THE BASICS OF TOWN PLANNING

The purpose of this article is to provide some insight into the rezoning process and implications thereof from a conveyancing perspective.

DUE DILIGENCE

The first step any developer will take prior to embarking on the development / acquisition of a property which is intended to be developed, would be to undertake a due diligence in respect of the property.

This will determine the manner in which a property is developed, the time frame involved, and the costs of development. Essentially, this is an exercise that involves investigating the property’s physical and legal development potential.

Examples of the kinds of property characteristics that are investigated would include whether any buildings or structures on the property are protected by our heritage laws, as this would mean that special permits are needed to alter or demolish them. It is also essential to check the current zoning, or permitted land use rights attaching to the property, to ensure that the planned development is catered for in such rights.

If the existing zoning does not permit the planned development, then a rezoning will be necessary, which takes approximately 18 months, and can, if there are objections and appeals, take up to 4 years. There are many other very important aspects of a due diligence that should be investigated before beginning development planning.

There is a body of law that governs the lawful use of all parcels of land in South Africa. This body of law can be divided into four main categories. These are town planning laws, environmental laws, heritage laws, and common law restrictions on land use.

TOWN PLANNING SCHEMES

A municipality is entitled in terms of the Municipal Systems Act (No 32 of 2000) to create legislation pertaining to its designated area. A town planning scheme is just one example of the legislation that municipalities create by way of the powers granted to them by the Act.

The purpose of a town planning scheme is to enable the comprehensive management of all property and related public sector functions across a municipality. It is the responsibility of the municipality to enforce compliance with the town planning scheme and to carry into effect the provisions set out therein. There are thus various town planning schemes as each municipality has one (or more) and they only apply to a certain area. The scheme applicable to the property to be developed needs to be obtained. They are available for inspection at your local municipality.

The town planning scheme will set out what the default land use rights are for all properties situated within the jurisdiction of the local municipality. There are three columns set out in every town planning scheme. The first tells you what the permitted land use rights are for that property; the second tells you what kind of land use rights the property does not have, but which you could apply to the municipality for consent to obtain; and the third tells you what kinds of rights the property does not have.

AMENDING LAND USE RIGHTS

A property’s ‘default’ land use rights are contained in the applicable town planning scheme. These town planning schemes essentially dictate what uses a piece of land can lawfully be put to. If an owner wants additional rights or different rights to use the land in a manner other than prescribed by the scheme, an application can be lodged to apply for these rights.

If this application is granted it will result in an amendment to the ‘master’ town planning scheme, which we refer to as an amendment scheme. Every property that acquires different land use rights by way of an application thus has its own amendment scheme approved for it, giving it different rights to those prescribed in the applicable town planning scheme.
Application can be made by an owner or a person acting on behalf of an owner to amend land use rights. The municipality’s Land Use and Management (also known as ‘Town Planning’) department decides on the applications after having circulated them for comment to the relevant internal departments that provide services within the municipality’s jurisdiction. A decision is then made to deny or grant the application in whole or in part, sometimes on certain conditions, which may (and often) include the payment of amounts for engineering contributions, or to deny it. An appeal can be lodged if a person is dissatisfied with the initial decision.

When the applicant is happy with the decision, he submits documents called “MAP3’s” which depict what the amendment to the town planning scheme will look like – this is the draft amendment scheme. When the municipality is satisfied that all conditions prescribed by it and by law have been complied with, it publishes a notice advertising to the public that the land use rights applicable to the property have been amended. This is called ‘promulgation’. It is only on promulgation that an amendment scheme comes into effect and the additional/different land use rights might be used.

CONSENT USE AND REZONING
There are two main kinds of applications. The first is an application for consent rights; in this kind of application, the applicant is applying to the local authority to grant consent to use the land in a particular way. This kind of application can only be brought where the town planning scheme that governs the property states that it is possible to apply to the municipality for such consent rights.

If there is no option to apply for consent rights, and the existing land use rights do not cater for the proposed development, then it will be necessary to make the second type of application, which is called a rezoning application. In this type of application, the applicant applies to change the zoning or the set of land use rights that apply to the property in terms of the town planning scheme, to another set of land use rights that will cater for the proposed development.

For example, if you own a piece of land and it is zoned as residential, then you would be permitted to build residential dwellings on the property, subject to other limitations, such as the number of residential dwellings, building line restrictions, how much of the erf is covered by buildings, amongst others. If you wanted to convert your home into a Bed and Breakfast, you would normally need to apply for consent use from the municipality to do so. This is because by converting to a Bed and Breakfast, the usage of the property is changing, although slightly, from ‘residential for private purposes’, to ‘residential for partly commercial purposes’. If you wanted to convert the whole of your home into offices, however, you would need to rezone your property entirely, from Residential zoning, to Business zoning, because the Residential zoning would not ordinarily allow for your property to be used as offices.

TOWN PLANNERS
In order to make the above applications, the services of a town planner are used. Town Planners are experts in this field of law and know how to motivate an application to rezone as it is often up to them to convince the local authority that you should be entitled to these rights.

In the ordinary course, it can take 3-18 months for an application to be approved. It can take approximately 3 months for a simple application for the removal of title deed conditions; 6 months for a simple and unopposed application for the granting of consent use rights; and 18 months for a simple, unopposed rezoning application. However, if any interested parties object to the application, it could take 2-4 years to finalise. There is no guarantee that you will be afforded any of the rights that you apply for, which is why the town planner’s motivation is so essential to sway the opinion of the local authority.

Town planning decision can be challenged if the outcome is not as desired. A decision taken by the municipality can be taken on appeal. If you are unhappy about a decision taken on appeal, you can apply to the High Court to review the decision of the appeal panel.
OTHER TYPES OF TOWN PLANNING APPROVALS/APPLICATIONS
When rezoning a property, there may be other types of approvals that are required by the local municipality. For example, if you own 5 pieces of land next to each other, but you want to build a shopping centre across all of those erven, the local municipality will not approve your building plans for that shopping centre unless you first notarially tie the erven together. Alternatively, the local municipality may require you to consolidate the five erven. Consolidation is a process whereby several erven are combined into one, larger erf.

The property may also need to be sub divided which results in one erf, becoming two or more erven. This might be necessary in order to facilitate the opening of a township, or to create a cluster or Homeowner’s development.

REMOVAL OF RESTRICTIVE TITLE DEED CONDITIONS
The title deed for the property can contain various restrictive conditions, which restrict the owner’s rights to deal with the property. An example would be that not more than one dwelling is permitted on the property.

In the case an application will be made in terms of the Gauteng Removal of Restrictions Act in order to remove these conditions. This application, once granted, results in the publishing of a notice in the Government Gazette. This notice is lodged in the Deeds office together with the title deeds to give effect to the removal.

SERVITUDES
Property owners can further create restrictions by agreement. These agreements once recorded in the Deeds Registry against the title deeds of the Property are called servitudes. An example would be a right of way or encroachment servitude. Once such a praedial servitude registered, the servitude will be binding on future owners of the Property.

ENFORCEMENT OF TOWN PLANNING LAWS
The use of property contrary to its zoning is a criminal offence in terms of our law. This means that a court can convict the property owner or occupier of a criminal offence and sentence them to imprisonment or a fine, not exceeding the limits set out in the relevant town planning laws. In addition, contraventions of the zoning laws can lead to a court application being brought by the local municipality to prevent such an owner or occupier from continuing to use the land unlawfully. The municipality is responsible for enforcing zoning laws and to ensure that property owners and occupiers use land in a manner that is lawfully permitted.

If an aggrieved neighbour or interested party wants to compel compliance with any town planning laws, the town planning or land use management department for the area concerned can be contacted to lodge a complaint. The local authority would then be obliged to investigate the matter and if they find that the land use is unlawful, to enforce compliance with the town planning laws within the parameters of the powers afforded to the municipality in terms of such laws. Alternatively, you can approach a town planner to assist you in establishing the permitted use of a property and if the use is unlawful, what other options are available to you to enforce compliance with the laws.

CONCLUSION
There are various laws that affect the town planning process. As a result, the assistance and advice of a town planner and or attorney should be utilised.