

ZONING SCHEMES: ARTICLES 7 TO 20 OF THE LAND USE PLANNING ORDINANCE

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Hoofstuk II van die Ordonnansie op Grondgebruikbeplanning handel oor soneringskemas. Alle grond in die Kaapprovinsie is nou onder ontwikkelingsbeheer, en alle plaaslike besture sal in een van twee kategorieë val: die wat dorpsaanlegskemas gehad het by inwerkingtreding van die nuwe Ordonnansie, en die daarsonder.

Dorpsaanlegskemas word soneringskemas en die 'ou' regte bly voortbestaan tot 1 Julie 2001. Vir die ander plaaslike besture sal alle grond geag word om in ooreenstemming van die aanwending daarvan gesoneer te wees.

Voorsiening word gemaak vir afwykings en vier tipes hersonerings: deur die eienaar (art. 16); deur die plaaslike bestuur (art. 18); vervangingskemas (art. 14(4)); en vir onderverdelings (art. 22). Verder word die implikasies en probleme rondom die interpretasie van bg. aspekte bespreek.

INTRODUCTION

With the coming into effect of the Land Use Planning Ordinance (No 15 of 1985) all land in the Cape Province is now subject to development control in terms of zoning schemes. The purpose of zoning schemes is given in section 11 as '... to determine use rights and to provide for control over use rights and over the utilisation of land ...'

For the purposes of implementing Chapter II of the Ordinance, local authorities are divided into two categories, viz. those which had a town planning scheme in force immediately

prior to the commencement of the Ordinance, and those which did not. The administration of zoning schemes differs materially between these two categories.

CATEGORY 1 LOCAL AUTHORITIES

There are 87 local authorities, listed in the Schedule contained in Provincial Notice PN334/1986 dated 6 June 1986, in this category. Their town planning schemes are deemed to be zoning schemes, and remain in force for 15 years, subject of course to various types of rezonings and amendments discussed below. Their scheme maps are similarly deemed to be zoning maps. At the end of 15 years, i.e. on 1 July 2001, unutilised rights in terms of a zoning scheme lapse. Any property which has not been developed or used to its full potential must then be given a 'deemed zoning', i.e. will be 'deemed to be zoned in accordance with the utilisation thereof.' (This concept of 'deemed zoning' requires special consideration and is dealt with further below).

An appeal mechanism is provided for an extension of the 15 year period before unutilised rights lapse. The extension is for a minimum period of 5 years, and may be further extended. The criterion for such extensions is whether, in the opinion of an appeal committee, the owner of land '... has suffered or will suffer loss'. However, appeals must be made timeously as the appeal committee must make its first determination before expiry of the 15 year period.

Any land situated within the Municipal Area but outside the area of the town planning scheme, i.e. land which had not yet been incorporated into the scheme, must be given a deemed zoning with immediate effect

(1-7-1986) and is subject to the existing scheme regulations contained in the local authority's zoning scheme.

CATEGORY 2 LOCAL AUTHORITIES

All other local authorities in the Province fall into this category. With immediate effect (1-7-1986) all land must be given a deemed zoning, based on the scheme regulations in terms of section 8 (Provincial Notices PN353/1986 dated 20-6-1986 and PN634/1986 dated 31-10-1986). These scheme regulations provide for a total of 30 zones (including sub-zones). These local authorities may, or, if directed to by the Administrator, must prepare a zoning map.

These new requirements under the Ordinance will probably prove to be extremely onerous on these smaller local authorities, who may possess neither the relevant planning expertise nor the accurate records necessary to determine zonings, and who will thereafter be required to deal with departures and various types of rezonings.

DEPARTURES

A measure of flexibility in the administration of zoning schemes is provided by the formalisation of the concept of 'waivers' or 'relaxations' which were previously granted in terms of section 57 of Ordinance 33 of 1934. Departures which may be applied for fall into two sub-categories. The first is an alteration of the land use restrictions, i.e. the physical parameters such as height, bulk, coverage, building lines etc., laid down in the scheme regulations. The second is the utilisation of land for a purpose not permitted in a particular zone; it should be noted that this type of departure can only be granted on a temporary basis.

* The opinions expressed in this article do not necessarily reflect the views or policies of the Cape Town City Council.

A departure will lapse if it is not exercised (or to the extent that it has not been exercised) within two years, unless a further period is granted.

All departures must be recorded in a register and the relevant properties ('land units') must be shown on the zoning map (if one exists).

In terms of the scheme regulations in terms of section 7(2) (Provincial Notices PN334/1986 dated 6-6-1986, PN378/1986 dated 27-6-1986, and PN633/1986 dated 31-10-1986), the Administrator has authorised the granting of various types of departures by local authorities. A maximum devolution of authority to grant departures has been granted to the larger local authorities, with reduced powers for smaller local authorities.

In addition, all local authorities have been authorised to grant a departure for the erection of a second dwelling unit (commonly called a 'flatlet' or 'granny flat') on any property which has the right to erect a single dwelling house. However, this could be considered to amount to the authorisation of a **permanent** departure from the permitted utilisation, which would accordingly be in conflict with section 15(1)(a)(ii) of the Ordinance and could possibly be challengeable in law.

A different concept of 'departure' is also introduced under the Ordinance. In addition to a departure granted in terms of section 15, the Administrator (or a council with the necessary devolved powers) may impose a departure as a condition of approval of any application under the Ordinance (see section 42 and the definition of 'departure'). It is necessary in this context to disassociate the concept of a departure from the historical connotation of a 'relaxation': a departure is any altered land use restriction which differs from the standard land use restriction applicable to a particular zone, and therefore can be more or less restrictive than the norm.

This type of departure could, typically, be imposed in the approval of a rezoning or subdivision. For example, in granting a rezoning to a zone which has a height restriction of three storeys, a condition could be imposed either restricting the height to two

storeys, or permitting a height of four storeys. Either one would constitute a departure.

Similarly, in granting a departure in terms of section 15, a council could impose another departure as a condition of approval, e.g. imposing an increased building line requirement in granting a departure for an increase in coverage.

All such 'imposed' departures must also be recorded in the register and, where applicable, be indicated on the zoning map.

REZONINGS

There are four categories of rezonings:

- Section 16: on application by the owner of land.
- Section 18: on the initiative of the local authority or the Administrator.
- Section 14(4): A 'substitution scheme'.
- Section 22: rezoning to a zone 'in a manner permitting of subdivision'.

The first two types are basically little different to rezonings under the old Ordinance, although the procedures have been modified.

The rezoning application is advertised for objections before it is considered by the local authority. Any objections submitted are referred to the applicant for his comments, and only after these are received by the local authority will the application and the objections be considered jointly before coming to a decision.

If a structure plan has been approved by the Administrator, this may include devolution to the local authority of the right to approve rezonings. However, to a large extent the rights of appeal derogate from the principle of devolution. Where there has been no devolution, the decision on the rezoning rests with the Administrator.

A rezoning will lapse after two years if it has not been acted upon within that time, and the land will revert to its original zoning. If, however, the rights under the new zoning have been partially exercised, the local authority

will have to determine a deemed zoning. The local authority is however given the right to extend the period of the rezoning, irrespective of whether the new rights have not been acted upon or have been partially acted upon. Apparently, such an extension can even be granted after the two year period has expired. This could pose a difficult decision for local authorities as to when to extend a rezoning and when to insist on a fresh rezoning application, given the basic principle of the Ordinance that unutilised rights should lapse.

An exception to lapsing of rezonings occurs when land is rezoned on the initiative of the Administrator or a local authority and the intention is that the local authority will acquire the land. This is presumably intended to cater for future public open space requirements, road improvement schemes, etc., or where the land is otherwise required for local authority purposes. However, there appears to be an oversight in the legislation in that the exception to lapsing does not apply where the local authority is already the owner of the land concerned.

The third type of rezoning – a substitution scheme – offers a measure of short-term planning, in that it lapses after five years instead of two years. This type of rezoning would be applicable to larger areas than a single erf – possibly a few city blocks, the central business district, or new suburban expansion etc. Again, if the new rights have been partially or fully exercised in respect of any land unit, that property will acquire a deemed zoning at the end of the five year period. Again, too, there appears to be an oversight in that rezonings in terms of a substitution scheme will lapse even when the local authority intends to acquire the land.

The fourth type of rezoning is something of a conundrum. It is far from clear what is intended by the phrase 'zoned in a manner permitting of subdivision'; the scheme regulations in terms of section 7(2) (PN334/1986), and those in terms of section 8 (PN353/1986) both define and employ the term 'subdivisional area' which does not appear in the Ordinance. It would be logical to assume that a subdivisional area is an area which has

been zoned in a manner permitting of subdivision. However, it appears that Provincial officials interpret these as two separate, unrelated concepts, and it is suggested that any queries in this regard should be directed to the Provincial Administration.

A rezoning in a manner permitting of subdivision will lapse if the relevant application for subdivision is not made within two years. If a subdivision application is made, the rezoning can still lapse if the subdivision is not 'confirmed' (see comments on Subdivisions: sections 22 to 32 for further details on this aspect).

The various types of rezonings, with their different lapsing dates, will undoubtedly create confusion and difficulties for property owners and developers, professional consultants and local authorities alike. It will no longer be sufficient to know what a property is zoned for, it will also be necessary to know when and under what circumstances that zoning may or will change. It is perfectly plausible for a property to be rezoned by virtue of a substitution scheme; to thereafter (but within 5 years) be rezoned to a different zone on application by the owner; to revert to the substitution scheme zoning after two years (if partially acted upon); and to acquire a deemed zoning at the end of the five year period when the substitution scheme lapses. Many other permutations are possible, and compounded if they should occur around 2001 when unutilised rights in terms of the original zoning scheme lapse.

DEEMED ZONING

As indicated in the previous section, deemed zoning occurs in a number of different circumstances. In terms of section 16(3), 'when land is deemed to be zoned ... (in accordance with the utilisation thereof, as determined by the Council concerned) ... the most restrictive zoning permitting of the utilisation of the land concerned either in conjunction with a departure or not, as the council concerned may determine, shall be granted'.

There are, regrettably, different possible interpretations of this clause and the following points are made in order

to explain what appears to be the most logical interpretation.

- 'Zoning' must be based on the existing zones and sub-zones contained in the zoning scheme. It is clearly not intended that, in determining deemed zoning, a local authority should create as many different unique zones as there are different unique 'actual utilisations' of properties.

If, for example, a zoning scheme has for its lowest intensity business zone a zone 'Business 1' with a bulk factor of 1,0 then any property developed for business use with a bulk factor of 1,0 or less would have to be granted a 'Business 1' zone.

- Any departure previously granted must be taken into account in the determination of a deemed zoning. To continue with the example cited above, if a property in a 'Business 1' zone has been granted (and acted upon) a departure to permit an actual bulk of 1,1 it must be granted a 'Business 1' zone with the relevant departure. It should not be 'bumped up' to the next higher category, say 'Business 2' with a bulk factor of, say, 2,0.
- The phrase 'permitting of the utilisation' should be taken literally. Continuing the above examples, a building with an actual bulk of 1,2 must be granted 'Business 2' zone with a bulk factor of 2,0. The next lower category, 'Business 1' with a bulk factor of 1,0, does not 'permit of the utilisation'. The zoning determined must, however, be 'the most restrictive'; it would therefore be incorrect to grant a 'Business 3' zone with a bulk factor of 3,0 since although this zone would 'permit of the utilisation' it would not be 'the most restrictive zone'.

These simple examples do not serve to illustrate the full complexity of the determination of deemed zoning. In addition to bulk, zoning schemes invariably include controls on coverage, height, spaces about buildings and often minimum plot sizes, parking provisions and various other types of controls. Whenever it is necessary to

determine a deemed zoning, all the relevant controls must be taken into account. There is no basis for assuming that some control or controls are 'more relevant' than others in determining whether a particular utilisation is permitted in a particular zone.

The administration of this provision will require that local authorities have complete, accurate and up-to-date records for every property which is required to be deemed to be zoned in accordance with its utilisation – especially as the Ordinance makes provision for appeals against such deemed zonings.

REGULATIONS

Identical procedures have been prescribed for applications for departures, rezonings and subdivisions, in terms of the Regulations made in terms of section 47(1), PN333/1986 dated 6-6-1986.

The key points are as follows:

- In most instances, the local authority will require the application to be made on the form prescribed by the Director of Local Government.
- Where the application form is inadequately or incorrectly completed the local authority must advise the applicant within two weeks, and come to an agreement with the applicant regarding the content of the application form within 6 weeks of the date it was originally submitted.
- Once the local authority has accepted the application, it must advertise the application (where appropriate) within one month.
- Where the final decision rests with the local authority it must notify the applicant and any objectors of its decision within four months of the date of application; in other cases it must notify the Director of Local Government of its recommendation within the same period.
- Any right of appeal by the applicant or objectors against the Council's decision must be exercised within two weeks of the date of notification. The appeal must be directed to the Director of Local Government and a copy

served on the local authority, who must in turn submit its comments to the Director within one month.

IN CONCLUSION

Not all town planners will be convinced about the benefits to be derived from the lapsing of unutilised rights. While this may result in the elimination of 'over-zoning' or 'inappropriate' zonings in terms of previous town planning schemes, and prevent speculative rezonings from prejudicing other rezoning proposals, it could be at a high cost to local authorities who will have to stretch limited resources to administer the various provisions and, as indicated earlier, could

be problematic and confusing for developers and their consultants.

The larger local authorities, certainly, will require sophisticated data base and data processing systems to accurately monitor changes in zoning and departure status. Smaller local authorities may be advised to consider appointing consultants to determine deemed zonings, as well as to prepare structure plans and/or substitution schemes to guide future development. In addition, local authorities classified as 'Category 2' above, who are subject to the scheme regulation in terms of section 8, should consider seeking amendment to the scheme re-

gulations, in terms of section 9(2), to delete zoning which are not appropriate to their particular circumstances so as to 'tailor' the scheme regulation to suit their own needs and simplify ongoing administration.

Numerous appeals can be anticipated for extensions to the 15 year period before use rights lapse, and the critical question of whether existing rights can in fact 'lapse' without compensation being due remains to be answered by judicial determination. The associated question, of course, is that if compensation is payable, who is liable? The local authorities will obviously not be able to bear this cost.