veranderinge te lomp geword het, en ook omdat dit nie afsonderlik voorsiening gemaak het vir vooruitbeplanning en ontwikkelingsbeheer nie.

Die artikel beskryf die geskiedkundige verloop van die ontstaan van die nuwe Ordonnansie op Grondgebruikbeplanning, en bespreek dan die vier beginsels waarop dit berus, nl. die bevordering van vooruitbeplanning; die bevordering van die markmeganisme; die devolusie van besluitneming, en die rasionalisering van administratiewe prosedures.

Laastens word die impak van die beginsels waarop die verskillende elemente van die Ordonnansie berus, soos struktuurplanne, sonering-skemas, onderverdeling en die Beplanningsadviesraad, bespreek.

INTRODUCTION

The new Land Use Planning Ordinance, which replaced the old Townships Ordinance (33/1934) in July 1986, was drafted because the Townships Ordinance had become cumbersome and outdated during the course of the 50 years that it had been in operation. When the Townships Ordinance was drafted shortly after the First World War, the major problem that had to be faced was the haphazard subdivision of land that was being perpetrated at the time; zoning and forward planning were new and untried concepts at that stage. Therefore Chapter 2 of the old Ordinance, which deals with the subdivision of land, received prominence, whereas

zoning control and the forward planning of land, were grouped together in a less important chapter, namely Chapter 4 (with forward planning playing the least important role).

This order of priority changed over the years and this change was one of the major reasons why a new ordinance was needed. In the new Land Use Planning Ordinance the order of priority is reversed compared to that of the old Townships Ordinance: forward planning is now the most important element, followed by zoning control and lastly subdivision. This order of priority is reflected in the sequence of the first three chapters, 1: Structure plans, 2: Zoning schemes, and 3: Subdivision of land.

The second reason why the Townships Ordinance had to be replaced was that it had become illogical and cumbersome owing to frequent and extensive amendments, particularly during the sixties and early seventies.

ORIGIN OF THE NEW ORDINANCE

It was concluded by the Provincial Administration that a comprehensive revision of the Ordinance was needed. Accordingly in 1974 parties that were considered to have an interest were approached with a request for proposals. Memoranda were received from those bodies most closely affected by the working of the Ordinance. These submissions were for the large part diverse and detailed, and this made it difficult to decide upon a basic philosophy as rationale for a new ordinance. One of these memoranda, drafted in 1975 by me on behalf of the Chief Town and Regional Planner, proposed and elaborated upon two fundamental principles on which the philosophic framework for the new Ordinance was subsequently based. These were: first, the separation of forward planning and control and se-

cond, the concept that unutilised zonings should lapse instead of being perpetual. Subsequently these and certain other principles were integrated by C J van Tonder into a central philosophy and a draft ordinance in his MPA-thesis which was finalized in 1981 (Van Tonder 1981). It served as a basis for further discussion within the Department of Local Government.

As the next step a working committee, comprising of representatives of the private institutions most involved, was set up and briefed to submit recommendations to the Executive Committee. The Working Committee's report, a refinement of the Van Tonder proposal, was released during September 1982 (CPA 1982). This report was referred to all parties involved and specifically to local authorities. Extensive comment was received which was then, where possible, incorporated in the Draft Ordinance. The Executive Committee then authorised an overseas study tour by Mr Van Tonder, which led to the introduction of certain additional concepts into the Draft Ordinance.

A legal adviser was appointed in August 1983 to formulate the legal terminology in the Draft Ordinance. At that stage, further inputs were sought from local authorities, the private sector and the other three provinces, and then the legal advisor's draft was finalised for publication in December 1983.

The Draft Ordinance was introduced in the Provincial Council in February 1984 and referred to a Select Committee after the first reading. Thereafter, certain amendments were made. In 1985 the Ordinance was adopted by the Provincial Council and signed by the State President. The Ordinance came into effect on 1 July 1986, after some delay caused by the preparatory work necessary for its operation.

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PURPOSE OF THE NEW ORDINANCE

The purposes of the new Ordinance are varied and range from the general to the specific. In the broadest sense the new Ordinance was needed, as explained above, to replace the Townships Ordinance which had become outdated and cumbersome. This very broad purpose is elaborated on in terms of more specific goals below; because of the introductory nature of this article the more detailed objectives of the Ordinance are left to other contributors.

Van Tonder identified nine goals for the Ordinance (1981:98). Four were social goals: to promote private land ownership; to limit the cost of housing; to uphold political supremacy in public decision making, and to commit politics to the cause of planning. A further four goals were economic: to limit disturbance of the market mechanism, to protect and define tenure of property, to ensure a regard for financial considerations and to streamline procedures. The ninth goal was categorised as judicial, namely to uphold the legal principle of *audi alteram partem* (the right to an unbiased hearing and to motivated decision making). These nine goals were subsequently consolidated to four major goals:

- the promotion of forward planning;
- the reinforcement of the free market in land use control,
- the devolution of decision making, and
- the rationalisation of procedures.

These four goals were maintained throughout the latter stages of the evolution of the Ordinance, and today remain officially applicable for the purpose of the operation of the Ordinance. They are briefly elaborated on below.

Forward planning

The promotion of forward planning has, subsequent to its formulation as a goal of the new Ordinance, been incorporated in the Venter Commission Report (1984) as a primary objective in the quest to expedite township es-

tablishment. As explained above, the Townships Ordinance largely failed to give substance to one of its objectives, namely purposeful forward planning. Under that Ordinance, forward planning and land use control were managed mainly by means of one mechanism, namely the town planning scheme. This had undesirable consequences: either forward planning was neglected because of the financial implications of the rights granted by forward zoning, or forward planning, where actually undertaken, resulted in large scale over zoning with all its consequent disadvantages.

In an attempt to overcome these problems, the provisions embodied in the new Ordinance provide for a separation of forward planning and land use control. Forward planning will be embodied in structure plans which will neither confer nor withdraw rights, while land use control will be performed in terms of zoning schemes granting rights which will exist only insofar as, and as long as, they are utilized. However, as forward planning and control cannot be completely separated, there will be a bridging mechanism between structure plans and zoning schemes in order to make provision for short term forward zoning. The mechanism is termed a 'substitution scheme', and the maximum time period involved is 5 years.

Free market

The second major goal of the Ordinance, namely the reinforcement of the free market principle, emanates from promotion of that principle by the central government. In view of the fact that the utilization of land is an important factor in the national economy, an attempt has been made in the Ordinance to give free market principles greater recognition in land use administration by minimizing unutilized land use rights. In order to achieve this, unutilized zonings should eventually be eliminated, and, in this regard, the Ordinance provides for a 15 year period of grace. The Ordinance furthermore makes provision for linking zoning to time limits as well as for the lapsing of rights that cease to be utilized, which will obviate

long term non-utilization of rights. Further measures which have the effect of reinforcing the market mechanism is the abolition of the enhancement levy and of the building clause, which were both responsible for distortions in the property market.

Devolution of power

The third major goal of the Ordinance is the promotion of the principle of devolution of power. The devolution of power to local authorities is declared government policy and special mechanisms are written into the Ordinance to give positive substance to this approach in respect of land use administration. The underlying principle is that the devolution of land use control can effectively be achieved by control over forward planning. In terms of this approach, a fairly flexible system of devolution can be instituted in which levels of devolution, varying from place to place, are provided for. Control will therefore be concentrated on structure plans, which will be utilized to devolve zoning powers and, through the zoning scheme, the power to subdivide land.

Rationalization of procedures

The last major goal of the Ordinance is the rationalization of procedures. A serious shortcoming of the old Ordinance was that it was cumbersome and difficult to administer because of diversity of procedures, which to a large extent caused costly delays. The administrative functioning of the Ordinance has been considerably rationalized in that procedures were simplified and streamlined. The most important example is the fact that subdivision has become a secondary control mechanism because decisions of principle will be taken mostly on the planning and zoning level. This has the positive effect that land subdivision (including townships) will be expedited and can be dealt with on a lower level. The mechanisms for which the Ordinance provides, are aimed at shortened procedures and more protection of buyers, which at the same time makes it easier for entrepreneurs to develop and market erven, and at lower cost.

IMPACTS OF THE NEW ORDINANCE

These four major goals of the new Ordinance, are given substance by means of certain planning principles and control mechanisms that have been embodied in the Ordinance. These principles and mechanisms, briefly referred to above in order to illustrate the four goals, will be elaborated on below in order to draw conclusions in respect of possible impacts of the Ordinance on land use and land development.

The structure plan

The emphasis in the Ordinance is placed in the first instance on forward planning. It is the primary objective without which various major elements of the Ordinance cannot be implemented. The structure plans by means of which forward planning will be performed, though non-enforceable, are statutory. This will ensure public participation, political supremacy and political commitment. The structure plan concept as embodied in the Ordinance is consistent with the national hierarchy of plans as recommended by the Venter Commission and accepted by the Cabinet. Structure plans will, among other things, set out guide lines for future spatial development, including urban renewal and urban design. It is compulsory for a structure plan to incorporate a statement on conservation, and for public participation to occur in the preparation of such a plan.

Structure plans will be prepared on behalf of local authorities or committees on which local authorities serve or the Provincial Administration, and will be approved by either the Administration or, at a detail level, by the local authorities themselves.

Structure plans and land use rights

The fact that structure plans will neither confer nor take away rights has been the subject of considerable discussion. The statement is often made that structure plans will of necessity have an impact on rights as their stipulations will affect land values. Critics who draw this conclusion fail to distinguish between **land use rights** and **land values**.

Land use rights apply only in so far as

they are formalised and acknowledged in legislation; to be more particular, only in so far as legislation provides for compensation to be paid upon withdrawal of those rights. Land values, on the other hand, are the result of a process of bargaining and risk taking in the private economy, and reflect the expectations of private individuals in respect of the development or speculation value of land. These expectations are based on various factors, of which planning is likely to be one. However, in a free-enterprise economy it would be contrary to market principles if expectations, as reflected in land transactions, become formalised and guaranteed by means of their conversion into rights. It was one of the major criticisms of the old Ordinance that the system related forward planning directly to land use rights, and thereby distorted the market mechanism in that expectations became formalized and guaranteed instead of being linked to market forces.

As no provision is made for compensation in the chapter on structure plans, the position under the new Ordinance will be that structure planning should influence land values (if this does not happen, the planners should wonder whether their planning means anything). However, the influence on land values will occur at the risk of the individual purchasers of land. If a high land price is paid based on a stipulation in a structure plan and that particular element of the plan is subsequently removed, it simply means that the business risk that the purchaser had taken, did not come off; this happens all the time in a market economy. Where land values are reduced as a result of structure plan stipulations, land owners can require implementation of the particular structure plan stipulations as zonings. This would automatically invoke the compensation clause.

The zoning scheme

The new zoning system, of which the principal characteristic is that zoning will no longer apply in perpetuity, will of necessity have a significant impact on land use planning and land development. When the new Ordinance came into effect, town planning schemes became zoning schemes, and

zoning schemes were also instituted in the rest of the Province. The effect of this is inter alia that a uniform system for control of change of land use is created. As discussed above, the situation under the old Ordinance that forward planning was incorporated in town planning schemes by means of forward zoning, inevitably led to intervention by the authorities in the free market mechanism. In the new dynamic system of land use planning, land use rights became dependent on their utilization. Hence the market mechanism can be relied upon to determine need, leaving the authorities free to concentrate on what is really important, as for example, the most desirable location for development, and the planning of services.

There has been gross misunderstanding and some misrepresentation with regard to the principle that zoning must relate to utilization of the land; in particular the 15-year period of grace (or grandfather clause) that was incorporated in the Ordinance to phase in the new system, has been criticised. In fact, the principle of perpetual zoning is monopolistic, and the principle of zoning according to use ends this monopoly and introduces a flexible zoning system based on market principles. There is also little likelihood of any hardship being entailed, as a zoning right that has any financial value will hardly remain unutilised for fifteen years. In any event, the Ordinance stipulates that, in individual cases, the 15-year period must be lengthened by five years at a time, if hardship can be proved. The new zoning system should therefore not have the negative impact that some foresee, and should in fact have positive consequences for land use planning and land development as is explained above and in the earlier discussion of the reinforcement of the free market.

Subdivision

The old concepts of township establishment and minor subdivision are combined in one simplified concept, namely subdivision, which embodies the advantages of both. Subdivision will, as shown above, be a largely mechanical process in view of the emphasis on forward planning and zoning.

Appeals

Another significant basic principle is the entrenchment of the right of appeal to the Administrator against the approval or refusal of an application. This has been required by the development sector and the public. The notification of affected owners is emphasized in the Ordinance and a new type of appeal, namely against approval of an application, is instituted.

Planning Advisory Board

In order to assist the Administrator in more sensitive cases, provision has been made for a Planning Advisory Board comprising seven experts from the private sector. The Board's composition assures its independence of departmental influence. In order to obviate stagnation, provision is made for members to serve for a continuous period of four years maximum.

The distinction between the Planning Advisory Board and the Appeals Committee, that has been instituted as a consequence of a recommendation of the Venter Commission, should here be emphasized: The Plan-

ning Advisory Board evaluates the merit of applications, including appeals against approval or refusal of applications, while the Appeals Committee has no function with regard to the merit of applications. It has the largely technical function of ruling on issues such as standard of services, division of service costs and compensation payable in cases of down-zoning.

IN CONCLUSION

To summarize: the origin, purpose and impacts of the Land Use Planning Ordinance can be related, in broad terms, to the problems experienced during the 50 years that the Townships Ordinance was in operation, and to the philosophy and principles formulated as a solution to these problems. The basic philosophy is that forward planning should have two objectives: first, to achieve, and to commit the public authorities to, the necessary spatial ordering of land use in order to allow the private sector to develop land, and second, to devolve to local authorities, under certain conditions, the power to approve re-

zonings and subdivision of land. It has been shown that a significant sequence of priority is reflected in the first three chapters of the Ordinance: Structure plans, Zoning schemes and Subdivision of land. The impacts of the new Ordinance will be varied but if this sequence of priority is realised in practice, the consequences for land use planning and control and for land development can only be beneficial.

REFERENCES

- Cape Provincial Administration (CPA) 1982. *Verslag van die Werkskomitee wat aangestel is om 'n Konsep-Ordonnansie op Grondgebruikbeplanning op te stel*. Cape Town.
- Van Tonder, C. J. 1981. *An evaluation of physical planning administration in terms of provincial legislation in the Cape Province and preliminary proposals for the improvement thereof*. Unpublished thesis, University of Cape Town.
- Venter Commission, 1984. *Commission of inquiry into township establishment and related matters*. Government Printer, Pretoria.