Real Estate Law & Conveyancing

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In this issue

SOUTH AFRICA

What property owners should know about restrictive title deed conditions vs municipal approval

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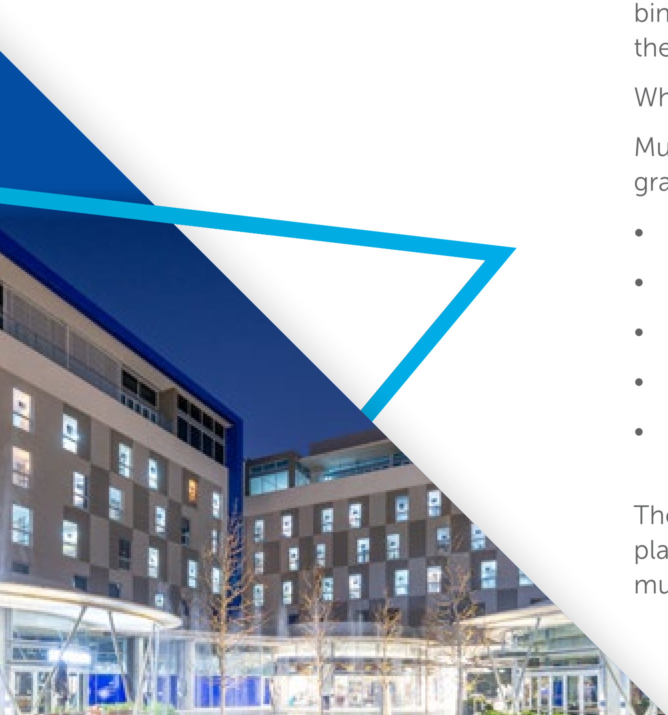
What property owners should know about restrictive title deed conditions vs municipal approval



Property owners and developers often operate under the misconception that municipal approval for a development project automatically grants them the legal right to proceed with development, even when existing restrictive title deed conditions conflict with those approvals. This article clarifies a critical legal principle that can protect developers against significant financial loss.

What is a restrictive condition?

A restrictive condition is defined in the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) as any condition registered against the title deed of land restricting the use, development or subdivision of the land concerned. These conditions become real rights upon registration, binding all successive owners of the property regardless of their knowledge of the conditions.

What constitutes municipal approval?

Municipal approval encompasses various forms of consent granted by local authorities, including:

- Zoning scheme approvals
- Building plan approvals
- Special consent for specific land uses
- Municipal Planning Tribunal decisions under SPLUMA
- Rezoning applications and amendments to land use schemes

These approvals are granted under municipal planning powers and regulate land use within municipal areas through zoning schemes.

Which takes precedence?

South African law establishes a clear legal hierarchy: restrictive title deed conditions take precedence over municipal approvals. This principle is unequivocal and has been consistently upheld by the courts.

One of the seminal cases affirming this position is *Malan and Another v Ardconnel Investments (Pty) Ltd* [1988] 2 All SA 128 (A), where the court held that municipal town planning schemes cannot override or supersede restrictive title deed conditions. The judgment further clarified that local authority consent granted under such schemes does not, on its own, constitute legal authorisation for property use that contravenes registered title deed restrictions.

This principle was reaffirmed by the Supreme Court of Appeal in *Van Rensburg NO and Another v Naidoo NO and Others; Naidoo NO and Others v Van Rensburg NO and Others* [2010] 4 All SA 398 (SCA), which endorsed the precedent established in *Malan* and confirmed that restrictive title deed conditions take precedence over municipal planning approvals.

Upon registration against the title deed, restrictive conditions create real rights that are both contractual and servitudal in nature. These rights bind all successive owners of the property, regardless of their knowledge of the conditions and irrespective of any municipal approvals or zoning permissions that may subsequently be granted.

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The common legal error

Consider this scenario: A developer purchases property zoned for residential use under the municipal zoning scheme, which permits three dwelling units. The municipality approves building plans for a sectional title development comprising 10 units. The developer proceeds with construction, only to face a court application from neighbouring property owners seeking demolition. The reason? The title deed contains a restrictive condition stating: "*Not more than one dwelling house shall be erected on this erf.*"

This is not a hypothetical scenario. In *Van Rensburg*, the Shan Trust obtained municipal special consent to operate a guest house with 11 rooms on property in Summerstrand, Port Elizabeth. However, the title deed contained a restrictive condition limiting the property to residential purposes with only one dwelling house. The Shan Trust had undertaken extensive improvements from the time it became owner, constructing additional buildings beyond the original dwelling house.

In the High Court, Froneman J held that:

> *"It is common cause that this kind of restrictive condition takes precedence over the municipality's zoning and planning schemes ... Consequently, any possible permission by the municipality to build or use buildings contrary to the conditions cannot be lawful."*

The Supreme Court of Appeal endorsed this approach, finding that Froneman J had carefully considered the Shan Trust's conduct over the years and concluded that the Shan Trust had shown flagrant disrespect for the law and the rights of others.

More recently, in *Long v Appeal Authority iro Ndlambe Municipality and Others* [2023] JOL 61956 (ECG), the court set aside a Municipal Planning Tribunal's approval of a guesthouse operation where restrictive title deed conditions had not been removed. The court determined that the Municipal Planning Tribunal's decision was materially influenced by an error of law, specifically its failure to properly appreciate the legal effect of the restrictive title deed conditions in relation to the applicable land use scheme. The court declared the development of a guesthouse on erf 1483 in Kenton-on-Sea unlawful.

The lesson is clear; municipal approval alone does not authorise development that conflicts with registered restrictive title deed conditions.

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Conclusion

The legal framework establishes an unambiguous hierarchy – restrictive title deed conditions supersede municipal planning approvals.

Property owners cannot rely solely on municipal consent to authorise a development that contravenes registered title deed restrictions. Before undertaking any development, it is essential to ensure compliance with both zoning scheme and land use approvals as well as all title deed conditions.

Recent judicial decisions, including *Long*, demonstrate that courts will set aside Municipal Planning Tribunal decisions when they fail to properly consider the binding effect of restrictive title deed conditions, confirming that such decisions constitute errors of law.

Developers must therefore first secure the removal of any conflicting restrictive conditions through the prescribed SPLUMA procedures. Failure to do so may result in severe legal and financial consequences, such as demolition orders, criminal prosecution or enforcement actions by neighbouring property owners.

Adhering to proper procedures is crucial to avoid non-compliance. For guidance on navigating these complexities, property owners should seek professional legal advice.

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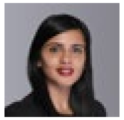

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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