

SUBSTITUTION OF CONTROLLING AUTHORITY: ACT 21 OF 1940 - SPLUMA

The ever-expanding “ripple effect” of the Spluma Splash has unearthed a number of further potential anomalies which may impact on the work of practising professional planners.

In the latest of a series of potential red flags which have been raised in the wake of the coming into effect of SPLUMA (and the more recent municipal by-laws), comes the confusion which surrounds the interpretation of Section 45(6) of the Spatial Planning and Land Use Management Act, 2013 (SPLUMA).

The provisions of the aforesaid Section are quoted below:

“(6) Where a condition of title, a condition of establishment of a township or an existing scheme provides for a purpose with the consent or approval of the administrator, a Premier, the townships board or any controlling authority, such consent may be granted by the municipality and such reference to the administrator, a Premier, the townships board or controlling authority is deemed to be a reference to the municipality.”

At first blush, the section appears to be a simple “transfer” of authority to the relevant municipality, on a basis similar to the corresponding provisions of the Gauteng Removal of Restrictions Act, 1996 (Act 3 of 1996). In other words, where title conditions require the consent of the erstwhile Administrator or Township Board or similar, such authority will be deemed to be the municipality.

The difficulty lies with the reference to “the controlling authority” in Section 45(6) of SPLUMA. The term “controlling authority” is often used in the context of the Advertising on Roads and Ribbon Development Act, 21 and 1940. Historic conditions of title often refer to a prohibition on the use of land close to or abutting on a provincial road, unless the controlling authority has granted consent to such effect. The controlling authority, in most instances, is the provincial department responsible for provincial roads.

It is evident that the long title of Act 21 of 1940 implies that the primary purpose thereof was never to regulate the use of land per se. Rather, the Act had, as its main objective, to protect the integrity, the role and the function of provincial roads in certain areas, against land-use practices and advertising which may negatively affect same. Act 21 of 1940 was never created to serve as an instrument to bring about land use rights and to regulate the use of land in a general sense.

The long title of Act 21 of 1940 reads as follows:

“To regulate the display of advertisements outside certain urban areas at places visible from public roads, and the depositing or leaving of disused machinery or refuse and the erection, construction or laying of structures and other things near certain public roads and the access to certain land from such roads”

Returning to the provisions of Section 45(6) of SPLUMA, and the fact that it does not qualify its reference to the “controlling authority”, it is evident that, without considering the purport of Act 21 and 1940, a person interpreting the provisions of the aforesaid section of SPLUMA may arrive at a conclusion that, where a property which forms the subject of a land development application is affected by a condition of title emanating from Act 21 and 1940, the consent required in terms thereof may be procured directly from the responsible municipality (as opposed to the relevant provincial department).

This appears to be an erroneous interpretation of the provisions of SPLUMA, as Act 21 of 1940 has not been repealed and the “controlling authority” in terms thereof remains the relevant provincial department (rather than the municipality). Also, the municipality is not endowed with the authority to regulate matters associated with provincial roads. It follows that it could never have been the intention of SPLUMA to unilaterally usurp the authority of the relevant provincial department responsible for roads and to place such authority in the municipal sphere.

It follows that, where a property is affected by a condition of title emanating from Act 21 of 1940, it will indeed be necessary to approach the “controlling authority” (the relevant provincial department) for its consent, as may be applicable to the intended use of the subject property.

In addition to the above, and against the growing uncertainty regarding the transitional arrangements after the coming into effect of SPLUMA, the SAACPP is also aware that, in certain provinces, there are examples of land developments that have been “sanctioned” in terms of Act 21 of 1940, based on the incorrect assumption that the controlling authority was capable of “granting” land-use rights and permissions to subdivide, etc. Clearly, having regard to the long title of Act 21 of 1940, this is an incorrect interpretation and

members of the Association are cautioned to respond appropriately to the challenges of conditions of title which stem from said Act.

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