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REAL ESTATE ALERT

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Real right of extension

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To what extent will “changed circumstances” allow a developer to deviate from the plans of extension submitted in terms of section 25(2) of the Sectional Titles Act 95 of 1986 (STA)?

Section 25 of the STA permits a developer to reserve a real right of extension when opening a sectional title register. This enables the developer to develop the sections in phases dictated by market conditions and alleviates the financial burden placed on developers of large schemes.

The developer may submit an application for the reservation of a real right of extension when applying for the opening of the sectional title register or any time thereafter but prior to the establishment of a body corporate.

A developer may reserve a real right of extension to develop a future phase which could be a future building or buildings or a vertical or horizontal extension of an existing building on a specified part of the common property. The building or buildings may be divided into a section or sections, common property and exclusive use areas may be created. It is possible that a future phase may only comprise exclusive use areas.

The contents of the real right of extension is defined by the following documents which the developer is obliged to submit to the Deed Office when reserving the real right of extension:

- (a) a plan to scale of the building or buildings on which:
 - the part of the common property affected by the reservation;
 - the siting, height and coverage of all buildings;
 - the entrances and exits to the land;
 - the building restriction areas, if any;
 - the parking areas; and
 - the typical elevation treatment of all buildings are indicated;
- (b) a plan to scale showing the manner in which the building or buildings are to be divided into a section or sections and exclusive use areas or the manner in which the common property is to be made subject to the rights of exclusive use areas only;
- (c) a schedule indicating the estimated participation quotas of all the sections in the scheme after such section or sections have been added to the scheme; and

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A developer is obliged to disclose a real right of extension in the deed of alienation to the purchaser, failing which the deed of alienation is voidable at the election of the purchaser.

(d) particulars of any substantial difference between the materials to be used in the construction of the building or buildings and those used in the construction of the existing building or buildings.

("Section 25(2) documents")

Section 25(13) of the STA provides that:

"a developer or his or her successor in title who exercises a reserved right referred to in subsection (1), shall be obliged to erect and divide the building or buildings into sections and to delineate areas of the common property subject to rights of exclusive use strictly in accordance with the documents referred to in subsection (2), due regard being had to changed circumstances which would make strict compliance impracticable, and an owner of a unit in the scheme who is prejudiced by his or her failure to comply in this manner, may apply to the Court, whereupon the Court may order proper compliance with the terms of the reservation, or grant such other relief, including damages, as the Court may deem fit".

A developer is obliged to disclose a real right of extension in the deed of alienation to the purchaser, failing which the deed of alienation is voidable at the election of the purchaser. The developer is not obliged to disclose the detail of the real right of extension in the deed of alienation and the documents submitted to the deeds

office are not practically accessible to a prospective purchaser. The reason for including the disclosure provision is to ensure that a purchaser is able to make an informed decision.

A developer who has exercised its right of extension by creating further sections and/or exclusive use areas must submit a plan of extension to the Deeds Office together with its application to register the extension.

The purpose of section 25(13) was described as follows in *SP & C Catering Investments (Pty) Ltd v Body Corporate of Waterfront Mews and others* [2010] 2 All SA 261 (SCA):

"The section is plainly designed to enable unit owners to enforce compliance with the specifications. It gives the developer the opportunity to justify non-compliance with his original specifications on the ground of "changed circumstances" and no more. The concept of the legislature intended to give him an opportunity, in the face of a complaint by an aggrieved unit owner, effectively to obtain a variation of his registered real right to the detriment of the registered owners is ludicrous."

In *Orbital Properties 13 (Pty) Ltd and another v Blue Dot Properties 271 (Pty) Ltd and others* [2010] 4 All SA 282 (SCA), the contents of the right of extension was the reservation of the plant area to be used as a deck for section 4. The owner of section 4 refused to pay for the

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The risk for a developer deviating from the section 25(2) documents lies in the fact that an aggrieved owner can approach court.

area and the developer then decided to sell the real right of extension to the purchaser of section 3. The owner of section 4 sought an interdict preventing the developer from transferring the real right of extension to the purchaser of section 3. The court agreed with the principle that financial considerations may bring a change in circumstances which make strict compliance impossible. The section 25(2) documents give content to the right of extension and the developer is not excused from compliance with the documents altogether but only from complying "strictly". The right of extension consists in conferring the right to the exclusive use of the plant area to the owner of section 4 and the developer cannot confer the right upon any other owner.

Prior to June 2011, the deeds examiners examined the sectional plans of extension and if there was a deviation from the section 25(2) documents submitted to the deeds office with the reservation of the right of extension, the developer had to approach the court to sanction the deviation. During May 2011, the *Western High Court (Roseparkadmin CC and others v the Registrar of Deeds*, case number 5522/2011) set aside a rejection note made by a deeds office examiner and ordered the Registrar of Deeds to register the sectional plan of extension. The court made it clear that there is no duty on the Registrar of Deeds to approve the plan of extension. This is done by the Surveyor General. The court held that "it is the owner who feels that he is prejudiced by the changes who alone may apply to court and it is not the developer who is required to make the application".

Roseparkadmin CC case caused the Chief Registrar to issue Chief Registrar's Circular 7/20011 confirming that it is not the duty of the Registrar of Deeds to enforce compliance with regard to deviations. This was confirmed by Registrar's Conference Resolution 12/2011. However, it is the duty of the Registrar of Deeds to ensure that the extension is within the physical boundaries of the reserved right.

The risk for a developer deviating from the section 25(2) documents lies in the fact that an aggrieved owner can approach court.

In *Skillfull 54 (EDMS) Beperk v Human No (5107/ 2013) (2014) ZAFSHC 14*, the court refused to grant the interdict in favour of an owner prohibiting a developer from erecting an apartment block which differed substantially from the section 25(2) documents. The developer contended that market conditions changed during the preceding 20 years. The market demand in the area changed from apartments destined for renting out to students to a demand for family apartments. The court did not grant the interdict based on the fact that the owner (applicant) was unable to prove that he was prejudiced by the failure of the developer to comply with the section 25(2) documents.

In *Hartenbosch Woonwapark CC v Registrar of Deeds and others (WCWC Case 3273/2017)* the market conditions changed and the demand for small units slowed down. The developer decided to amend the site development plan to indicate larger units. This was a deviation of the section 25(2) documents, but was approved by all the members of the body

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In practise, the Registrar of Deeds will not examine the sectional plan of extension for any deviation from the Section 25(2) documents, but will still examine the plans of extension to ensure that the extension is within the physical boundaries of the reserved right.

corporate. The Registrar of Deeds refused to register the sectional plan of extension as it deviated completely from the section 25(2) documents. The court held that the developer must strictly comply with the original section 25(2) documents, save in situations where there have been a change in circumstances. The court is allowed to disallow a developer to deviate from the original section 25(2) documents upon objection received from an owner. In this instance the body corporate represented by all the owners approved the deviation.

In practise, the Registrar of Deeds will not examine the sectional plan of extension for any deviation from the section 25(2) documents, but will still examine the plans of extension to ensure that the extension is within the physical boundaries of the reserved right. It is advisable to extend the boundaries on the section 25(2) documents to cover the maximum permissible bulk allowed in terms of the town planning scheme as there is no provision compelling a developer to exercise the full extent of the real right of extension, whilst any encroachment over the physical boundaries will create problems.

Lucia Erasmus

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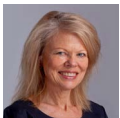
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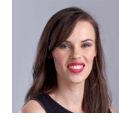
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