DLA CLIFFE DEKKER HOFMEYR

REAL ESTATE ALERT

27 August 2012

CURRENT STATUS OF UNFINALISED LAND DEVELOPMENT APPLICATIONS SUBMITTED IN TERMS OF THE DEVELOPMENT FACILITATION ACT, 67 OF 1995

On 22 September 2009, the Supreme Court of Appeal granted an order in the matter of *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (2) SA 554 (SCA)*, declaring Chapters V and VI of the Development Facilitation Act, No 67 of 1995 as unconstitutional.

A dispute arose between the City of Johannesburg (CoJ) and the Gauteng Development Tribunal, a provincial organ created by the Development Facilitation Act (DFA), to exercise the powers relating to the establishment of townships and the rezoning of land within the municipal area of the CoJ, in terms of the Constitution. The complaint by the CoJ was directed to those portions of the DFA (chapters V and VI) that create and confer authority on tribunals to approve land use applications that may be in conflict with the authority conferred on the CoJ by the Town - Planning and Townships Ordinance,1986 (Ordinance). The Ordinance gives local authorities the authority to regulate land use within their particular municipal areas. The Ordinance authorises a Municipality to prepare a town-planning scheme for the land within its municipal area and thereafter to amend the scheme.

Chapters V and VI of the DFA also intend to give development tribunals the authority to change land use rights of land within a municipal area.

In its judgment, the Supreme Court of Appeal (SCA) held that the existence of parallel authority in the hands of two separate bodies, with its potential for the two bodies to speak with different voices on the same subject, is disruptive to orderly planning and development within a municipal area.

The SCA took special notice of the fact that the Ordinance contemplates detailed control and regulation of land use being exercised by a Municipality. To introduce a third party into that process of control and regulation, with the power to intervene and impose its own decisions that may be inconsistent with the decisions and objectives of the CoJ, is a recipe for chaos.

In its decision, the SCA considered the practical implications of declaring decisions already made by development tribunals invalid.

With the above in consideration the SCA ordered that:

- Chapters V and VI of the DFA are to be declared invalid.
- This declaration of invalidity is suspended for 18 months from the date of the order (being 22 September 2009) subject to the provisions that:
  - No development tribunal may accept or consider any application for the grant or alteration of land use right in a municipal area.
  - No development tribunal may, on its own initiative, amend any measure that regulates or controls land use within a municipal area.

The Constitutional Court (ConCourt) confirmed the order made by the SCA declaring Chapters V and VI of the DFA unconstitutional. The period of suspension was extended until 17 June 2012. The ConCourt took cognisance of the fact that if the Order declaring Chapters V and VI of the DFA unconstitutional had to take immediate effect, land development in certain areas would come to a halt. This would also have a negative impact on the growth of the economy. The ConCourt deemed the extended period sufficient for Parliament to rectify the defects or to enact new legislation.

continued

On 22 March 2012, the Department of Rural Development and Land Reform (Department) issued a statement confirming that applications received by development tribunals before 17 June 2012 will continue to be heard and determined by the tribunals, as if the ConCourt had not declared Chapters V and VI of the DFA invalid.

On approximately 23 April 2012, the South African Council for Consulting Professional Planners (SAACP) and four property developers brought a further application to the ConCourt to extend the period of suspension of the declaration of constitutional invalidity of Chapters V and VI of the DFA. The applicants did not agree with the correctness of the statement issued by the Department.

The City of Tshwane Metropolitan Municipality subsequently applied for leave to intervene. The ConCourt dismissed the application. The reason for the order was that the main application for direct access, to have the period of suspension of the declaration of invalidity of certain chapters of the DFA further suspended, had been dismissed.

This order has created confusion as the main application was never heard. The period has lapsed and the main application can no longer be heard. New legislation has not yet been promulgated.

This raises the question as to the correct procedure to be followed where townships applied for under the DFA have not been finalised. It is evident that if the application was not lodged prior to 17 June 2012, the relevant Chapter of the DFA cannot be applied. The vacuum relates to undetermined applications submitted before 17 June 2012 and the finalisation of services and transfers in such townships.

Due to the uncertainty that has been created in the property market relating to the future application of the relevant Chapters of the DFA, it would be advisable for developers whose applications have not been decided by a tribunal to consider whether the application should not be withdrawn under the DFA and submitted in terms of the Ordinance.

A further problem arises when the township register has already been opened in respect of a township approved in terms of the DFA but engineering services have not been installed. Before an erf can be transferred in any township established in terms of the DFA, a certificate must be issued confirming the availability of engineering services. Section 38 of the DFA requires, among other things, that the designated officer must notify the registrar that the land development (township) applicant has complied with its obligation to provide engineering services. If the tribunal is not allowed to act in terms of the repealed Chapters of the DFA, or if the tribunal for a particular area has dissolved, the developer will not be able to transfer any erf in the land development area (township).

The Department was cited as the seventh respondent in the application brought by the SAACP and the four property developers. The Department confirmed in its answering affidavit that it persists in the view expressed in its statement dated 22 March 2012.

The Chief Director of Spatial Planning and Information has verbally confirmed that a meeting was held with officials from the relevant Deeds Registries and that the views expressed in the Department's statement dated 22 March 2012 will be followed.

Although discussions between a Cliffe Dekker Hofmeyr representative and the officials from the Deeds Registry confirmed that all unfinalised land development matters that were duly commenced before 17 June 2012 in terms of the DFA, will continue to be finalised in terms of the DFA, no formal Chief Registrar Circular has been issued.

Unfortunately an uncertainty has been created in the property industry, which could have a negative effect on all unfinalised land developments in terms of the DFA, unless the vacuum created by the absence of legislation and clear guidelines is addressed soon.

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