

Building Plans

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INTRODUCTION

This article serves to give some insight into the issue of building plans related to the sale of residential immovable property.

COMMON MYTHS

- Myth: it is unlawful/illegal for a property to be transferred without approved building plans in place for the property;
 - *Reality: there is no legal requirement that requires estate agents, conveyancers, the deeds office, the municipalities or the banks to ensure that up-to-date approved building plans are in place for a property at any stage before, during or after the registration process.*
- Myth: the municipalities are obliged to keep copies of the approved building plans on file for every property that falls within its limits.
 - *Reality: the municipalities are under no legal obligation to keep building plans on file.*

LEGAL POSITION RE BUILDING PLANS

Previous Law

The prior law is found in the case of *Van Nieuwkerk v McCrae 2007(5) SA 21 W*. In this case, the court held that in the sale of residential property a buyer is entitled to assume that the building on a property was erected in compliance with all statutory requirements. This assumption was held to be implied in any agreement relating to the sale of property.

It was further held that it was an implied (or at least a tacit term) of such an agreement that alterations to the building also complied with the statutory requirements.

Current Law

The current law is set out in the case of *Odendaal v Ferraris (422/2007) [2008] ZASCA 85* where the court held that a lack of approved building plans for a property constitutes a latent defect. If the seller is unaware of the lack of approved plans, he will not be able to disclose this and the voetstoots clause will protect him.

Please refer to our separate article in regard to latent and patent defects for the full facts.

BUILDING PLAN CONSIDERATIONS

- There are various approaches taken by different estate agencies.
- Some estate agents require sellers to warrant that the approved plans are in place.
- Others set out a yes/no/unsure approach in the disclosure document.
- Others avoid the issue.
- To ask or not to ask – that is the question.
- In our opinion, it is better to determine the issue with certainty.
- If Sellers are aware that there are no approved plans, written disclosure is necessary.
- If the Seller did the alterations, the seller must be aware of the existence of the approved plans.

SOME HUMAN FACTS TO CONSIDER

- Sellers do not take the warranty or the disclosure document seriously enough.
- Sellers do not understand the implications of giving a warranty regarding building plans without properly checking first.
- Sellers often assume they have approved plans without actually checking they have these / that they are approved.
- Sellers often operate on assumptions that the “plans must be approved” / “the architect has them” / “the city council has a copy – it’s their job” / “there is an approved set in the drawer” / “the seller gave us approved plans when we bought the house which we assume are correct”.

- Sellers take the view: “the plans are approved even though they don’t reflect all the improvements: but are still correct as they are approved”.
- Estate agents need to protect sellers from the above assumptions.
- Best practice: Purchasers must be given a copy of the building plans before the agreement of sale is signed and a recordal in regard to these plans is made in the agreement:

“The Purchaser records having been given a copy of the approved building plans for the improvements on the Property and is satisfied with such plans”

BUILDING PLANS AND BANKS

- Not all bonds have a condition that the plans be approved.
- Banks impose this condition if they are of the view there are alterations without approved plans.
- Failing a condition set out in the bond grant, the approved plans are not part of the bond process.
- If plans are a condition of the bond, properly approved copies must be given to the bank to fulfill the condition before registration of transfer can take place.

SALE AGREEMENT CLAUSES

Plans Before Registration

The seller undertakes to at the Sellers cost, prior to registration of transfer in the Deeds Registry, provide the purchaser with building plans to the property, which plans must correctly reflect all improvements on the property and must further be approved by the City Council. Registration of transfer will be delayed until the Seller has complied with the above obligation.

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In the event that the plans are not approved prior to registration of transfer at the Deeds Registry, the parties agree that registration of transfer shall be effected by the conveyancers in the deeds registry notwithstanding that the plans are not approved subject, however, to the following conditions:

- *The seller shall provide written confirmation that the appointed architect has been paid in full.*
- *The appointed architect shall provide written confirmation that in the architect’s professional opinion, there are no impediments to the successful registration if the plans post registration.*

- *The conveyancers shall retain the sum of R_____ after the registration of transfer in trust until the successful registration of the plans with the local authority, at which time the funds will be released to the seller with interest accrued.*

CONSIDERATIONS ARISING FROM THE ABOVE

- Plans after registration, is only possible where the bank has not imposed a bond condition regarding such plans;
- Plans to be provided after registration has various implied risks;
- To mitigate the risk, an architect must look at the matter fully and provide confirmation in writing that there will be no issues;
- Be cautious in regard to building line restrictions where the neighbours refuse to co-operate;
- Best Practice: have the building line issues resolved before registration;
- Be cautious of the “bulk” issue. Town planning allows for a certain “bulk” and “coverage”. Plans can’t be approved where there is not enough bulk;
- Be cautious of “town planning” issues such as zoning: Certain alterations such as additional dwellings / garage conversions require special consents / zoning

CONCLUSION

It is best to take advice from an architect or attorney if unsure around this issue of building plans. Mistakes can be costly and create unnecessary delays.



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