

# **The Right to a View: Common Law, Legislation and the Constitution**

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## **Declaration**

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Carolina A Koch, December 2012, Stellenbosch

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## Summary

South African law does not recognise an inherent right to the existing, unobstructed view from a property. Nevertheless, seemingly in disregard of this general principle, property owners often attempt to protect such views and courts sometimes in fact grant orders that provide such protection. This dissertation aims to establish whether South African law does indeed not acknowledge a right to a view and whether there are any exceptions to the general rule against the recognition of the right to a view.

The principle that the existing view from a property is not an inherent property right is rooted in Roman and Roman-Dutch law. This principle was received in early South African case law. Inconsistency in the application of the principle in recent case law renders its development uncertain. An analysis of recent decisions shows that the view from a property is sometimes protected in terms of servitudes or similar devices, or by virtue of legislation. In other instances, property owners attempt to prevent the erection of a neighbouring building that will interfere with their existing views, based either on a substantive right or an administrative shortcoming. When the protection of view is based on a limited real right (servitudes or similar devices) or legislation, it is generally effective and permanent. Conversely, when it is founded on a substantive right to prevent building on neighbouring land or an administrative irregularity rendering a neighbouring building objectionable, the protection is indirect and temporary.

A comparative study confirms that the position regarding the protection of view is similar in English and Dutch law. Constitutional analysis in terms of the methodology developed by the Constitutional Court in *FNB* indicates that cases where view is protected are not in conflict with section 25(1) of the Constitution of the Republic of South Africa, 1996. The investigation concludes with an evaluation of policy considerations which show that the position with regard to a right to a view in South African law is rooted in legitimate policy rationales.

## Opsomming

'n Inherente reg op die bestaande, onbelemmerde uitsig vanaf 'n eiendom word nie deur die Suid-Afrikaanse reg erken nie. Desnieteenstaande poog eienaars dikwels om die uitsig vanaf hul eiendomme te beskerm en soms staan die howe bevele tot dien effekte toe. Dit skep die indruk dat die Suid-Afrikaanse reg wel die bestaande uitsig vanaf 'n eiendom as 'n inherente eiendomsreg erken of dat sodanige uitsig minstens onder sekere omstandighede beskerm kan word. Hierdie verhandeling het ten doel om onsekerhede betreffende die algemene beginsel oor 'n reg op uitsig uit die weg te ruim en om lig te werp op gevalle waar 'n onbelemmerde uitsig wel beskerm word.

Die Romeinse en Romeins-Hollandse reg het nie 'n reg op uitsig erken nie. Hierdie posisie is deur vroeë regspraak in die Suid-Afrikaanse regstelsel opgeneem. 'n Onderzoek na latere Suid-Afrikaanse regspraak toon egter aan dat howe wel onder sekere omstandighede, skynbaar strydig met die gemeenregtelike beginsel, beskerming aan die onbelemmerde uitsig vanaf eiendomme verleen. 'n Eerste kategorie sake behels gevalle waar die uitsig vanaf 'n eiendom deur 'n beperkte saaklike reg, in die vorm van 'n serwituut of 'n soortgelyke maatreël, of ingevolge wetgewing beskerm word. In 'n tweede kategorie sake word die beskerming van 'n uitsig deur middel van 'n aanval op die goedkeuring van 'n buureienaar se bouplanne bewerkstellig. Sodanige aanval kan óf op 'n substantiewe reg óf op 'n administratiewe tekortkoming berus. Die onderskeie kategorieë verskil wat betref die doelmatigheid en omvang van die beskerming wat verleen word. 'n Saaklike reg of wetgewing verleen meestal effektiewe en permanente beskerming. Hierteenoor het 'n aanval op die goedkeuring van 'n buureienaar se bouplanne hoogstens indirekte en tydelike beskerming van die uitsig tot gevolg.

Regsvergelyking bevestig dat die Engelse en Nederlandse reg die Suid-Afrikaanse posisie ten opsigte van 'n reg op uitsig tot 'n groot mate eggo. Grondwetlike analise aan die hand van die *FNB*-metodologie dui daarop dat die gevalle waar uitsig wel beskerming geniet nie strydig is met artikel 25(1) van die Grondwet van die Republiek van Suid-Afrika, 1996 nie. Bowendien regverdig beleidsgronde die behoud van die huidige beginsel in die Suid-Afrikaanse reg.

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# Chapter 1:

## Introduction

### 1 1 Introduction

In a recent decision by the Eastern Cape High Court, *Ndlambe Municipality v Lester and Others*,<sup>1</sup> (“*Ndlambe Municipality*”) the court ordered the demolition of the first respondent’s primary residence that obstructed the views from the third respondent’s<sup>2</sup> property. The order is the latest in years of litigation between the first and third respondents, arising from the third respondent’s discontent with its neighbour’s (the first respondent’s) building works. In an attempt to prevent the obstruction of the existing, unobstructed view from its property over the Bushman’s River and the Indian Ocean, the third respondent made numerous applications to have the approval of the first respondent’s building plans set aside and, once building had commenced, to have the building demolished. These applications were not directly based on an alleged inherent right to the existing view from the third respondent’s property. However, it is clear from the decision that the third respondent’s efforts to have the approval of the relevant building plans set aside and to have the building demolished relied on a number of strategies to prevent or at least limit the obstruction of the panoramic views from its property.

The application for the demolition order was made after the first respondent had failed to comply with an earlier court order, directing him to submit amended building

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<sup>1</sup> *Ndlambe Municipality v Lester and Others* (92/2011) [2012] ZAECGHC 33 (3 May 2012).

<sup>2</sup> The third respondent is a registered private company that is the owner of a property adjoining that of the first respondent.

plans that comply with the applicable building and zoning requirements.<sup>3</sup> The court focused its decision on two aspects: firstly the unlawfulness of the first respondent's building, and secondly his neighbour's right to challenge the approval of the relevant building plans to protect its existing view.<sup>4</sup> On the first aspect the court decided that the first respondent's building was an unlawful structure on the basis that he failed to submit amended building plans that comply with the applicable building regulations and zoning scheme, despite previous decisions ordering him to amend the plans.<sup>5</sup> Secondly, regarding the question of whether the third respondent (neighbour) had a right to challenge the approval of the first respondent's building plans to protect the existing views from its property, the court accepted, without analysing the authority on this issue, that the neighbour was entitled to attack the approval of the relevant building plans because interference with the views from its property would be unlawful in neighbour law.<sup>6</sup> The court therefore apparently assumed that a property owner is entitled to object to the approval of a neighbour's building plans not only because those plans failed to comply with the applicable building regulations and zoning scheme, but also purely on the basis that the building works that are proposed in such plans would block the existing views from the aggrieved owner's property.

Having established that it had a discretion in a matter where a demolition order is sought, the court considered whether or not granting such an order would satisfy

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<sup>3</sup> *Ndlambe Municipality v Lester and Others* (92/2011) [2012] ZAECGHC 33 (3 May 2012) paras 35-45.

<sup>4</sup> The issue of demolition of an unlawful structure is not discussed here. In this regard, see J Strydom *A hundred years of demolition orders: a constitutional analysis* (2012) unpublished LLD dissertation University of Stellenbosch.

<sup>5</sup> *Ndlambe Municipality v Lester and Others* (92/2011) [2012] ZAECGHC 33 (3 May 2012) paras 33-36, 51, 53, 76, 92, 101, 104, 109, 111, 112, 116 and 117.

<sup>6</sup> *Ndlambe Municipality v Lester and Others* (92/2011) [2012] ZAECGHC 33 (3 May 2012) paras 15, 21, 22, 34, 39, 86, 88, 90, 92, 111 and 117. See n 10 and n 11 below regarding authority confirming that a property owner does not have an inherent right to the existing view from her property and that a property owner does not usually have a right to be informed of an application for the approval of a neighbour's building plans.

the requirements that it may not cause disproportionate prejudice and that it must be lawful.<sup>7</sup> It ruled that a demolition order would not cause disproportionate hardship and prejudice to the first respondent<sup>8</sup> and that it would give effect to the law and public policy.<sup>9</sup> On the one hand the first respondent acted in flagrant disregard of the applicable building regulations, and on the other the building conflicted with the common law principle that a property owner may not act in such a way as to interfere with the reasonable use and enjoyment of a neighbour's property. Additionally, the first respondent's building constituted an unlawful structure that, if not demolished, would permanently deprive the third respondent of "reasonable views from, and lawful use of, his own property".<sup>10</sup> Accordingly, the court granted a demolition order.

*Ndlambe*, like many similar preceding cases, concerns a property owner's attempt to prevent or at least restrict the erection of a neighbouring building that would obstruct the existing view from her property. Courts are often still approached to protect such views regardless of a series of decisions<sup>11</sup> indicating that in terms of the common law, a property owner does not have an inherent right to the existing, unobstructed view from her property. Attempts to protect existing, unobstructed views from properties are mostly cast in the form of objections against building works

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<sup>7</sup> *Ndlambe Municipality v Lester and Others* (92/2011) [2012] ZAECGHC 33 (3 May 2012) paras 77-118.

<sup>8</sup> *Ndlambe Municipality v Lester and Others* (92/2011) [2012] ZAECGHC 33 (3 May 2012) paras 78-102.

<sup>9</sup> *Ndlambe Municipality v Lester and Others* (92/2011) [2012] ZAECGHC 33 (3 May 2012) paras 102-118.

<sup>10</sup> *Ndlambe Municipality v Lester and Others* (92/2011) [2012] ZAECGHC 33 (3 May 2012) para 117. The court's reasoning indicates, without analysis, that it either ignored or rejected the case law, mentioned in n 11 below, that confirms that a property owner does not have an inherent right to the existing view from her property. It also suggests that a property owner has a right to be informed of a neighbour's application for the approval of building plans, despite several authoritative preceding judgments to the contrary. See *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 45, 55-56 and 130 and the discussion of this case in 3 2 1 and especially Ch 3 n 22.

<sup>11</sup> *Myburgh v Jamison* (1861) 4 Searle 8; *Van der Heever v Hanover Municipality* 1938 CPD 95, and *Dorland and Another v Smits* 2002 (5) SA 374 (C), discussed in Ch 2 and *Clark v Faraday* 2004 (4) SA 564 (C) 575-577; *Muller NO v City of Cape Town* 2006 (5) SA 415 (C) paras 72-74 and *De Kock v Saldanhaabai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006) paras 36-39, discussed in Ch 3.

on neighbouring properties. The aim of these objections is usually that a challenge against approval of the building plans would, if successful, have the effect of preventing or at least temporarily stalling building works that may interfere with the view from a neighbouring property.<sup>12</sup> Accordingly, issues regarding the protection of the existing view from a property still arise and it seems as if the established principle that South African law does not recognise a right to the existing view from a property is often either simply ignored or strategically evaded with attacks against the approval of building plans for a neighbouring property. Despite decisions that have established and confirmed the common law principle that the existing view from a property does not flow naturally from the right of ownership, the uncertainty regarding (or perhaps merely attempts to avoid) the position of a right to a view in South African law therefore persists. The brief discussion above of the *Ndlambe* decision shows that the confusion is probably continued or even exacerbated by the fact that these attacks do not clearly distinguish between objections against building works based purely on the mistaken assumption of an inherent right to preserve an existing view and objections that are founded in procedural problems with the approval of building plans.

## **1 2 Research question**

Case law suggests that at common law, a property owner does not enjoy an inherent, protected property right to continued enjoyment of the existing view from her property, unless that right is secured by way of a registered servitude or a similar

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<sup>12</sup> Case law discussed in Ch 3 indicates that property owners in South African law often attempt to protect the existing views from their properties with attacks on the procedures followed when neighbours' building plans were approved.

right deriving from contract or legislation.<sup>13</sup> However, decisions such as *Ndlambe* create the impression that if the existing, unobstructed view from a property contributes to the use, enjoyment or value of the benefiting property, it may be protected against obstruction by a neighbouring owner's building work, even in the absence of a servitude or similar right specifically created to protect that right. These decisions often do not explain how the objecting neighbour could in effect acquire a right of view over the adjoining land without a servitude or similar device.

If the right to an existing view is protected by a servitude or another similar device, litigation concerning obstruction of the view would usually focus on the validity or interpretation of the servitude or the relevant legislation. However, in the absence of a servitude or similar device, litigation usually assumes the form of an attack against approval of the neighbour's building plans. In a number of cases, courts have faced the possibility of indirectly acknowledging the right to a view by way of attacks against the approval of building plans on the grounds of non-compliance of the plans or the building with applicable building and zoning regulations, or attacks based on procedural irregularities or on the basis of a particular interpretation of section 7(1)(b)(ii)(aa)(ccc) of the National Building Regulations and Building Standards Act 103 of 1977 ("National Building Act").<sup>14</sup> The grounds on which many of these cases were argued and decided suggest that it might be possible, counterintuitively, for a property owner to rely on a right to protect her unobstructed view over neighbouring land even when that view is not protected by a servitude or similar device, in other words to do indirectly what cannot be done directly. There clearly are some instances where a property owner may succeed in protecting the view from her property, at least temporarily, by either relying on a

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<sup>13</sup> See n 11 above.

<sup>14</sup> See n 12 above.

substantive right (for example the right to be informed of a change in zoning) or enforcing procedural rights with regard to the approval of building plans. If a property owner in South African law does not have an inherent right to the existing view from her property, she may therefore nevertheless successfully protect such a view with alternative strategies involving procedural attacks on the administrative approval of building plans relating to neighbouring buildings.

The question, for purposes of this dissertation, is whether this position regarding the indirect protection of the existing view from a property is tenable. To answer this question, several sub-questions must be investigated. Firstly, is it correct that South African common law does not recognise or protect a right to an existing view, unless such a right is specifically protected by a servitude or a similar device? And secondly, if this is indeed the common law position, should it be possible to protect an existing view indirectly through procedural attacks on the approval of building plans? Thirdly, if such an indirect protection of an existing view is possible, when could it work and what are the limits of such protection?

The first step in determining whether the position regarding the protection of the existing view from a property in South African law is tenable is to confirm that at common law, a property owner is indeed not entitled to continued enjoyment of the existing, unobstructed view from her property. This question includes the issue of whether the common law position provides the opportunity to prevent the obstruction of the existing view from a property through the creation of a servitude or a similar device. A further question is whether this position was adopted in early South African law and whether this position is still applicable. Accordingly, the reception of Roman and Roman-Dutch principles in South African law is first considered to ascertain what the current South African common law position is. Secondly, it is necessary to

establish whether the courts have strictly and consistently enforced the common law position in cases concerning the protection of an existing view from a property. An important question in this regard is why the common law position is sometimes disregarded or circumvented and whether the common law position has perhaps been either replaced with a new principle, or effectively changed with the application of numerous exceptions to the original position.

The possibility of protecting the existing view from a property indirectly through an attack on the approval of a neighbour's building plans is specifically considered in this regard. Apart from possible misstatements or misunderstandings of the common law position, case law creates the impression that many recent efforts to protect an existing view assume the form of attacks that focus on the procedure followed in approving building plans, rather than on an inherent right to continue enjoying the existing view.<sup>15</sup> The question in this regard is whether this switch to procedural attacks has had any substantive effect on the common law position. For this purpose, recent case law that seems to ignore or amend the common law position has to be analysed in order to establish whether the procedural attacks on offending building works have had any substantive effect.

Following on from the analysis of the common law and recent case law, it is also necessary to establish whether and to what extent the modern South African law position regarding the protection of the existing view from a property is echoed in other legal systems. A comparative analysis could assist in evaluating firstly whether the South African position protects competing property interests effectively and secondly whether policy shifts are required or indicated.

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<sup>15</sup> See n 12 above.

The next step involves a constitutional analysis of the position in modern South African law. If the default position is indeed that the existing view from a property is not inherently protected as a property right, but it turns out that an existing view may nevertheless be protected by way of a registered servitude, a similar device, or indirectly by procedural attacks on the approval of building plans, then the protection of a view will inevitably constitute a restriction of a neighbouring owner's right to develop (build on) her property. The protection of the existing, unobstructed view from a property by way of any of these strategies may cause a deprivation of a neighbour's right to build and such a deprivation has to be justified in terms of section 25(1) of the Constitution. Accordingly, the protection of the view from one owner's property and the effect that it has on another owner's property entitlements must satisfy the requirements for a constitutionally valid deprivation of property. Constitutional analysis is therefore required to determine whether any amendments of the common law position should and can be justified in terms of section 25.

Finally, policy rationales that may support and explain the common law position and exceptions to this position are examined and the possibility of departing from the general rule in specific circumstances is explored.

### **1 3 Chapter outline**

Addressing the apparently continuing uncertainty regarding the protection of an existing, unobstructed view from a property first of all requires clarification of the position at common law. Judging from the preliminary evidence in case law and despite the position adopted in decisions like *Ndlambe*, the South African common law does probably not acknowledge an inherent right to the existing view from a

property. This hypothesis is explored in chapter 1, where a legal-historical perspective is adopted to establish the common law position pertaining to a property owner's right to a view over adjoining property. This issue is discussed with reference to Roman and Roman-Dutch law as well as the adoption of the common law principle in early South African case law. More recent South African decisions are analysed to determine whether the common law principle is still applicable in modern South African law and if it is, to establish how it has developed since it was adopted in early case law. The origin, adoption and development of devices such as servitudes and restrictive covenants that may specifically be created to entitle a property owner to prevent the obstruction of the existing view from her property are also investigated in the context of Roman, Roman-Dutch, early and modern South African law. The dissertation does not involve a complete legal-historical analysis. Roman and Roman-Dutch law is only investigated briefly and superficially to establish whether the South African position regarding the protection of the existing view from a property is grounded in historical roots and whether these roots may assist in the clarification and development of the principles regulating the protection of an existing, unobstructed view in modern South African law.

Recent South African decisions indicate that courts seemingly ignore, misinterpret or circumvent the general common law principle that a property owner is not inherently entitled to the continued existence of the unobstructed view from her property, since they are apparently willing to protect the existing view from a property in the absence of a clear right, in the form of a servitude or a restrictive covenant, to prevent the obstruction of the owner's view. Furthermore, this unsubstantiated protection often occurs in circumstances where a property owner attacks the approval of a neighbouring owner's building plans on the basis of administrative

shortcomings, which creates confusion regarding the basis of the protection. An analysis of recent case law considers the reasons for the apparent uncertainty and investigates whether an attack on the approval of a neighbour's building plans may effectively and substantively protect the continued enjoyment of the existing view from a property.

Judging from decisions like *Ndlambe*, it seems as if a property owner may have the opportunity to protect, at least temporarily but perhaps even permanently, the existing undisturbed view from her property either by enforcing an apparent substantive right to prevent building works on a neighbouring property, or alternatively with an attack on the approval of a neighbour's building plans, either because the approval process did not comply with building and zoning regulations, or because the plans were approved in terms of an objectionable procedure.

According to these premises, a property owner (A) would have a substantive right to protect the existing view from her property against obstruction caused by building works on a neighbouring property (B) when there is a registered servitude or a similar device that prevents B from developing her property in a way that would obstruct A's existing view. A would also be entitled to temporarily or even permanently protect the existing view from her property if she has a pre-existing property right that entitles her to postpone or even prevent the erection of buildings on B's property.<sup>16</sup> For purposes of this dissertation, a property owner (A) who attacks the approval of a neighbour's (B's) building plans with the aim of preventing B from building in a manner that would interfere with the existing view from her (A's) own property is using what may be considered as an alternative (as opposed to substantive) strategy to protect the existing, unobstructed view from her property. In

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<sup>16</sup> See 3.2.

chapter 3, these alternative strategies are divided according to the different grounds on which they are based, because these grounds probably play a role in how effectively the various attacks protect the existing view from a property.

In some instances, an attack on the approval of a neighbour's building plans is based on a property owner's clear substantive right, in terms of a registered servitude or restrictive covenant, to prevent building works on such a neighbour's property.<sup>17</sup> In other cases, such an attack relies on a pre-existing property right to be informed of, to comment on and sometimes to prevent building on a neighbouring land that would interfere with the existing view from her property.<sup>18</sup> Such a pre-existing right exists when an application for the approval of building plans includes an application for the removal or amendment of a restrictive condition, the re-zoning of a property, a departure from the applicable building regulations or zoning scheme, or if the building plans contravene any applicable legislation. If building plans that involve any of these additional applications or that would contravene legislation were approved without informing an affected property owner or without giving her the opportunity to comment on or to consent to the approval of the relevant application, she may attack the approval of the plans on the ground that she was denied an opportunity to exercise her substantive right to be part of the approval process. Consequently, if a property owner has a pre-existing right to be involved in the approval of a neighbour's building plans she may effectively rely on a substantive ground to prevent the obstruction of her existing view either temporarily or permanently. Unlike a servitude and a restrictive covenant that clearly and directly protect the existing view from a property, an attack on the approval of a neighbour's building plans, although it is based on a substantive right, will protect the existing

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<sup>17</sup> See 2 3 2.

<sup>18</sup> See 3 2.

view from a property indirectly and often only temporarily. Nevertheless, attacks on the approval of a neighbouring owner's building plans that are based on one of these substantive rights to prevent or postpone the approval of the relevant plans differ from other attacks that are purely based on procedural shortcomings in the approval process and yet others where the exercise of a local authority's discretion to approve the plans is attacked.

An attack which is purely based on a procedural irregularity concerns the approval of building plans in the absence of a specific procedural requirement, for example where building plans were approved while there was no building control officer employed by the local authority that approved the plans.<sup>19</sup> Conversely, an attack based on the exercise of a local authority's discretion to approve the relevant plans relies on a specific interpretation of section 7 of the National Building Act.<sup>20</sup> Chapter 3 analyses applicable legislation and case law to determine whether there are instances where the existing view from a property may be protected on any of these substantive or procedural grounds and, if such protection is possible, what it entails and what remedies it provides.

From the analysis of recent case law and applicable legislation, the overview in chapters 2 and 3 should indicate whether it is at all possible to protect an existing view against obstructing building works on neighbouring land. In terms of the hypotheses on which the dissertation is based, such protection should mostly succeed when the view is protected substantively by a registered servitude or a similar device. Apparently, the protection can also sometimes succeed, often probably only temporarily, when the objection is based on a substantive right to be informed of (or to object against) departures from the existing legal situation required

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<sup>19</sup> See 3.3.2.

<sup>20</sup> See 3.3.3.

to make the building possible. In other situations, where the objection against building is based purely on procedural grounds unrelated to any substantive property rights, it seems unlikely that an attack against the building will have more than an incidental, temporary effect of protecting an existing view.

Corresponding problems regarding the protection of an existing view from a property exist in foreign legal systems. A comparative analysis of English and Dutch law is undertaken in chapter 4 to determine whether and how these jurisdictions provide for the protection of the right to a view. The comparative investigation specifically focuses on these two jurisdictions because they are representative of the two main legal traditions, namely civil law and Anglo-American law. Furthermore, English law, which is an example of an uncodified common law system, appears to be useful because of case law on the topic of a right of view that is comparable to South African case law, while Dutch law represents a different modern embodiment of the Roman law tradition that forms the basis of the South African Roman-Dutch law. However, since Dutch law differs from South African law in the sense that it is a codified system, it would be interesting and useful to determine to what extent the Dutch civil code preserved the historic principles relating to the protection of the existing view from a property.

For the sake of demarcating the scope of this dissertation, it is primarily concerned with the position of a right to a view in South African law. English and Dutch law are only discussed insofar as they specifically correspond with or elucidate an aspect that is considered in the discussion of South African law. The comparative analysis undertaken in chapter 4 does not therefore give a complete or even an extensive account of the position of a right to a view in English or Dutch law, or of specific features of the law in these jurisdictions, such as easements, restrictive

covenants, nuisance, praedial servitudes, general provisions of the Dutch civil code, the doctrine of abuse of rights or planning procedures. These features are only considered to the extent that they indicate whether and how the existing view from a property may be protected in the legal systems considered.

Section 25 of the Constitution of the Republic of South Africa, 1996, is aimed at the constitutional protection of property. If the existing, unobstructed view from a property is not protected as an inherent property right in terms of the common law, any substantive right or alternative strategy that may result in the effective protection of one owner's existing view inevitably implies that a neighbouring owner's right to develop or build on her property is thereby limited. If such a limitation constitutes a deprivation of property as contemplated in section 25(1) of the Constitution, the effect that protection of view has on neighbouring owners is regulated by and should be justified in terms of section 25(1). Chapter 5 evaluates the validity of such deprivations in terms of the methodology developed by the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*<sup>21</sup> ("FNB"). The chapter specifically focuses on the different forms that may be adopted by a deprivation caused by the protection of an existing view from a property. The protection of the existing view from a property through servitudes; restrictive conditions that prohibit or restrict building; zoning plans; building regulations and statutory provisions that prohibit or restrict building and procedural attacks on the approval of building plans may all restrict a property owner's right to build on her property. These restrictions may amount to different forms of deprivations of property

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<sup>21</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

interests, and each of them must of necessity comply with the section 25(1) requirements for constitutionally valid deprivations.

Servitudes of view, servitudes not to build higher, and similar restrictive covenants will directly protect the existing view from a property through a real right, based on an initial agreement, that restricts the owner of the servient tenement's right to develop her property. Nevertheless, because the owner of the servient tenement initially agreed to the creation of the servitude or the restrictive covenant, the restriction that it places on her right to develop her property does probably not constitute an arbitrary deprivation of property for purposes of section 25(1) of the Constitution.<sup>22</sup> A building regulation may directly or incidentally prevent the obstruction of the existing view from a property, for example in *Muller NO and Others v City of Cape Town and Another*<sup>23</sup> ("Muller"), where the applicants had the opportunity to permanently or temporarily prevent building works on a neighbouring property that would obstruct the existing view from their property because the neighbour's proposed building would exceed the lawful height limitation.<sup>24</sup> The limitation that a building regulation places on an owner's right to use her property, for instance the restriction on the neighbour in *Muller's* right to build as high as he wanted to, must be analysed in terms of the *FNB* test, with specific emphasis on the aims of the applicable regulatory deprivation. Statutory provisions may also protect the existing view from a property through limitations or prohibitions on building works in a specific area. In *Transnet Ltd v Proud Heritage Properties*<sup>25</sup> ("Transnet"), the first respondent's right to development of her property was restricted by virtue of section 74 of the National Ports Act 12 of 2005 ("National Ports Act"), which created a duty

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<sup>22</sup> See 5 2 3 1.

<sup>23</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) paras 27, 31 and 36.

<sup>24</sup> See the discussion of this case in 3 2 2 3 and 5 2 2 2.

<sup>25</sup> *Transnet Ltd v Proud Heritage Properties* (405/08) [2008] ZAECHC 155 (5 September 2008).

on the National Ports Authority to maintain adequate and efficient lighthouses. Chapter 5 considers whether a statute like the National Ports Act that limits a property owner's right to develop her property (to protect the existing view to or from a specific property or object) deprives that owner of property in a way that is inconsistent with section 25(1) of the Constitution.<sup>26</sup> Furthermore, chapter 5 investigates whether a property owner who relies on the expectation that the existing views from her property will continue to exist insofar as they are protected in terms of the applicable building regulations and zoning scheme suffers a deprivation if there is a change in the relevant building regulations or zoning scheme and, if she does, whether such deprivation is valid in terms of section 25(1) of the Constitution.<sup>27</sup> The temporary or permanent protection of the existing view from A's property through an attack on the approval of B's building plans may also cause a deprivation of B's right to build, for example in *Camps Bay Ratepayers' and Residents' Association v Harrison*,<sup>28</sup> where the first respondent's right to build was temporarily rendered ineffectual because the applicants objected against the approval of her building plans. In chapter 5 it is established whether the (temporary or indefinite) restriction of B's right to use (to build on) her property that is caused by A's objection to B's building plans amounts to a deprivation of B's property rights. The chapter also considers whether such a deprivation would be justified in terms of section 25(1) of the Constitution.

Chapter 6, the final chapter, provides an overview of the conclusions that were reached in the previous chapters, and briefly considers policy justifications for the principle that the existing, unobstructed view from a property is generally not

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<sup>26</sup> See 5 2 3 3. The decision in *Transnet Ltd v Proud Heritage Properties* (405/08) [2008] ZAECHC 155 (5 September 2008) is discussed in 3 2 2 4, 3 2 3, 5 2 2 2 and 5 2 3 3.

<sup>27</sup> See 5 2 3 4.

<sup>28</sup> *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA).

protected as an inherent property right. Policy considerations mentioned or discussed in South African and foreign case law, as well as considerations developed in Law and Economics literature, serve as bases to explain that the principle concerning the protection of the existing view from a property in South African law is rooted in legitimate and rational policy grounds that justify the negative effect that enforcement of the principle has on aggrieved owners deprived of their view over adjoining land.

South African courts are reluctant to protect the existing view from a property as an inherent property right because such protection would be in conflict with certain policy rationales. According to these rationales, a property owner should not have an inherent right to the existing view from her property because the enjoyment of a beautiful view from a property is generally perceived as a merely incidental benefit of property and protection of that incidental benefit would adversely affect neighbouring owners' inherent right to build on their properties. Furthermore, the principle that the right to a view does not flow naturally from ownership ensures the most efficient allocation of resources in terms of Law and Economics theory. In addition to explaining the results from the preceding chapters in terms of these policy considerations, chapter 6 explores the possibility of protecting the existing view from a property in exceptional circumstances where the view contributes to the use and enjoyment of the property.

#### 1 4 Qualifications and definitions

The terminology that is used in this dissertation reflects the phraseology that is used in literature concerning the view from a property.<sup>29</sup> The terms “prospect”, “view” and “outlook” are used alternately in the dissertation. All of these terms refer to the view from an owner’s property, unless it is specifically indicated that reference is made either to one owner’s view onto the property of another, or to the view to a specific (piece of) property. Descriptions like “pleasant prospect”, “undisturbed view” and “pleasing outlook” are sometimes used when the view from a property is considered as an attribute of that property.

This dissertation mainly focuses on the view from an owner’s property over the property of neighbours. “Property”, as it is used throughout the dissertation, is mostly immovable property, with or without a building, and from which an undisturbed view can potentially be enjoyed. However, the relevant property may also be movable or immovable property with a specific function, which requires that the view to it (the property) remains unobstructed, for example an advertising board or a lighthouse. Issues regarding the overlooking of private property and interference with privacy are not considered extensively, since the dissertation is mainly concerned with the protection of the existing view over – and not onto – neighbouring properties. The aim is to establish whether a property owner is generally or in specific circumstances entitled to an unobstructed view without interference by building works on neighbouring properties. It is therefore concerned with the preservation of a specific state of affairs (no or limited building) on a neighbouring property for the purpose of

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<sup>29</sup> For example, P Gane *The selective Voet being the commentary on the Pandects* Vol 2 (1955) 452 translates the word *prospectus*, as used in Voet 8 2 12, as “outlook”, while M Nathan *The common law of South Africa* Vol 1 (2<sup>nd</sup> ed 1913) 510 translated *prospectus* as “view”.

being able to look over or across such neighbouring land and not because such state of affairs on the neighbouring property itself is the object of the enjoyable view.

The undisturbed flow of light, air, the rays of the sun and radio waves to a property relates to an unobstructed view over or across neighbouring properties, in the sense that interference with any of these attributes of a property may also deprive an owner of a previously enjoyed benefit. The flow of light and air to a property is discussed briefly in chapter 2, insofar as it explains the relationship between the perception of and possible protection of an existing, unobstructed view from a property in the context of Roman and Roman-Dutch law. However, the undisturbed flow of the rays of the sun and radio waves are not considered in this dissertation, because, although there may be similarities between the protection of an undisturbed flow of sun and radio waves to a property and the protection of an existing view from a property, these similarities would not be useful in determining the position regarding the protection of an existing view from a property in South African law and the possibility of protecting such a view.

South African administrative law and planning law is only referred to where it is applicable to a specific argument or a particular aspect of the dissertation. Similarly, Law and Economics theory is considered only for purposes of indicating how it may be applied to explain and justify the principles that underlie the position of the protection of the existing view from a property and possible exceptions to these principles. This theory is therefore not explained or applied in a detailed or complete manner.

## Chapter 2:

### The right to a view under the common law

#### 2 1 Introduction

In principle, South African law does not recognise an inherent right to the existing view from a property, because a beautiful view is considered a mere incidental advantage, and since the recognition of a natural right to the view from a property would interfere with neighbouring owners' rights to build on their properties. Despite the absence of a natural right to the existing view from one's property, such view may be protected by way of a servitude or a similar device.<sup>1</sup> Recent case law indicates that courts are sometimes reluctant to apply the principle that the existing view from a property is not inherently protected as a property right when they have to determine whether or not to protect the undisturbed view from a property against building works on neighbouring land.

This chapter focuses on clarifying the South African common law position with regard to the protection of the existing view from a property. It does so by investigating the Roman and Roman-Dutch origins of the justification for both the principle that the existing view from a property is not recognised as an inherent property right and the exception that view may be protected with a servitude or a similar device. Furthermore, reference is made to the application of this rule in South African case law. Although case law shows that this principle is still applicable, it also

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<sup>1</sup> In *Myburgh v Jamison* (1861) 4 Searle 8 a condition was inserted in the transfer deed of a property that prohibited the erection of buildings that would obstruct the view from the appellant's adjacent property. Similarly, a contractual device was employed to protect the unobstructed view over certain properties in *Lewkowitz v Billingham & Co* (1895) 2 Off Rep 36.

indicates that, as is suggested in commentaries<sup>2</sup> on Roman sources, an incidental benefit such as the pleasant view from a property deserves to be protected in certain circumstances.

## **2 2 No inherent right to a view**

### **2 2 1 View as an incidental advantage**

#### *2 2 1 1 South African law*

In South African law, the view from a property is categorised as a “source of delight”.<sup>3</sup> Church and Church<sup>4</sup> state that interferences with certain sources of delight, for example interference with an aesthetically pleasing attribute, are not recognised as nuisance, although they may amount to interference with the comfort of human existence. Consequently, the loss of a pleasant view from a property because of the erection of an unsightly or visually unpleasing structure does not give rise to an actionable nuisance, unless it can be proven that the obstruction of the view causes otherwise actionable damage for the affected owner.<sup>5</sup>

The decision in *Dorland and Another v Smits*<sup>6</sup> (“*Dorland*”) confirms that the view from a property is considered an attribute that is not inherently protected as part of an owner’s right of ownership. In this judgment, the court considered the possibility of protecting visually appealing attributes of properties and concluded that purely

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<sup>2</sup> In D van der Merwe “n Lastigheid in die oorlasreg: Optrede wat uiteraard regmatig is, ongeag die negatiewe gevolge daarvan” (1983) 16 *De Jure* 218-233 at 226-233.

<sup>3</sup> J Church & J Church “Nuisance” in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* Vol 19 (2<sup>nd</sup> ed 2006) para 193.

<sup>4</sup> J Church & J Church “Nuisance” in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* Vol 19 (2<sup>nd</sup> ed 2006) para 193.

<sup>5</sup> J Church & J Church “Nuisance” in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* Vol 19 (2<sup>nd</sup> ed 2006) para 193. See also the discussion of *Dorland and Another v Smits* 2002 (5) SA 374 (C) that follows.

<sup>6</sup> *Dorland and Another v Smits* 2002 (5) SA 374 (C).

aesthetic considerations are irrelevant in common law relating to neighbours and nuisance.<sup>7</sup> The Cape Provincial Division was faced with the question whether or not aesthetic considerations should be regarded as important factors within the context of neighbours and nuisance.<sup>8</sup> This question arose from a dispute about the erection of an electrified security fence, which the appellants erected as a security measure aimed at the protection of their property. The respondent, who lived on the property adjacent to that of the appellants, contended that the fence constituted a nuisance in the sense that it posed a potential danger and that it was aesthetically displeasing.<sup>9</sup>

After the court *a quo* granted an order in favour of the respondent (then applicant), obliging the appellants (then respondents) to remove the security fencing, the appellants appealed to the full bench. Comrie J endeavoured to establish the South African legal position with regard to upholding a property's aesthetic attributes.<sup>10</sup> Unable to find authority that expressed the view that aesthetics is relevant at all, Comrie J warned that, as a matter of policy, courts should not venture into the area of aesthetics.<sup>11</sup> Accordingly, the court concluded that in the common

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<sup>7</sup> *Dorland and Another v Smits* 2002 (5) SA 374 (C) 383.

<sup>8</sup> *Dorland and Another v Smits* 2002 (5) SA 374 (C) 383.

<sup>9</sup> The respondent (then applicant) applied to the court *a quo* for an order seeking to oblige the appellants (then respondents) to remove the security fencing. She was successful. The appellants appealed to the full bench. This discussion will focus on the consideration that the full bench gave to aesthetics in the context of neighbours and nuisance.

<sup>10</sup> *Dorland and Another v Smits* 2002 (5) SA 374 (C) 383.

<sup>11</sup> *Dorland and Another v Smits* 2002 (5) SA 374 (C) 383. Neither counsel for the respondent nor Comrie J was able to find authority to confirm that aesthetics are relevant. The judge partly ascribed this to the influence that English law had in this sphere. Comrie J mentioned that neither the *ratio* of *Vanston v Frost* 1930 NPD 121, nor that of *Paolo v Jeeva NO and Others* 2002 (2) SA 391 (D) directly relates to the present matter. According to Comrie J, because of the subjective and personal nature of aesthetics, courts should steer clear of adjudicating upon such considerations. He made reference to the idea of *gustibus non est disputandum*, translated by VG Hiemstra & HL Gonin *Trilingual legal dictionary* (3<sup>rd</sup> ed 1992) 175 as "tastes differ". The Afrikaans translation, "oor smaak val daar nie te twis nie", gives a wider definition, indicating that since tastes differ, it is not worth fighting about. Comrie J also referred to the decision of the California Court of Appeal, third district, in *Oliver et al v AT&T Wireless Services et al* (1999) 76 Cal App 4th 521 (90 Cal Rptr 2d 491), where it was explained why it is undesirable for aesthetic considerations to enjoy protection:

"Otherwise, one person's tastes could form the basis for depriving another person of the right to use his or her property, and nuisance law would be transformed into a license to the courts to set neighborhood aesthetic standards."

law relating to neighbours and nuisance, purely aesthetic considerations are irrelevant.<sup>12</sup> The decision in *Dorland* confirms the general position in South African law regarding the protection of the view from a property, namely that a property owner does not have a right to the existing, unobstructed view from her property. It also provides one of the justifications for not recognising an inherent right to the view from a property, namely that view is a purely aesthetic attribute of property that courts should refrain from adjudicating upon for fear of imposing unreliable subjective impressions by force of law.

Knobel<sup>13</sup> criticises the *Dorland* decision for excluding the possibility that interferences with purely aesthetic property attributes may constitute nuisance. He argues that there may be instances, for example where a property owner specifically builds on her property to obstruct the view from her neighbour's property, where South African courts should adjudicate the matter on aesthetic considerations. In such circumstances, the lawfulness of interference with a property owner's visual enjoyment of her property should be determined by considering whether the conduct that caused the interference was objectively unreasonable. Scott<sup>14</sup> supports Knobel's criticism of the judgment on the point that the ruling deemed aesthetic considerations irrelevant in the context of neighbour law and nuisance. She agrees that aesthetic considerations may in some instances form a basis for nuisance liability and that reasonableness should be the deciding factor when determining the lawfulness of interferences with aesthetic property attributes.

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<sup>12</sup> *Dorland and Another v Smits* 2002 (5) SA 374 (C) 383. The appeal succeeded. Although this discussion only focuses on the issue regarding aesthetics and nuisance, the court's decision to order that the appeal should succeed was based on the argumentation of other submissions as well.

<sup>13</sup> JC Knobel "Inbreukmaking op die estetiese as oorlas: *Dorland v Smits* 2002 5 SA 374 (K)" (2003) 66 *THRHR* 500-505.

<sup>14</sup> S Scott "Recent developments in case law regarding neighbour law and its influence on the concept of ownership" (2005) 16 *Stell LR* 351-377 at 356.

## 2 2 1 2 Roman law

The idea that certain aspects of a property are purely delightful attributes or benefits originated in Roman law, where a distinction was made between acts that cause damage for a property owner and acts that merely interfere with an incidental advantage of property. This distinction resulted in the recognition of certain exceptions to the rule that acts that have a detrimental effect on others are unlawful, which were based on the logic that not all property attributes form an integral part of property ownership. By this logic, not all interferences with property are necessarily unlawful. For example, interference with the flow of water or light to a neighbouring property was seen as depriving a property owner of a mere incidental benefit not forming part of the core rights inherent in property ownership that, despite previous enjoyment, was therefore regarded as lawful.<sup>15</sup>

According to the *Digest*, the natural flow of water to a property was purely a benefit for the property owner, the loss of which was not actionable.<sup>16</sup> This is illustrated by the fact that, although a property owner in Roman law could institute the *actio aquae pluviae arcendae* when acts performed on a neighbouring property, for example the erection of a building, interfered with the natural flow of water to her property,<sup>17</sup> she could only institute this action if the interference with the flow of water would cause damage to her property. For example, this action would be available if an interference caused water to flow faster or stronger and consequently cause

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<sup>15</sup> *D* 39 2 26 and 39 3 1 21.

<sup>16</sup> *D* 39 3 1 21 and *D* 39 2 26; see D van der Merwe “n Lastigheid in die oorlasreg: Optrede wat uiteraard regmatig is, ongeag die negatiewe gevolge daarvan” (1983) 16 *De Jure* 218-233 at 220.

<sup>17</sup> The *actio aquae pluviae arcendae* is treated in *D* 39 3 1. D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD thesis University of Pretoria 1982) 3-20 gives a detailed discussion of this action, while M Kaser *Roman private law* (transl R Dannenbring, 2<sup>nd</sup> ed 1968) 98 refers to it as part of the law that governs neighbour relations that originated during the early Roman period.

damage to a property, but not if the interference merely prevented the water to reach (and therefore benefit) such a property.

A Roman property owner also had the *cautio damni infecti*<sup>18</sup> at her disposal. This remedy protected the owner of immoveable property against danger that might stem from a derelict neighbouring property.<sup>19</sup> It allowed an owner to obtain security from her neighbour if she feared that a dilapidated building on her neighbour's property posed a threat to her own property. Nevertheless, this protection was not available to an owner who feared that she might suffer damage because of interference with the supply of natural light to her property.<sup>20</sup> The justification given for this exception is that the supply of light to a property was merely an incidental benefit that the owner enjoyed. An act through which the supply of light to a property was cut off was not unlawful since it only ended the enjoyment of a prior incidental benefit and did not cause damage.<sup>21</sup>

Despite the fact that there is no clear indication of a specific principle regarding the protection of the existing view from a property in Roman law, landowners could not build structures purely to obstruct a view. A *constitutio* that Justinian issued in

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<sup>18</sup> *D* 39 2 deals with the *cautio damni infecti*.

<sup>19</sup> The remedy of *cautio damni infecti* afforded a property owner protection against a defective building. M Kaser *Roman private law* (transl R Dannenbring, 2<sup>nd</sup> ed 1968) 98-99 discusses the application and operation of the *cautio damni infecti*. He explains that, in instances where a neighbour refused to give security for possible damage that might be caused by her dilapidated building, the praetor granted the owner of the threatened property detention of the dilapidated land (*missio in possessionem*). The owner of the threatened property would further be granted bonitary ownership if the neighbour continued to refuse to give this stipulation and, should the neighbour then resist this possessive taking (his taking possession), the owner of the threatened property would be granted an action for damages. JAC Thomas *The Institutes of Justinian: Text, translation and commentary* (1975) 213-214 argues that, in Justinian's time, a distinction was drawn between contracts of private law and praetorian stipulations. He defines the *cautio damni infecti* as a praetorian stipulation that was available in instances where an owner feared that the dilapidated state of another's property threatened to cause damage to her property. In terms of a *stipulatio damni infecti*, as Thomas refers to the *cautio damni infecti*, the owner who feared damage to her property could demand from the owner of the ruinous building a stipulation to compensate for any damage that actually occurred. Should the latter owner refuse to give such a stipulation, the complainant could seek an interdict to enter upon the offending land. See also A Rodger *Owners and neighbours in Roman law* (1972) 41.

<sup>20</sup> *D* 39 2 26.

<sup>21</sup> *D* 39 2 26. D van der Merwe "n Lastigheid in die oorlasreg: Optrede wat uiteraard regmatig is, ongeag die negatiewe gevolge daarvan" (1983) 16 *De Jure* 218-233 at 222.

537 is an example of an instance where the view from a property was indeed protected in Roman law. This provision stipulated that a fine of ten pieces of gold could be imposed on a person who erected a structure in Constantinople with the purpose of inconveniencing her neighbour by obstructing her view to the ocean.<sup>22</sup> It was aimed at the protection of the view from one owner's (A's) property in instances where a neighbour (B) abused the right to build on her property only to harm A by obstructing her view.<sup>23</sup>

### 2 2 1 3 Roman-Dutch law

Roman-Dutch jurists received and applied the Roman law distinction between acts that cause damage for a property owner and acts that merely deprive owners of previously enjoyed incidental benefits.<sup>24</sup> This is illustrated by the fact that in Roman-Dutch law, like in Roman law, the remedies *operis novi nuntiatio* and *cautio damni infecti* did not apply in instances where a property owner suffered the loss of a merely incidental benefit that she previously enjoyed, for example when the natural flow of water or light to a property was disturbed.<sup>25</sup> Voet explains this position as follows:

<sup>22</sup> N 63; see D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD thesis University of Pretoria 1982) 81 and D van der Merwe "n Lastigheid in die oorlasreg: Optrede wat uiteraard regmatig is, ongeag die negatiewe gevolge daarvan" (1983) 16 *De Jure* 218-233 at 222.

<sup>23</sup> D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD thesis University of Pretoria 1982) 81 adds that the idea of an "abuse of right" is apparent in such an instance. This comment confirms that it is not so much the interference with the one owner's comfortable enjoyment of her property (the obstruction of her view of the ocean) that is prohibited, but rather the other owner's abuse of the right to make use of her property in an ordinary sense.

<sup>24</sup> W Freedman "Paradise lost? The obstruction of a pleasant view and the law of nuisance" in SV Hoctor & PJ Schwikkard (eds) *The exemplary scholar: Essays in honour of John Milton* (2007) 162-184 at 165-167.

<sup>25</sup> Voet 39 1 1. According to Voet 39 2 5, an owner whose flow of water or natural light to her property has been interfered with by a neighbour's actions did not have a right to claim security for anticipated danger under Roman-Dutch law.

“If a person when building on his own ground darkens the lights of a neighbour to whom he owes no servitude, he is understood to have acted rightfully. So also it is if by digging a well on his ground he cuts the springs of water which provide water for the well of another, and thus the position of his neighbour is worsened. The reason is that one ought not to be regarded as incurring damage when he is prevented as it were from enjoying a benefit which he was hitherto enjoying; and it makes a great difference whether a person incurs damage, or is prevented from enjoying a benefit which he was hitherto receiving. The enforcement of a right which one possesses involves no wrong.”<sup>26</sup>

The beautiful view from a property was not specifically categorised as an incidental advantage in Roman law, but there are indications that the enjoyment of an unobstructed view from a property was indeed considered a merely incidental benefit in Roman-Dutch law. Although the obstruction of a pleasant view is not explicitly mentioned when Voet refers to the diversion of the natural flow of water and the elimination of air or light to a property as the loss of benefits that property owners previously enjoyed,<sup>27</sup> he encourages one to apply the same principles to a servitude of prospect as those applicable to a servitude of the free flow of light and air:<sup>28</sup>

“The servitudes of outlook and of not having outlook obstructed (*prospectus, et ne prospectui officiatur*) correspond in most things with the right of letting in openings for light and air and of not having such openings obstructed.”<sup>29</sup>

Furthermore, Voet categorises the blocking of openings for light and air together with outlook when he discusses the *servitus altius tollendi*.<sup>30</sup> This shows that Voet probably reasoned that the same rules that applied to openings for light and air should apply to the existing view from a property and that the obstruction of a

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<sup>26</sup> Voet 39 1 1, as translated by P Gane *The selective Voet being the commentary on the Pandects* Vol 6 (1957) 2.

<sup>27</sup> Voet 39 1 1.

<sup>28</sup> Voet 8 2 12.

<sup>29</sup> Voet 8 2 12, as translated by P Gane *The selective Voet being the commentary on the Pandects* Vol 2 (1955) 452.

<sup>30</sup> Voet 8 2 6.

pleasant view was, like the diversion of the flow of water and the elimination of the supply of light to a property, merely an interference with a previously enjoyed benefit.

The Roman law distinction between the loss of a merely incidental advantage that a property owner enjoys and real damage that she may suffer was thus received and applied in Roman-Dutch law. The Roman-Dutch rule that the view from a property is, like the flow of water, air and light, considered a mere delightful attribute of property applies in South African common law. Because of this categorisation, view is not inherently protected in South African law and consequently its obstruction is not actionable.

## **2 2 2 The right to build higher**

### *2 2 2 1 Roman-Dutch law*

The recognition of a general right to the protection of existing, undisturbed views from properties in Roman-Dutch law would have created difficulties for the exercise of a landowner's right to use her property for building purposes. According to Grotius, the right to build on one's property had a very wide scope:

"The air vertically above his own land every one may lawfully use for building purposes without any limit as to height, but in length and breadth not beyond his own land."<sup>31</sup>

He corroborated in a later passage:

"For by the common law every one may build on his own ground to any height he pleases, even though his neighbour may be inconvenienced thereby."<sup>32</sup>

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<sup>31</sup> Grotius 2 1 23, as translated by AFS Maasdorp *The introduction to Dutch jurisprudence of Hugo Grotius* (3<sup>rd</sup> ed 1903) 43.

In principle, this was an unrestricted entitlement that inherently formed part of property ownership. This entitlement implied that a property owner did not have a right to the existing view from her property, since her neighbour was entitled to erect structures even if they would interfere with such a view. Nevertheless, this freedom could be limited by servitudes<sup>33</sup> and therefore the principle that a property owner may build as high as she wanted to on her property did not place an absolute prohibition on the protection of the existing view from a property.

## 2 2 2 2 South African law

In *Van der Heever v Hanover Municipality*,<sup>34</sup> Jones J held that a property owner could build as high as she wants on her property and that she may plant trees if that is her desire. In this case the Cape of Good Hope Provincial Division was faced with

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<sup>32</sup> Grotius 2 34 19, as translated by AFS Maasdorp *The introduction to Dutch jurisprudence of Hugo Grotius* (3<sup>rd</sup> ed 1903) 149. This rule flows from the maxim *cuius est solum, eius est usque ad coelum et ad inferos*. According to PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5<sup>th</sup> ed 2006) 92, this rule can be translated as "the owner of the land is the owner of the sky above and everything contained in the soil below the surface..." and it reflects the idea that ownership is an unrestricted right, a *plena in re potesta*. In CG van der Merwe & MJ de Waal *The law of things and servitudes* (1993) 104-105, Van der Merwe defines the *cuius est solum* maxim by stating that "[i]n terms of the ... maxim ... a landowner is deemed to be not only owner of the surface of the land but also of the space above the land and anything attached to or beneath the surface of the land". (Van der Merwe mistakenly uses the word *interos*, and not *inferos* like Badenhorst, Pienaar and Mostert). With regard to this principle, Van der Merwe refers the reader to Grotius 2 1 23 and to *Rocher v Registrar of Deeds* 1911 TPD 311, where, at 315, Mason J applied this principle to the case before him. The principle *superficies solo cedit* relates to the *cuius est solum* principle. According to the rule *superficies solo cedit*, a building forms part of the land that it was erected on. M Kaser *Roman private law* (transl R Dannenbring, 2<sup>nd</sup> ed 1968) 111 argues that this principle, which originated in Roman law, illustrates that a composite thing forms a whole, which is capable of vindication, because the principle implicates that a landowner can only vindicate the building together with the land. PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5<sup>th</sup> ed 2006) 147 define *superficies solo cedit* as a common law principle in terms of which "buildings and other structures become the property of the owner of the land on which they have been built or erected". M Kaser *Roman private law* (transl R Dannenbring, 2<sup>nd</sup> ed 1968) remarks that, contrary to the classical *superficies solo cedit* rule, Western vulgar law in the post-classical period of Roman law allowed for a person, who built on the private property of another with the consent of the landowner, to become owner of the building she erected.

<sup>33</sup> At the end of Voet 39 2 5 it was stated that the free flow of natural light and the flow of springs of water to one's well could be protected by servitudes. A servitude *altius non tollendi* could have prohibited the owner of a servient tenement to build higher, while a servitude *prospectus, et ne prospectui officiatur* might also have had this effect in order to serve its aim of protecting the prospect from the dominant tenement.

<sup>34</sup> *Van der Heever v Hanover Municipality* 1938 CPD 95.

a question pertaining to the natural flow of light to a home. Although the judgment concerns the flow of light to a property and not the enjoyment of the view from a property, the *ratio decidendi* may have certain implications for a property owner's legal position with regard to the view from her property. Jones J argued:

"It is perfectly clear that the owner of property ... is entitled to build as high as he likes on his land, and he is entitled to plant trees on the land, and if the building or trees exclude light or sunshine from the property of another person, it seems to me that that person is remediless, unless it can be shown that his rights have been in some way or other infringed upon ..."<sup>35</sup>

This excerpt confirms that a property owner may use her property as she sees fit, and that she may specifically build as high as she desires. It also clarifies the opposing rights and entitlements of neighbouring owners by stating that the owner whose property is deprived of light or sunshine because of building works on the neighbouring land is remediless. By implication, the entitlement of an owner to use (build on) her property trumps the potential entitlement not to be deprived of light or sunshine to one's property. The natural flow of light or sunshine to a property may be analogous to the view from a property. However, the similarities between these property attributes are not considered in this dissertation, except by analogy in instances where such a comparison is necessary for the sake of argument. For the purpose of establishing the position in South African law, discussion of these similarities is limited to pointing out that neither the view from a property nor the natural flow of light or sunshine to a property is an entitlement that implicitly flows from the right of ownership.<sup>36</sup> By ruling that the affected property owner has to prove that her rights have been infringed upon, Jones J effectively confirmed a property

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<sup>35</sup> *Van der Heever v Hanover Municipality* 1938 CPD 95 at 96 per Jones J.

<sup>36</sup> See 1 4.

owner's right to build as high as she wants to and thereby gave a subordinate position to the entitlement or right that might have been affected thereby.

The decision in *Clark v Faraday and Another*<sup>37</sup> ("Clark") confirmed that South African law acknowledges the principle that the owner or occupier of land may use her property in an ordinary and natural manner.<sup>38</sup> In this case, the court considered the erection of a building on a property, which complied with the applicable building regulations, as an ordinary and natural use of a property owner's land.<sup>39</sup> The applicant and first respondent were neighbouring owners of properties situated on the back slope of Table Mountain with views over Hout Bay. After the local authority approved the first respondent's building plans on 3 April 2003, she started with the erection of a house on her property. The applicant, being concerned about the building work and particularly the blocking of the views from his property, approached the Cape High Court about six months later. He applied for an urgent interdict to prohibit the first respondent from continuing with the building work pending the finalisation of an application for the review and setting aside of the local authority's decision to approve the building plans.

The applicant disputed the local authority's approval of the building plans and alleged that, once the first respondent's house was finished, it would block the views from his (applicant's) property and would thereby cause a material diminution in the market value of his property.<sup>40</sup> He reasoned that the local authority was therefore

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<sup>37</sup> *Clark v Faraday and Another* 2004 (4) SA 564 (C).

<sup>38</sup> *Clark v Faraday and Another* 2004 (4) SA 564 (C) 577. The court explained that, should the owner or occupier of property use her property in an ordinary and natural manner and still cause damage to the property of another, she would not be guilty of causing the affected party *injuria* or nuisance.

<sup>39</sup> *Clark v Faraday and Another* 2004 (4) SA 564 (C) 577.

<sup>40</sup> The applicant relied on the Supreme Court of Appeal's decision in *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA), where it was *obiter* held that s 7(1)(b)(ii)(aa)(ccc) of the National Building Act prohibits the approval of building plans if the execution of the proposed plans will cause the obstruction of the view from a neighbouring property, which will cause a derogation in

obliged by section 7(1)(b)(ii)(aa)(ccc) of the National Building Regulations and Building Standards Act 103 of 1977 (“National Building Act”), which prohibits a local authority to approve building plans if it is satisfied that the proposed building will, *inter alia*, “probably or in fact derogate from the value of adjoining or neighbouring properties”,<sup>41</sup> to refuse the approval of these building plans.<sup>42</sup>

Van der Westhuizen AJ rejected this application.<sup>43</sup> He subsequently contemplated the scope of section 7(1)(b)(ii) and held that it must be interpreted restrictively and with regard to its purpose and rationale.<sup>44</sup> A narrow interpretation, he argued, is desirable to prevent this section from having the effect of prohibiting the erection of a building purely because it would cause the obstruction of the view from a neighbouring property. Such an interpretation would be inconsistent with the common law rules that regulate the creation and extinction of praedial servitudes,

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the value of such neighbouring property. See Ch 3 for a discussion of *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA).

<sup>41</sup> Section 7(1)(b)(ii)(aa)(ccc) of the National Building Act.

<sup>42</sup> *Clark v Faraday and Another* 2004 (4) SA 564 (C) 572-573. The respondent’s husband argued (see point 18 at 572) that since there was no servitude or title deed restriction that regulated the matter, and because any sensible person would have realised that a building (within the limits posed by building regulations) might be constructed in front of her property, the value of the applicant’s property would not be diminished should the respondent construct the building within the confines of the relevant building regulations. This point was picked up and later decided in *De Kock v Saldanhaabaai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006) and *Searle v Mossel Bay Municipality and Others* (1237/09) [2009] ZAWCHC 10 (13 February 2009).

<sup>43</sup> Van der Westhuizen AJ, in *Clark v Faraday and Another* 2004 (4) SA 564 (C) 575-576, argued that the decision in *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA) was based on the unlawfulness of the process that was followed when the plans were approved (the fact that the local authority did not comply with the requirement that, in terms of ss 5(1), 6(1) and 7(1) of the National Building Act, a building control officer’s recommendations must be considered before the approval of such plans). However, the decision was not based on the fact that the local authority failed to consider the impact that the approval of the plans would have on the value of the appellant’s property due to the loss of the view from it. Van der Westhuizen AJ concluded that the Supreme Court of Appeal’s interpretation and application of this section did not form part of that judgment’s *ratio decidendi* and was therefore not binding. See also AJ van der Walt *The law of neighbours* (2010) 367-368.

<sup>44</sup> *Clark v Faraday and Another* 2004 (4) SA 564 (C) 576. Van der Westhuizen AJ held that the provisions of the National Building Act should be interpreted and understood within the context of legal principles and rules regulating the development of urban areas.

especially the *servitus prospectus* and the *servitus altius non tollendi*.<sup>45</sup> Furthermore, it would contradict the common law rule that an owner may build as high as she wants to on her own property even if such building work would be to the detriment of a neighbour.<sup>46</sup>

According to the *Clark* court's interpretation of section 7(1)(b)(ii)(aa)(ccc) of the National Building Act, a local authority is compelled to reject building plans if the value of a neighbouring property would diminish because of the specific nature or appearance of the proposed building. However, building plans do not have to be rejected because of the mere presence of a building, even if it would obstruct a neighbour's view from her property. The *Clark* judgment therefore confirmed that a property owner does not commit a nuisance if she erects a building in terms of approved building plans, even if such a building would block her neighbour's view.<sup>47</sup>

### 2 2 2 3 *The implications of the servitus altius tollendi for the right to build*

The *servitus altius tollendi* is a category of servitude that creates a right of raising a building higher.<sup>48</sup> The possibility of creating such a servitude seems to be in conflict with the principle that a property owner is inherently entitled to build as high as she

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<sup>45</sup> *Clark v Faraday and Another* 2004 (4) SA 564 (C) 577. The *servitus prospectus* gives the dominant property owner a right to an unobstructed view, while the *servitus altius non tollendi* prohibits the owner of the servient tenement to build higher. See 2 3 for a discussion of the servitudes that can be created to protect the view from a property.

<sup>46</sup> *Clark v Faraday and Another* 2004 (4) SA 564 (C) 577. With regard to the principle that an owner or occupier of property may use the property even if it causes damage to the property of another, the court referred to *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A), where it was held that such an owner or occupier would not commit an *injuria* or nuisance as long as the land is used in an ordinary or natural manner. Reference was also made to *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) and *Dorland and Another v Smits* 2002 (5) SA 374 (C), where the respective courts agreed with this principle.

<sup>47</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5<sup>th</sup> ed 2006) 127-128 refer to the decision in *Clark v Faraday and Another* 2004 (4) SA 564 (C) when they discuss the rules applicable to the protection of a South African owner's right to the existing view from her property.

<sup>48</sup> Voet 8 2 5. See D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD thesis University of Pretoria 1982) 122-124 and 137-139.

wants to on her property and therefore creates the impression that the view from a property may naturally be protected against building works that have not been “authorised” with a *servitus altius tollendi*.

D van der Merwe discusses the extensive controversy regarding this servitude.<sup>49</sup> He contends that this controversy can be attributed to the fact that the *servitus altius tollendi* seems to contradict the principle of freedom of ownership.<sup>50</sup> In terms of this principle, an owner inherently has the right to do on her property as she pleases and is under no obligation to endure any interference with her property. At first glance it is therefore strange that the Romans acknowledged the *servitus altius tollendi*, since the seemingly obvious interpretation is that it gives an owner the right to build higher on her property, implying that the right to build higher on one’s property does not naturally flow from ownership. If this is the correct interpretation, it would mean that the existence of the *servitus altius tollendi* contradicts the principle

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<sup>49</sup> D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD thesis University of Pretoria 1982) 137-139 gives an account of the different interpretations that was given to the servitude *altius tollendi* by the sixteenth to eighteenth century’s European writers. Van der Merwe distinguishes the works of these writers from that of the Roman-Dutch writers. W Freedman “Paradise lost? The obstruction of a pleasant view and the law of nuisance” in SV Hoor & PJ Schwikkard (eds) *The exemplary scholar: Essays in honour of John Milton* (2007) 162-184 at 166-167 specifically discusses the interpretation that the Roman-Dutch institutional writers gave to a servitude of building higher (*servitus altius tollendi*). He argues that Roman-Dutch jurists overcame the problem of interpreting a servitude *altius tollendi* by arguing that this servitude had one of two functions. Either it vested the owner of the dominant tenement with the power to ignore height limitations imposed by building laws; or it conferred on the owner of the dominant tenement the right to raise the height of a building on the servient tenement. Voet prefers the latter explanation, arguing that a servitude *altius tollendi* did not, as other Roman-Dutch jurists argued, confer on the owner of the dominant tenement a right to raise a building on her own property, because she was already entitled to do so by mere virtue of her ownership.

<sup>50</sup> D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD thesis University of Pretoria 1982) 121-122 mentions that the Commentators, in imitation of the Glossators, acknowledged the principle that every owner has the freedom to do on her property as she likes and explains that this principle implied that an owner did not have to endure any infringement on her property, unless such an infringement was in accordance with an act or permitted in terms of a servitude. D van der Merwe “n Lastigheid in die oorlasreg: Optrede wat uiteraard regmatig is, ongeag die negatiewe gevolge daarvan” (1983) 16 *De Jure* 218-233 at 230 reasons that the difficulty that the European writers on Roman law had in interpreting the *servitus altius tollendi* is ascribable to the fact that they considered this servitude to give an owner a right that was (already) inherent to her right of ownership.

of freedom of ownership.<sup>51</sup> However, according to D van der Merwe, all the interpretations of the *servitus altius tollendi* were aimed at leaving the freedom of ownership principle intact.<sup>52</sup>

Voet<sup>53</sup> discussed three different interpretations of the *servitus altius tollendi*.<sup>54</sup> In the first instance, he referred to the generally accepted opinion that the meaning of this servitude is that neighbours agree to the relaxation of legislation that places height restrictions on buildings.<sup>55</sup> The other two interpretations respectively entail that this servitude gives the owner of the dominant tenement the right to build higher on the servient property<sup>56</sup> or that it obliges the owner of the servient tenement to build higher on her own property<sup>57</sup> – in both instances the buildings are raised to benefit the owner of the dominant tenement. The first interpretation is the most contentious. This discussion will only focus on the controversies regarding this (first mentioned) interpretation.

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<sup>51</sup> D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD thesis University of Pretoria 1982) 122-124, 137-139 and 203-205 mentions that the confusion regarding the interpretation of the *servitus altius tollendi* is apparent in the work of the Commentators, the sixteenth to eighteenth century European writers on Roman law and Roman-Dutch writers. Although many Roman-Dutch writers wrote during the sixteenth to eighteenth century, D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD thesis University of Pretoria 1982) 136 and 157-158 makes a distinction between sixteenth to eighteenth century European writers on Roman law and Roman-Dutch writers whose work dates from the seventeenth and eighteenth centuries. He notes that the latter group often includes writers whose work were not limited to Roman-Dutch law, but also included deliberation of the European *ius commune*. Their works were based on Roman law with a specific focus on the legal practice of the times in which they lived.

<sup>52</sup> D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD thesis University of Pretoria 1982) 139 and 205.

<sup>53</sup> Voet 8 2 5, 8 2 6 and 8 2 7. See also *D* 8 2 1, 8 2 2, 8 3 2 and 8 4 7.

<sup>54</sup> These interpretations can be summarised as follow: The owner of the dominant tenement is allowed to build higher than the height restrictions imposed by law (Voet 8 2 5), the owner of the dominant tenement has the right to build (higher) on the property of the servient owner (Voet 8 2 6), or the owner of the servient tenement is obliged to build higher on her own property (Voet 8 2 7).

<sup>55</sup> Voet 8 2 5. Voet did not support this interpretation.

<sup>56</sup> Voet 8 2 6.

<sup>57</sup> Voet 8 2 7.

Vinnius,<sup>58</sup> amongst others, supported the interpretation that the *servitus altius tollendi* is an agreement between neighbours to relax legislation that restricts the height of buildings. He was of the opinion that, in instances where the law imposed certain limitations on building work with regard to its height, neighbours could create a *servitus altius tollendi* through which the one would give the other the liberty to build higher than the limit that was prescribed by law.<sup>59</sup>

Van der Linden<sup>60</sup> agreed that, through the creation of a *servitus altius tollendi*, one owner could give her neighbour the right to disregard legal restrictions on the height of buildings by building higher. He reasoned that, since legally instituted building regulations<sup>61</sup> were aimed at favouring neighbouring owners, it was possible for the favoured neighbour to surrender such a benefit by allowing her neighbour to build higher than the legally prescribed limitation.<sup>62</sup> The effect of such an agreement would not be that a public right would be opposed, but merely that a privilege that was brought in to favour an owner would not be utilized.<sup>63</sup> Voet<sup>64</sup> rejected this

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<sup>58</sup> Vinnius ad *Institutiones* 4 6 2 n 5, referred to in Voet 8 2 5. See also Van der Linden ad Voet 8 2 5 and D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD thesis University of Pretoria 1982) 203.

<sup>59</sup> Voet 8 2 5.

<sup>60</sup> Van der Linden ad Voet 8 2 5, 8 2 6 and 8 2 7.

<sup>61</sup> Van der Linden ad Voet 8 2 5 argued that the *servitus altius tollendi* presupposes a law, an edict or ordinances of the emperors and that an owner who wished to build higher than the limitation prescribed by one of these laws would need to get the consent of her neighbour (in the form of a *servitus altius tollendi*).

<sup>62</sup> Van der Linden ad Voet 8 2 5 reasoned that one is allowed to make agreements in terms of which a private right would contradict a public right. He referred to *D* 39 1 1 10 together with *D* 2 14 7 14 in this regard. D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD thesis University of Pretoria 1982) 138 and 204, referring to n 8 of Donnellus *Commentarius* 11 5 14, criticises the idea that the *servitus altius tollendi* was available to reverse legal provisions that placed certain restrictions on an owner's freedom to build. He rejects this interpretation, arguing that it is strange that legislation can be reversed by an agreement between two individuals. Although it was possible to disregard legislation by making a private agreement, he further argues that an enactment that restricted the height of buildings was more probably aimed at the preservation of the character of a city or town than at protecting a property owner against the erection of buildings on neighbouring properties that would cut off the flow of light to her tenement. Furthermore, a provision that was instituted by law cannot be abolished by an agreement between private individuals.

<sup>63</sup> Van der Linden ad Voet 8 2 5. Referring to *D* 2 14 38 and *D* 50 17 27, Van der Linden noted that it is not allowable to make an agreement that is contrary to a public right where such a right directly touches a public interest. Although the laws that regulated building works mainly promoted public

interpretation of the *servitus altius tollendi*. He argued that a statutory measure that limits an owner's absolute freedom to build is already a servitude, which means that an agreement to disregard such a statutory servitude is not a further servitude, but merely an agreement to restore the owner's original freedom to build.<sup>65</sup>

D van der Merwe criticises the argument on which Voet relies for rejecting this interpretation of the *servitus altius tollendi*.<sup>66</sup> According to Van der Merwe, Voet creates the fiction that legislation that imposes building restrictions creates servitudes because such a construction enables him to conclude that an agreement to build higher (therefore, an agreement to disregard a statutory servitude) is not a *servitus altius tollendi*, but merely a way of restoring an owner's freedom to build. Van der Merwe suggests what he describes as a "more meaningful" criticism of this

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interests, the predominant concern was that one owner's building works would expose her neighbours to danger.

<sup>64</sup> Voet 8 2 5.

<sup>65</sup> Voet 8 2 5. In order to illustrate that a law that imposes building restrictions is actually a servitude, Voet compared it to a law that Justinian imposed to prohibit a landowner from building in such a way that her neighbour who has a threshing-floor would suffer damage because the wind that is necessary to separate the chaff from the grain would be hindered from reaching the threshing floor. According to Voet, such an act is similar to a servitude, because it limits one owner's "natural freedom" to freely use her property in order to benefit or protect another owner's property. See also D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD thesis University of Pretoria 1982) 203. Interpreting the *servitus altius tollendi* as an agreement to reverse a statutory servitude would, according to Voet, be wrong. Voet 8 2 5 argued that the rule (natural right) that every landowner is entitled to build higher on her property, even if such building work will block her neighbour's openings for light or air or would obstruct her outlook, should be indicative of the way that one should interpret the *servitus altius tollendi*. He rejected the opinion that this servitude entitles a landowner to build higher on her own property (despite legally imposed height restriction that prohibits her to build higher), arguing in Voet 8 2 6 that, since a landowner already has the natural freedom to use the air above her land for building purposes, such an interpretation of the *servitus altius tollendi* is erroneous. See the explanation of Voet's argument by D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD thesis University of Pretoria 1982) 203-204 and 78. According to Van der Merwe, Voet uses the legal concept of a statutory servitude to criticise the idea that the *servitus altius tollendi* gives an owner the right to build higher than what the building regulations, imposed by authority, prescribe. Voet regarded a regulation that imposed such limitations on an owner's absolute freedom to build as a statutory servitude and any agreement to reverse such a servitude not as a further servitude, but rather as an agreement to restore the natural freedom to build. Van der Merwe defines the concept of a statutory servitude as a limitation on an owner's free exercise of her rights of ownership that is created to the benefit of a neighbouring tenement and similar to a servitude, except that it is imposed by an authority instead of being created through an agreement between the parties.

<sup>66</sup> D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD thesis University of Pretoria 1982) 204 reasons that it was unnecessary for Voet to construct legislation that imposes height restrictions as statutory servitudes. He describes Voet's argument as "forced".

interpretation of the *servitus altius tollendi*.<sup>67</sup> His criticism is that this interpretation is wrong, because an agreement between two private individuals cannot undo legislation. He also rejects Van der Linden's<sup>68</sup> opinion that because a statute that prescribes certain height restrictions is specifically aimed at protecting a landowner against certain acts by her neighbour, it is possible for the neighbour to whose advantage the height restrictions were imposed to relinquish this protection.<sup>69</sup> D van der Merwe<sup>70</sup> reasons that a public law rule can only be amended by another public law rule and that it is therefore incorrect to contend that an agreement between private individuals (state subjects) can lead to the abolition of a state-imposed enactment. An agreement between private individuals cannot abolish a public law rule even if such a rule is only aimed at benefitting the person who wishes to abolish it and its abolition would therefore not affect an interest of the public as a whole.

D van der Merwe<sup>71</sup> concludes that the *servitus altius tollendi* does not introduce an incongruity to the principle of freedom of ownership, since all of the interpretations given to it are aimed at preserving the principle of freedom of ownership. If his contention is correct, namely that all interpretations of the *servitus altius tollendi* aim to keep the principle of freedom of ownership intact, no interpretation of this servitude can have the effect of indirectly protecting the view from an owner's property against obstruction by building work on a neighbouring property.

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<sup>67</sup> D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD thesis University of Pretoria 1982) 204; D van der Merwe "n Lastigheid in die oorlasreg: Optrede wat uiteraard regmatig is, ongeag die negatiewe gevolge daarvan" (1983) 16 *De Jure* 218-233 at 230.

<sup>68</sup> Van der Linden ad Voet 8 2 5.

<sup>69</sup> See n 62.

<sup>70</sup> D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD dissertation University of Pretoria 1982) 203-205.

<sup>71</sup> D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD dissertation University of Pretoria 1982) 205.

## 2 3 Protection of an undisturbed view through servitudes

### 2 3 1 Roman and Roman-Dutch law

Roman law provided for the protection of the view from a property through servitudes. A property owner had the opportunity to create a *servitus ne prospectui officiator*<sup>72</sup> that would protect the view from her property against any form of obstruction, or she could create a *servitus altius non tollendi*<sup>73</sup> to ensure that her view is not blocked by the erection of a new or the raising higher of an existing building on the servient tenement.<sup>74</sup>

The same servitudes were available under Roman-Dutch law. Voet<sup>75</sup> referred to the *servitus prospectus, et ne prospectui officiator* as the servitude of outlook and of not having outlook obstructed. He discussed it, together with the servitude of having no outlook, the *servitus non prospiciendi*, within the context of urban servitudes.<sup>76</sup> Although the discussion of the servitude of outlook and of not having outlook obstructed is limited, Voet noted that they closely correspond with rights regarding openings for light and air.<sup>77</sup>

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<sup>72</sup> D 39 1 5pr.

<sup>73</sup> D 39 1 2.

<sup>74</sup> D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD dissertation University of Pretoria 1982) 53 mentions that both the *servitus ne prospectui officiator* and the *servitus altius non tollendi* are negative servitudes. M Kaser *Roman private law* (transl R Dannenbring, 2<sup>nd</sup> ed 1968) 119 discusses these two servitudes as examples of urban servitudes in Roman law and CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 498 categorises the *servitus ne prospectui officiator* and the *servitus altius non tollendi* as urban servitudes (*huisdiensbaarhede* in Afrikaans) and argues that urban servitudes concerning light and view played an important role in Roman and Roman-Dutch law.

<sup>75</sup> Voet 8 2 12.

<sup>76</sup> Voet categorised this servitude with the *servitus altius tollendi* (the servitude of raising a building higher), discussed in Voet 8 2 6; the *servitus altius non tollendi* (not raising a building higher), discussed in Voet 8 2 8; the *servitus luminum or luminis immittendi* (making openings for light and air in a neighbour's wall), discussed in Voet 8 2 9; the *servitus luminis non aperiendi* (not making such openings in one's own wall so as to overlook the property of another), discussed in Voet 8 2 10; and with the *servitus ne luminibus officiator* (not making such openings in one's own wall) that is discussed in Voet 8 2 11.

<sup>77</sup> Voet 8 2 12. The rights pertaining to openings for light and air, as mentioned in this title, refer back to Voet 8 2 9, Voet 8 2 10 and Voet 8 2 11, and includes the right of not having such openings obstructed.

“The servitudes of outlook and of not having outlook obstructed (*prospectus, et ne prospectui officiatur*) correspond in most things with the right of letting in openings for light and air and of not having such openings obstructed. There is this exception that outlook mainly asserts its place in the lower part of a refectory, and openings for light and air in the upper part; also that outlook is broader and fuller than that of such openings. And opposed to this servitude also is that of having no outlook onto the site of another, which is otherwise permitted by natural law.”<sup>78</sup>

The comparison between the *servitus prospectus, et ne prospectui officiatur* and the right of having openings for light and air enlightens the inquiry about the protection of a view by way of servitude.<sup>79</sup> According to Voet, the *servitus prospectus, et ne prospectui officiatur* differs from the right to have openings for light and air concerning what part of the building is affected thereby and the scope of the respective servitudes.<sup>80</sup> A servitude that protects outlook mainly applies to the lower part of a building, as opposed to servitudes relating to openings for light and air, which mainly concern the upper parts of buildings. Furthermore, the servitude of outlook is more extensive and comprehensive than those protecting openings for light and air.<sup>81</sup>

Other Roman-Dutch writers also commented on servitudes that protect the view from a property. Grotius<sup>82</sup> described the servitudes that protect owners’ right to free

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<sup>78</sup> Voet 8 2 12 as translated by P Gane *The selective Voet being the commentary on the Pandects* Vol 2 (1955) 452.

<sup>79</sup> See M Nathan *The common law of South Africa* Vol 1 (2<sup>nd</sup> ed 1913) 510 for a discussion of the comparison that Voet draws between the right to openings for air and light and the *servitus prospectus, et ne prospectui officiatur*.

<sup>80</sup> Voet 8 2 12.

<sup>81</sup> The ancient Romans and even the civilisations to which the Roman-Dutch law originally applied depended on the specific construction of buildings to ensure a free flow of light and air. Modern civilisations are not to the same degree dependent on actual openings for the free flow of light and air, since technological developments have improved living conditions in this regard. See D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (unpublished LLD dissertation University of Pretoria 1982) 41 regarding the detriment that a Roman would have suffered if her supply of sunlight was cut off by her neighbour.

<sup>82</sup> Grotius 2 34 20.

light (*jus ne luminibus officiatur*)<sup>83</sup> or free prospect (*jus prospectus*) as the right to prohibit a neighbour from erecting buildings or planting trees that will prevent one's enjoyment of light, or to interfere with one's open view. He added, like Voet, that a right to a view is something more than a right to a free flow of light.<sup>84</sup>

Huber<sup>85</sup> listed the right not to be deprived of light or prospect as a house-servitude of sorts. His discussion of the servitude of prospect (*uitzicht*)<sup>86</sup> correlates with Voet's discussion thereof. Similar to Voet, Huber also distinguished between the flow of light to a property and the view from a property by arguing that light comes from above and nearby, compared to prospect, which is below or on level. He further commented that prospect extends further than light, which means that, if a servitude of prospect is registered, even a person who lives far from the dominant tenement can be subject thereto. Grotius<sup>87</sup> and Van Leeuwen<sup>88</sup> also grouped the right of free light with that of free prospect (*jus ne luminibus officiatur* and *jus prospectus*) and, like Voet and Huber, added that the right to a free prospect is something more than a right to access of light.

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<sup>83</sup> The *servitus ne luminibus officiatur* prohibits an owner from obstructing or interfering (with) the flow of sunlight to her neighbour's property, which ensures that the owner of the dominant tenement is entitled to a full supply of light through her window.

<sup>84</sup> Voet 8 2 12 considered the servitude of outlook (that gives an owner a right to a view) to be "broader and fuller" than the right to have openings for a free flow of light and air. Schorer ad Grotius 2 34 20 stipulated that the servitudes *altius non tollendi*, *prospectui* and *luminibus non officiendi* cannot be acquired through negative prescription. These servitudes have a negative character in the sense that they prohibit certain actions. The fact that an owner abstains from performing one of these prohibited actions does not mean that her neighbour acquires a right to prohibit her from performing these actions at a later stage. Schorer argued that the raising of one's building or the planting of trees on one's own ground is a matter of means. A landowner's abstention from building or planting within a certain period of time can therefore not cause her to be deprived of her right to do so in future. However, if a landowner's attempt to build higher was actively opposed by her neighbour and the time required for prescription has elapsed after such opposition, the neighbour will have acquired a servitude by way of prescription. See Voet 48 4 5 in this regard.

<sup>85</sup> Huber *Heedensdaegse rechtsgeleertheyt* 2 42 15.

<sup>86</sup> Huber *Heedensdaegse rechtsgeleertheyt* 2 42 23.

<sup>87</sup> Grotius 2 34 20.

<sup>88</sup> Van Leeuwen *Het Rooms-Hollandsch recht* 2 20 14.

Aside from protecting the view from one's property, it was also possible to prevent another from having a view onto your property by registering a servitude *non prospiciendi in aream alterius*. This servitude prohibited the owner of the servient tenement from having a view onto the property of the dominant tenement. Voet<sup>89</sup> mentioned that the right to have an outlook onto the site of another flowed from natural law. He referred to the servitude of not having a view onto the property of another as one which opposes the *servitus prospectus, et ne prospectui officiatur*. According to Grotius,<sup>90</sup> the *servitus non prospiciendi* (*gezichtverbod*) was noted and described as the right to forbid a neighbour from looking onto the property of another. Grotius added, like Voet, that in the absence of such a servitude everyone may look onto the property of another. Nathan<sup>91</sup> refers to the servitude *non prospiciendi in aream alterius* as a special servitude that was mentioned by Voet. He describes it as a servitude that prohibits the owner of the servient tenement from overlooking the yard, court or garden of the dominant tenement and comments that this servitude is "practically obsolete at the present times". One would expect that a servitude that was considered to be practically obsolete in 1913<sup>92</sup> would be in complete disuse by now. However, a servitude that protects a landowner's privacy by prohibiting another property from overlooking her site is perhaps not all that outdated. Nathan's comment probably reflects the focus on urban expansion and development that characterised the turn of the previous century. It is doubtful whether a servitude that protects a landowner's privacy against overlooking would be seen as archaic today. However, in the context of South Africa's need of housing, the protection of privacy, like the preservation of the delightful view from a property,

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<sup>89</sup> Voet 8 2 12.

<sup>90</sup> Grotius 2 34 27.

<sup>91</sup> M Nathan *The common law of South Africa* Vol 1 (2<sup>nd</sup> ed 1913) 510

<sup>92</sup> The second edition of Nathan's book, M Nathan *The common law of South Africa* Vol 1 (2<sup>nd</sup> ed 1913), was published in 1913.

is an attribute that only a small percentage of landowners would spend time and resources on.

Apart from the *servitus prospectus, et ne prospectui officiatur* and the *servitus non prospiciendi in aream alterius*, which were specifically aimed at the protection of (or prevention of) the view from a property, it was also possible for a landowner to protect the view from her property by creating a *servitus altius non tollendi*. This servitude prohibited a neighbour from building higher and could therefore have prevented the obstruction of openings for light and air or could have been aimed at some other benefit.<sup>93</sup>

Nathan<sup>94</sup> mentions that according to Voet, the *servitus ne luminibus officiatur* often implies the *servitus altius non tollendi*, since the flow of light to one's property is often attributable to the fact that there is no structure on a neighbouring property that obstructs it. If such an obstructing building would be erected or built higher, it would necessarily interfere with the flow of light (and therefore the *servitus ne luminibus officiatur*.)<sup>95</sup>

Despite the absence of an inherent right to the existing view from one's property, a Roman-Dutch property owner therefore had the opportunity to protect the existing view from her property with a servitude. She could create a *servitus prospectus* that would prohibit the obstruction of a specific view. She also had the option of creating a *servitus altius non tollendi*, which would place a limitation on the

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<sup>93</sup> Voet 8 2 8. The prospect from a property could probably be seen as a possible "other benefit" to be protected by the *servitus altius non tollendi*. The *servitus altius non tollendi* was also mentioned in Grotius 2 34 18.

<sup>94</sup> M Nathan *The common law of South Africa* Vol 1 (2<sup>nd</sup> ed 1913) 508.

<sup>95</sup> See D van der Merwe "n Lastigheid in die oorlasreg: Optrede wat uiteraard regmatig is, ongeag die negatiewe gevolge daarvan" (1983) 16 *De Jure* 218-233 at 229-230 for a discussion of the way that A Rodger *Owners and neighbours in Roman law* (1972) 38 explains the application and effects of the *servitus altius tollendi* and the *servitus altius non tollendi* in Roman law.

neighbour's right to build higher and could therefore have had the effect of preventing the obstruction of her pleasant view.

### 2 3 2 South African law

A South African property owner may protect the view from her property with a negative servitude.<sup>96</sup> She has the option of creating a *servitus prospectus*, which will prohibit the owner of the servient tenement from performing an act on her property that will obstruct the view from the dominant property. She can also create a *servitus altius non tollendi* to specifically prevent the owner of the servient tenement from erecting a building on her property, or from raising an existing building higher so as to obstruct the view from the dominant tenement.<sup>97</sup> A *servitus prospectus* may be created in respect of two properties that are not adjacent to each other.<sup>98</sup> These servitudes originated in Roman law and were received in Roman-Dutch law. Case law indicates that these servitudes are still applicable in South African law as a way to create a right to a view.<sup>99</sup> Therefore, it is possible for a property owner to protect the existing, unobstructed view from her property by registering a servitude.

In *Myburgh v Jamison*<sup>100</sup> the Supreme Court of the Cape of Good Hope had to give effect to a condition in the deed of transfer of a property that prohibited the erection of buildings that would obstruct the view from a specific adjacent property.

<sup>96</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5<sup>th</sup> ed 2006) 127. In *Erasmus v Blom* 2011 JDR 0321 (ECP) para 36 it was confirmed that in South African law a negative servitude (either a *servitus prospectus* or a *servitus altius non tollendi*) may be registered to protect the existing view from a property against lawfully built obstructions.

<sup>97</sup> CG van der Merwe & MJ de Waal *The law of things and servitudes* (1993) 207 explain that a servitude of view gives the owner of the dominant tenement the right to an open view by restricting the owner of the servient tenement's right to obstruct such a view with trees, buildings or both and that a *servitus altius non tollendi* prohibits the owner of the servient tenement from building higher on her land.

<sup>98</sup> CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 470 and 480.

<sup>99</sup> *Myburgh v Jamison* (1861) 4 Searle 8; *Lewkowitz v Billingham & Co* (1895) 2 Off Rep 36 and *Kruger v Downer* 1976 (3) SA 172 (W).

<sup>100</sup> *Myburgh v Jamison* (1861) 4 Searle 8.

The plaintiff alleged that the defendant violated the terms of this condition by planting trees that obstructed the view from his property. Counsel for the plaintiff urged the court to give effect to the purpose of the condition, namely to protect the view from the plaintiff's property. It was submitted on behalf of the defendant that a servitude of prospect was odious because it hinders development and therefore contravenes public policy.<sup>101</sup> This argument was raised in support of the defendant's request that the court should give a strict interpretation to the condition's wording. The court acceded to the defendant's demand, holding that the trees did not obstruct the plaintiff's view in a way forbidden by the condition.<sup>102</sup>

The Supreme Court of the Cape of Good Hope interpreted the condition in the deed of transfer<sup>103</sup> that prohibited the erection of buildings that would obstruct the view from the plaintiff's property as equal to a *servitus altius non tollendi*. It held that this condition was specifically meant to protect view against obstruction by later building works.<sup>104</sup>

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<sup>101</sup> A similar argument was made by Lord Hardwicke in *Attorney-General v Doughty* (1752) 2 Ves Sen 453. In *Dalton v Angus & Co* (1881) All ER 1 (HL) 24F Lord Blackburn referred to Lord Hardwicke's observation that the right of prospect should only be regarded as a matter of delight, since the development of towns and cities would be inhibited if it (the right of prospect) was regarded as a necessity.

<sup>102</sup> The court gave a narrow interpretation to the wording of the servitude by deciding that the servitude specifically forbids the obstruction of the plaintiff's view by the erection of a building and that trees that blocked the plaintiff's view did not constitute such a prohibited act. In *Kruger v Downer* 1976 (3) SA 172 (W), the plaintiff applied for a court order to compel the defendant to remove the part of a house that obstructed the plaintiff's view. The plaintiff, who bought property from the defendant, alleged that both parties intended to include a servitude of prospect against the defendant's land. Margo J considered both parties' version of the facts and the prohibition against building inside certain boundaries that were prescribed in the title deed. He held that, although there clearly was an intention to preserve view, the servitude was completely ineffective and couldn't be justified by a meaning that the language did not support.

<sup>103</sup> This condition prohibited the erection of a building on the one property so as to obstruct the view from the other property. There is no clearer indication regarding the wording of this condition or whether it was constructed as a specific type of servitude or not. Although this condition constitutes a restrictive condition, it is discussed here since the court interpreted it as equal to a *servitus altius non tollendi*. It therefore illustrates that South African courts recognise a *servitus altius non tollendi* as a way to prevent the obstruction of the view from one's property.

<sup>104</sup> This was the interpretation that counsel for the defendant proposed. Voet referred to the *servitus altius non tollendi* in Voet 8 2 8 and Voet 8 2 11. It was argued for the plaintiff that the condition's wording did not convey the meaning of the party to whose advantage it was inserted accurately.

The dispute in *Lewkowitz v Billingham & Co*<sup>105</sup> also involved the protection of an undisturbed view over certain properties. The respondent leased an advertising wall from the appellant, subject to the condition that either party could cancel the contract if a building that would obstruct the view to the wall was constructed during the lease period.<sup>106</sup> Shortly after the conclusion of the contract, a wooden structure was erected that obstructed the view to the leased wall. The appellant exercised his cancellation right. He was consequently ordered, in the court *a quo*, to pay damages for breach of contract, since the presiding magistrate adopted the respondent's view that the contract could only be cancelled if the wall was obstructed by a building. The wooden screen that was erected was not considered to be a building.

On appeal, the Supreme Court of the Transvaal per Kotze CJ reversed the decision of the court *a quo* and ruled in favour of the appellant. Kotze CJ emphasised that the reason for the condition against the construction of a building was to prevent the obstruction of the advertising wall.<sup>107</sup> He consequently interpreted the word "building" to include any structure that would obstruct the view to the wall.

Both the *Myburgh* and the *Lewkowitz* decisions concerned instances where views have been obstructed by structures other than buildings. Contrary to the narrow interpretation that the Supreme Court of the Cape of Good Hope gave to the terms of the condition in the *Myburgh* case, the Supreme Court of Transvaal

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According to the plaintiff's counsel, it was clear that the intention was to save the view. Contrary to this argument, the defendant's counsel wished the court to focus on the fact that servitudes, and especially servitudes of prospect, are regarded with disfavour by the law. In light of this argument, the court was asked to give a strict interpretation to the wording of the condition. Counsel for the plaintiff therefore urged the court to give effect to the intention or aim of the condition (to protect the view from the property), whereas the defendant's counsel demanded a narrow interpretation which focused on the specific wording of the condition (prohibiting the obstruction of view only when it is caused by the erection of a building).

<sup>105</sup> *Lewkowitz v Billingham & Co* (1895) 2 Off Rep 36.

<sup>106</sup> Although this condition does not constitute a servitude to protect the view from one's property, the decision shows how courts may interpret conditions, and also servitudes, that are aimed at preventing the obstruction of a specific view.

<sup>107</sup> The condition in the lease agreement was not registered as a servitude. However, it was aimed at the protection of an undisturbed view to a specific object (an advertising wall).

interpreted the word “building” widely in the latter case. While the Supreme Court of the Cape of Good Hope held that the wording of the condition specifically prohibits the erection of a building (and not trees), the Supreme Court of Transvaal ruled that in the specific context of the relevant contract, the word “building” includes any structure which would obstruct the view to the property. The *Myburgh* and *Lewkowitz* decisions show that a South African property owner can protect the view from her property with the creation of a contractual agreement, which could be registered as a servitude, or a similar device, such as a title deed restriction.

## **2 4 The possibility of protecting view in the absence of a servitude**

### **2 4 1 A casuistic approach**

The rigid application of the principle that a South African property owner does not have an inherent right to the existing view from her property does not necessarily give an accurate reflection of the value that the view from a specific property may have. For example, there may be instances where a group of properties were developed in a certain way to enhance the views from each of the buildings individually. The views enjoyed from such buildings may be considered as significant aspects of the use and enjoyment of the properties and not as merely incidental benefits.

D van der Merwe investigates the Roman origin of the argument that interferences with the free flow of water or light to a neighbour’s property should not be regarded as unlawful, and its justification, namely that the natural flow of water

and light to a property are merely incidental advantages.<sup>108</sup> He rejects the argument insofar as it suggests that the free flow of water and light to properties was always treated as incidental advantages in the Roman legal system.<sup>109</sup> Instead, he refers to texts that show that Romans followed a casuistic approach in this regard. Levy,<sup>110</sup> for example, concludes that, with regard to the flow of water, the main concern is the unreasonable or abnormal way in which an owner uses it and thereby causes detriment for her neighbour. In the context of the Roman Empire with its different provinces, Levy cites the discussion of one Agennius Urbicus, who noted that disputes about water were treated differently in different parts of the empire.<sup>111</sup> Accordingly, the use of the *actio aquae pluviae arcendae* was probably not prohibited in all instances where there had been interference with the natural flow of water.

Furthermore, there are indications that an interference with the flow of light to a property was also not in all cases considered to cause a mere loss of an incidental advantage. Rodger<sup>112</sup> and D van der Merwe<sup>113</sup> both criticise the orthodox view that a property owner under Roman law did not have the right to a flow of light to her property and argue that the excessive blocking of light was indeed unlawful in classical Roman law. Both these writers refer to a contradiction between *D 39 2 25*

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<sup>108</sup> D van der Merwe “n Lastigheid in die oorlasreg: Optrede wat uiteraard regmatig is, ongeag die negatiewe gevolge daarvan” (1983) 16 *De Jure* 218-233 at 218-222.

<sup>109</sup> D van der Merwe “n Lastigheid in die oorlasreg: Optrede wat uiteraard regmatig is, ongeag die negatiewe gevolge daarvan” (1983) 16 *De Jure* 218-233 at 226-233.

<sup>110</sup> E Levy “West Roman vulgar law, the law of property” in *Memoirs of the American philosophical society* Vol 29 (1951) 117-118. D van der Merwe “n Lastigheid in die oorlasreg: Optrede wat uiteraard regmatig is, ongeag die negatiewe gevolge daarvan” (1983) 16 *De Jure* 218-233 at 227 discusses and agrees with Levy’s argument.

<sup>111</sup> E Levy “West Roman vulgar law, the law of property” in *Memoirs of the American philosophical society* Vol 29 (1951) 117-118.

<sup>112</sup> A Rodger *Owners and neighbours in Roman law* (1972) 38-89.

<sup>113</sup> D van der Merwe “n Lastigheid in die oorlasreg: Optrede wat uiteraard regmatig is, ongeag die negatiewe gevolge daarvan” (1983) 16 *De Jure* 218-233 at 228-229.

and *D* 39 2 26.<sup>114</sup> In *D* 39 2 25, Paul quoted Trebatius, who was of the opinion that a person suffers damage if the supply of light to her house is cut off:

“Trebatius says that he also sustains damage who has the lights of his house cut off.”<sup>115</sup>

In the context of *D* 39 2, Trebatius’ statement would mean that the *cautio damni infecti* was available to an owner whose supply of natural light was cut off, because the loss of a supply of light to a property caused damage.<sup>116</sup> However, in *D* 39 2 26, Ulpian states Proculus’ conflicting opinion:

“Proculus says that when anyone erects a building on his own land, which he has a right to erect there, even though he has promised indemnity for threatened injury to his neighbour, he will still not be liable under this stipulation ... For although ... you divert my water and, ... you intercept my light, I will, nevertheless, not be able to sue you ... because he should not be considered to have committed an injury who prevents another from enjoying some benefit, which, up to that time, he had been accustomed to enjoy; and it makes a great deal of difference whether anyone causes damage, or whether he prevents another from enjoying a benefit which he had hitherto been accustomed to enjoy. The opinion of Proculus appears to me to be correct.”<sup>117</sup>

According to Rodger, Trebatius’ opinion<sup>118</sup> indicates that the excessive blocking of light was unlawful in classical Roman law.<sup>119</sup> D van der Merwe argues that it is not possible or necessary to reconcile *D* 39 2 25 with *D* 39 2 26.<sup>120</sup> He reasons that the contradiction in these two texts confirms that the Romans followed a casuistic

<sup>114</sup> A Rodger *Owners and neighbours in Roman law* (1972) 53 and D van der Merwe D van der Merwe “n Lastigheid in die oorlasreg: Optrede wat uiteraard regmatig is, ongeag die negatiewe gevolge daarvan” (1983) 16 *De Jure* 218-233 at 228-229.

<sup>115</sup> *D* 39 2 25, as translated by SP Scott *The civil law: The digest or pandects* Vol 8 (1932) 335.

<sup>116</sup> See 2 2 1 2 above for a discussion of the meaning and application of the *cautio damni infecti*.

<sup>117</sup> *D* 39 2 26, as translated by SP Scott *The civil law: The digest or pandects* Vol 8 (1932) 335-336.

<sup>118</sup> *D* 39 2 25.

<sup>119</sup> A Rodger *Owners and neighbours in Roman law* (1972) 89. Rodger supports his argument by referring to *D* 8 2 10, *D* 8 2 11 and the existence of the *servitus altius tollendi*.

<sup>120</sup> D van der Merwe “n Lastigheid in die oorlasreg: Optrede wat uiteraard regmatig is, ongeag die negatiewe gevolge daarvan” (1983) 16 *De Jure* 218-233 at 228.

approach to determine what should be considered as *damnum* for purposes of instituting an action based on the *cautio damni infecti*.

D van der Merwe<sup>121</sup> concludes that the rule that interference with the free flow of light or water to a property does not cause damage for a landowner originated in Roman law and was received in Roman-Dutch and later in South African law. However, the original scope and application of this rule is not accurately reflected in Roman-Dutch and South African law, because the specific context in which these rules originated and were applied in Roman times was not considered by the European Romanist jurists who received and applied them in Roman-Dutch law. According to D van der Merwe, these rules were not applied rigidly in Roman law and their application in modern law should therefore reflect their original casuistic nature.<sup>122</sup> Therefore, the rule that the free flow of water and light are merely incidental benefits and that interferences with them are not actionable is not a rigid principle and should be applied as a guideline to consider each case individually. If this rule is applied as a guideline instead of a principle, there may be instances where the flow of light or water to a property is considered more than a merely incidental benefit to a property. In cases where the view from a property forms part of the property's use and enjoyment and is considered more than a merely incidental advantage to the property, the principle that interferences with the existing view from a property is not actionable should probably not apply.

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<sup>121</sup> D van der Merwe "n Lastigheid in die oorlasreg: Optrede wat uiteraard regmatig is, ongeag die negatiewe gevolge daarvan" (1983) 16 *De Jure* 218-233 at 220-233.

<sup>122</sup> In D van der Merwe "n Lastigheid in die oorlasreg: Optrede wat uiteraard regmatig is, ongeag die negatiewe gevolge daarvan" (1983) 16 *De Jure* 218-233 at 226-227.

## 2 4 2 South African law

The court in *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others*<sup>123</sup> seemingly acknowledged, without explicitly deciding, that in some instances a property owner has a substantive right to the view from her property, without such view being specifically protected with a servitude or a restrictive condition. In this case the applicants owned a holiday house on the banks of the Vaal River. Some thirteen years after they had purchased the property, the respondents, who subsequently became owners of a neighbouring property, erected a thatched-roof structure over their jetty. This structure obstructed the applicants' view of the river and they consequently applied for an interdict to have the structure removed and to prevent the local authority from approving any plans for it.

The applicants acknowledged that a property owner does not have a substantive right to a view and therefore based their interdict application on an actionable nuisance allegedly caused by the first respondents.<sup>124</sup> Besides this

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<sup>123</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004).

<sup>124</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) para 7. The applicants contended that the first respondents unreasonably infringed upon their normal use and enjoyment of their property. At paras 32-33, Rampai J made a clear distinction between the complaint made by the respondent in *Dorland and Another v Smits* 2002 (5) SA 374 (C) and the objection raised by the applicants in the *Waterhouse Properties* case. The difference between the complaints was, according to Rampai J, that the respondent in *Dorland* complained of the installation of an electrical fence that was merely "something very ugly", as opposed to the applicant in the *Waterhouse Properties* case who complained of the erection of a structure on a neighbouring property that had a material and negative influence on the normal use and enjoyment of the property. The judge continued that the similarity between these two judgments is the fact that in both cases the complaints entailed a "sense of sight". Rampai J regarded the obstruction of the applicant's view in the *Waterhouse* case as a more serious infringement of property rights compared to the installation of a merely "ugly" fence in *Dorland*, the latter being, according to this judge, "a purely aesthetic issue which in our law is not accorded the status of a right". This distinction is not satisfying, since no property owner has the right to a view from her property. Therefore, neither the erection of something that is visually unpleasing, nor the obstruction of that which is visually pleasing should in principle be regarded as a wrongful act. See AJ van der Walt *The law of neighbours* (2010) 370 for a discussion of why the court in *Waterhouse Properties* considered the obstruction of the applicant's view in this case to be different from the interference with the respondent's aesthetical attributes in *Dorland*.

substantive basis for their application, the applicants also raised a procedural ground for such an interdict.<sup>125</sup>

In order to determine whether or not the erection of the structure caused an actionable nuisance for the applicants, the court considered whether this act was an unreasonable infringement of the applicants' normal use and enjoyment of their property. The court reasoned that the specific locality of and purpose for which the property was improved by the applicants indicated that the view of the river formed an integral part of the normal use and enjoyment of this property.<sup>126</sup>

Rampai J considered the litigants' conduct in terms of the requirements for the granting of a final interdict. The following questions were asked in this regard: Did the first applicant have a clear right that was affected by the first respondent's conduct?<sup>127</sup> Was the applicants' right to ownership infringed upon by the unreasonable conduct of the first respondent?<sup>128</sup> And, was there an alternative remedy at the applicants' disposal?<sup>129</sup>

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<sup>125</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) para 7. The applicants contended that the erection of the structure did not comply with s 4(1) of the National Building Act, since it was constructed without the prior consent of the relevant local authority.

<sup>126</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) paras 9-19. Before focusing on the requirements for an interdict, the court discussed the interplay between the rights of neighbouring property owners. This discussion formed part of the court's deliberation of the argument that the first respondent's conduct constituted a common law nuisance. In terms of the objective test for reasonableness, a property owner's conduct would only be considered unreasonable and therefore a nuisance if the harmful consequences that it had for a neighbouring owner were more than what a normal individual in the applicant's circumstances could be expected to endure. See CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 187-197; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5<sup>th</sup> ed 2006) 112-113 and J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* Vol 19 (2<sup>nd</sup> ed 2006) paras 173-185 for discussions of the principle that a property owner may not use her property in a way that unreasonably interferes with a neighbouring owner's use and enjoyment of her (the neighbour's) land.

<sup>127</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) para 22.

<sup>128</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) para 35.

<sup>129</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) para 58.

In the light of specific circumstances regarding the applicants' property, such as the reason why it was bought, improved and used for, and especially its location, the court decided that the view from the property formed part of their right of ownership. Rampai J regarded the applicants' enjoyment of the view of the river as an important part of the way in which they used their property. Therefore, the obstruction of its view was an actionable interference with the first applicant's ownership rights to the use, enjoyment and convenience of their property that should be regulated by the same common law principles that apply to other instances of nuisance.<sup>130</sup>

Concerning the effect that the first respondent's act had on the applicants' rights, the judge considered both the detriment that it caused for the applicants and the social use it had. The court found that the structure was so big that it would dramatically and permanently obstruct the applicant's view of the river, whereas it did not benefit the first respondent substantially and there was no evidence that it promoted public welfare. The effect that the erection of the structure had on the applicants' use and enjoyment of their property was therefore far greater than the advantage it had for the first respondent. Based on this conclusion, Rampai J decided that the first respondent's conduct was objectively unreasonable and therefore unlawful.<sup>131</sup>

Rampai J finally considered whether the applicants could make use of any other remedy in order to protect their rights. After dismissing the first respondent's

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<sup>130</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) paras 22-34.

<sup>131</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) paras 35-53.

contention that an action for damages could have been instituted,<sup>132</sup> he mentioned that an interdict has to be granted in instances

“where the injury caused by the respondent's objectively unreasonable interference cannot be adequately compensated or is so serious and material, as in this case, that the restoration of things to the state of affairs before the interference is the only appropriate method by which justice between neighbours can adequately be done...”<sup>133</sup>

With regard to the first two requirements for a final interdict that the court considered, it was established that the applicants had a substantive right that was infringed by the first respondent's unreasonable conduct. The court was mainly concerned to establish whether these prerequisites for a final interdict existed, while it confirmed the applicants' rights by deciding that no other remedy would adequately protect these. In its deliberation, the court also mentioned the first respondent's non-compliance with section 4(1) of the National Building Act because of its failure to submit building plans prior to the erection of the structure.<sup>134</sup> For these reasons, the court granted a final interdict, ordering the first respondent to demolish and remove the thatched-roof structure.<sup>135</sup>

The *Waterhouse* decision is unique in the modern South African jurisprudence regarding the obstruction of a view. The court's ruling that the respondent's conduct was objectively unreasonable implied that a property owner does have the right to an unobstructed view from her property, at least under certain circumstances. The

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<sup>132</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) para 60. Rampai J held that an action for damages would not adequately protect the applicants' rights.

<sup>133</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) para 60.

<sup>134</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) paras 54-56.

<sup>135</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) para 65.

circumstances that played a role in this case were apparently the property's location and use. It was located on the banks of a river and used as a retreat from which the beautiful views of the river could be enjoyed. Since the river was considered to be the main feature of the area, the court regarded the applicants' unobstructed view to the river as an important part of the use and enjoyment of their property. Therefore, according to the court's reasoning, the circumstances was of such a nature that the applicants' view should be protected against obstruction.<sup>136</sup>

Freedman criticises this judgment for not contributing to the development of a more sophisticated jurisprudence in the area of a landowner's right to a view.<sup>137</sup> He argues that the court followed the wrong methodology when it considered the rights of the applicants and the alleged interference with it. In order to determine the scope of the right of ownership, the court applied an objective test for reasonableness. In terms of this test, the court took into account the opinion of a reasonable person in the applicants' position. According to Freedman, this is the wrong point of departure when determining the scope of the right of ownership. Instead, one should depart from the relevant Roman-Dutch law principles by applying them in accordance with the Constitution and in a manner that meets the demands of a modern society.<sup>138</sup>

## 2 5 Conclusion

In terms of the general principle regarding the existing view from a property, a South African property owner does not inherently have a right to the existing view from her

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<sup>136</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) paras 28-29.

<sup>137</sup> W Freedman "Paradise lost? The obstruction of a pleasant view and the law of nuisance" in SV Hoctor & PJ Schwikkard (eds) *The exemplary scholar: Essays in honour of John Milton* (2007) 162-184 at 184.

<sup>138</sup> W Freedman "Paradise lost? The obstruction of a pleasant view and the law of nuisance" in SV Hoctor & PJ Schwikkard (eds) *The exemplary scholar: Essays in honour of John Milton* (2007) 162-184 at 184.

property. This rule is based on the argument that a pleasant view is an incidental advantage and not an actionable right. The idea that some property attributes are merely incidental benefits while others are rights originated in Roman law, where a distinction was made between instances where a property owner suffers damage and instances where she is merely deprived of an incidental advantage that she previously enjoyed. This distinction was received in Roman-Dutch law and confirmed in the South African case of *Dorland and Another v Smits*,<sup>139</sup> in the sense that the court held that the view from a property is an aesthetic attribute that is not inherently protected as part of an owner's right of ownership. The existing view from a property is also not generally protected as an inherent property right, because the recognition of such a right would be in conflict with the rule that a property owner may build on her property as she pleases. Roman-Dutch sources discuss the principle that a property owner may use her property as she sees fit, while the decision in *Clark v Faraday and Another*<sup>140</sup> confirms that this principle is part of South African law. Earlier decisions, such as *Myburgh v Jamison*<sup>141</sup> and *Lewkowitz v Billingham & Co*,<sup>142</sup> illustrate the fact that an unobstructed view can be protected by way of an agreement or the creation of a servitude between property owners. These decisions indicate that it is possible for a property owner to protect a pleasant view from her property, like it was possible for a Roman-Dutch property owner to protect her unobstructed view, with a servitude. Case law therefore confirms the position that, generally, a property owner does not have an inherent right to the existing view from her property, unless such a view is protected with a servitude or some other contractual agreement.

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<sup>139</sup> *Dorland and Another v Smits* 2002 (5) SA 374 (C).

<sup>140</sup> *Clark v Faraday and Another* 2004 (4) SA 564 (C).

<sup>141</sup> *Myburgh v Jamison* (1861) 4 Searle 8.

<sup>142</sup> *Lewkowitz v Billingham & Co* (1895) 2 Off Rep 36.

By contrast, the judgment in *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others*<sup>143</sup> suggests that, in exceptional circumstances, courts may depart from these general rules regarding the protection of the view from a property. In these cases the existing view from a property may apparently be protected if the circumstances indicate that enjoyment of the view was an inherent element of the use and enjoyment of the property.

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<sup>143</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004).

## Chapter 3:

# Alternative strategies to protect the unobstructed, existing view from a property

### 3 1 Introduction

A South African property owner does not have an inherent right to the existing view from her property in terms of the common law.<sup>1</sup> Nevertheless, a property owner has the opportunity to protect the existing undisturbed view from her property with a servitude,<sup>2</sup> and there are also (inconclusive) indications that the view from a specific property may inherently be protected in exceptional circumstances where it forms an integral part of the use and enjoyment of the property.<sup>3</sup> Apart from these well-established principles, case law indicates that there are other, alternative ways in which property owners have attempted (sometimes successfully) to protect the existing views from their properties. These strategies are either based on the enforcement of a substantive right that has the effect of protecting the existing view from a property, or they are cast in the form of attacks on procedural irregularities that may have the same effect, albeit temporarily.

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<sup>1</sup> In Ch 2 it was established that a property owner does not have an inherent right to the existing view from her property, since the pleasant view from a property is considered an incidental advantage and because the recognition of an inherent right to the existing view from a property would be in conflict with the principle that a property owner may build on her property as she pleases. See 2 2 for a discussion of these justifications for not acknowledging a right to a view.

<sup>2</sup> In *Erasmus v Blom* 2011 JDR 0321 (ECP) para 36 it was confirmed that in South African law the existing view from a property can only be protected against lawfully built obstructions if a negative servitude (either a *servitus prospectus* or a *servitus altius non tollendi*) is registered to protect such a view, or if a restrictive condition or the provisions of a town planning scheme or other building legislation prevents such obstruction. See 2 3 2 for a discussion of how a servitude may be used to protect the existing view from a property, and 3 2 2 1, 3 2 2 2 and 3 2 2 3 regarding the protection of an existing view from a property in terms of restrictive conditions and zoning schemes.

<sup>3</sup> See the discussion of *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) in 2 4 2.

Apart from servitudes that prohibit building works or prevent the obstruction of specific views, there are other substantive rights, based on pre-existing property rights, that may entitle the rights holders to prevent the erection of buildings on neighbouring properties. Every affected property owner is for instance entitled to prevent the erection of a building on a neighbouring property if such a building is prohibited by a restrictive condition; if the area has to be re-zoned to accommodate the proposed building; if the proposed building would depart from the applicable zoning scheme; or if legislation creates a right or duty to prevent the erection of such a building. Building plans indicating that the proposed building will contravene a restrictive condition or any applicable legislation; depart from the applicable zoning scheme or building regulations;<sup>4</sup> or that will require the re-zoning of an area may only be approved if neighbouring owners have given their prior permission. Therefore, a property owner has an inherent right to the existing view from her property insofar as such a view is protected in terms of restrictive conditions, the applicable building regulations and zoning scheme and any applicable legislation. Her existing view, as it exists within the parameters of these “devices” may only be obstructed by the erection of a neighbour’s building if she agrees to such building works.<sup>5</sup>

Procedural strategies that are used to prevent the erection of a building that would obstruct the view from a property are different from the substantive-right strategies set out above to the extent that they are purely founded on irregularities in the process through which building plans were approved. These strategies involve

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<sup>4</sup> In this chapter, the phrase “departure from zoning scheme” refers to the subdivision of property, or a departure from the zoning scheme in terms of a “consent use”, or a deviation from the applicable building regulations. J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 352-353 defines “consent use” and “departures”.

<sup>5</sup> Strategies based on a substantive right to prevent building are discussed in 3.2.

either an attack on a purely procedural shortcoming in the approval process, or an attack on the decision maker's discretion to approve the plans.<sup>6</sup>

Property owners use these alternative ways to protect the existing views from their properties in the absence of an inherent right to a view. Reliance on these alternative strategies confirms that, as was concluded in chapter 2, the right to an undisturbed view from one's property does not naturally flow from the right of ownership. Each of these alternative strategies (substantive and procedural) is explained and assessed in the two subsections below in terms of the remedies that they offer and with reference to their application in case law.

## **3 2 Strategies based on a substantive right to prevent building**

### **3 2 1 Basis of the right to prevent building**

A property owner (A) has a "substantive" right, which flows from her right of ownership, to be informed of – and sometimes to prevent – the approval of a neighbour's (B's) building plans when these plans involve the removal or change of a restrictive condition;<sup>7</sup> when the application for the approval of her building plans includes an application for the re-zoning of her property<sup>8</sup> or for a departure from the zoning scheme that affects her property;<sup>9</sup> or if the building plans are in conflict with any applicable legislation. If A's substantive right is created by legislation or a restrictive condition that prohibits any or a particular form of building on B's property, no building may be erected on B's property in conflict with that condition without A's permission, unless some state body (the local or provincial government or a court)

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<sup>6</sup> These strategies are examined in 3 3.

<sup>7</sup> J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 351, 355, 357, 394 and 396. See 3 2 2 1.

<sup>8</sup> See 3 2 2 2.

<sup>9</sup> *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 130. See also J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 354, 357 and 396 and the discussion in 3 2 2 3.

has the authority to qualify or override A's right to object. If her right is based on a restrictive condition, a zoning scheme or building regulations that prohibit the erection of buildings in a certain spot, or of a certain height or kind, B may not erect any building that would be in conflict with these limitations without allowing A an opportunity to object or,<sup>10</sup> in some cases, without A's consent.<sup>11</sup> In some instances, a state body such as the local or provincial government or a court can qualify or override A's right to object and if they do, B may erect a building despite A's objections.

In the absence of permission and unless a building authority or a court overrides A's right, the effect can be that although A does not have a right to a view as such, she, as the beneficiary of the substantive right, can prevent building on neighbouring land that would interfere with the existing view from her property. The protection of this substantive right has been implemented in various instances (discussed in the next subsections below) as a strategy to avoid the obstruction of the existing views from the beneficiary properties.<sup>12</sup>

A substantive right to prevent the erection of a building on a neighbouring property can in certain cases amount to an actual veto that prevents any form of building. For example, if the substantive right originates in legislation that places a duty on a specific landowner (B) not to build (at all or in a specific location or manner) on its property, such a person or authority must refrain from the erection of

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<sup>10</sup> An application for the re-zoning of land; a departure from the applicable zoning scheme; or the removal of a restrictive condition in terms of the Removal of Restrictions Act 84 of 1967 may not be granted if affected property owners have not been informed of the application and have not been given an opportunity to raise objections.

<sup>11</sup> A restrictive condition may not be removed in terms of the common law if its beneficiaries have not granted their permission. See 3 2 2 1.

<sup>12</sup> See the discussions of *Richardson and Others v South Peninsula Municipality and Others* 2001 (3) BCLR 265 (C) A; *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) and *Transnet Ltd v Proud Heritage Properties* (405/08) [2008] ZAECHC 155 (5 September 2008) in 3 2 below.

any buildings that will interfere with the duty, and the beneficiary (A) can enforce compliance with that duty. An example of such legislation is the National Ports Act 12 of 2005 (“National Ports Act”), which determines that the National Ports Authority is, *inter alia*, responsible for maintaining adequate and efficient lighthouses to assist in the navigation of ships. This provision places a duty on the National Ports Authority to protect the views to lighthouses and therefore entitles and compels it to prevent the obstruction of such views by building on any property in the vicinity of lighthouses. In this case the effect of the substantive right is that no building may be erected without the right holder’s (the National Ports Authority’s) approval and the right holder has an absolute right to prohibit the erection of any buildings that may interfere with the visibility of a lighthouse.<sup>13</sup> Although it is in principle possible that the right holder can give permission for building works in conflict with this duty, it is unlikely that such permission would ever be granted, and (in the absence of impropriety) it is equally unlikely that another state body would ever be able to qualify or override the Port Authority’s right to object. In this case, the right to prevent building on B’s land is therefore an absolute veto.

However, a substantive right to prohibit the erection of a building on a neighbouring property would not necessarily veto any form of building on the neighbouring property, since such a right may be subject to qualification or removal. If the substantive right originates from zoning legislation, it can be qualified or removed by the responsible local authority (or by a court) in terms of the same legislation.<sup>14</sup> If it originates in a restrictive condition, it may be qualified or removed

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<sup>13</sup> See the discussion of *Transnet Ltd v Proud Heritage Properties* (405/08) [2008] ZAECHC 155 (5 September 2008) in 3 2 2 4.

<sup>14</sup> In *Richardson and Others v South Peninsula Municipality and Others* 2001 (3) BCLR 265 (C) 268 the court qualified property owners’ right to prevent the erection of buildings on a neighbouring property, since it ruled that, despite the fact that the property owners (beneficiaries of the substantive right) did not consent to the subdivision of their neighbour’s property, the approval of the subdivision

by a court or, in some instances, by the responsible planning authority.<sup>15</sup> However, in some instances it is more exceptional to remove or qualify a substantive right to prevent building against the beneficiary's will than in others. If the right to prevent building on neighbouring land originates in an agreement that had been registered as a limited real right (restrictive covenants and certain categories of restrictive conditions) it is more unusual and therefore more difficult to have the right removed or qualified, while rights that originate in planning legislation (building regulations) can be qualified or overridden more easily.<sup>16</sup> Irrespective of whether such a right is qualified or removed by a court or a local authority, removal or qualification of the right will only be possible if it is in the public interest to do so (for example to remove a restrictive covenant with a racially discriminatory foundation), and not merely to benefit the owner wanting to build.<sup>17</sup> Because the beneficiary has a substantive right,

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should not be set aside. However, it ordered that the responsible local authority should consider imposing height limitations on current and future buildings on the subdivided property. The beneficiaries' substantive right did therefore not amount to a veto of their neighbour's building works but was qualified in the sense that the court ordered the local authority to consider imposing height restrictions that would limit his right to build. See the discussion of this case in 3 2 2 2.

<sup>15</sup> See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5<sup>th</sup> ed 2006) 354-356 and J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 345 and 351.

<sup>16</sup> See 3 2 2 1 for a discussion of the removal of restrictive conditions. PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5<sup>th</sup> ed 2006) 354 argues that a restrictive covenant can be modified or removed by agreement, since it is created in terms of an agreement.

<sup>17</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5<sup>th</sup> ed 2006) 356, referring to *Camps Bay Ratepayers Association v Minister of Planning Western Cape* 2001 (4) SA 194 (C) and *Hayes v Minister of Finance and Development*, WC 2003 (4) SA 598 (C), explain that an application for the removal of restrictions lodged with the Premier may only be granted if it serves a positive advantage, such as the public interest, and that the applicant's personal interest in such an application is irrelevant. They reason that proper notice of such an application must be given to all neighbouring owners who will be directly affected by its approval, to avoid procedurally unfair administrative action. In *Nowers NO v Burmeister* (EL 1038/08, ECD 2338/08) [2011] ZAECELLC 8 (2 August 2011) paras 50-51 the court established that zoning schemes are aimed at protecting community interests. In a discussion of this judgment, AJ van der Walt "Property" (2011) 3 *Juta's Quarterly Review* para 2 3 2 reasons that the court in *Nowers* upheld counterclaims involving alleged unlawful building works on the ground that courts have a duty to enforce compliance with the requirements set out in zoning schemes and other planning legislation because these legislative measures protect the rights of others.

she may in any event be entitled to attack such a qualification or removal of her right in terms of section 25 of the Constitution.<sup>18</sup>

Strategies to protect the existing view from a property that are based on substantive rights to prevent building often only feature once building has started, even though the principle is in fact that the beneficiary has a right to object or that prior permission should be obtained before the building plans are approved. However, building permission is sometimes granted without prior consultation, and then the beneficiary of the right to prevent building must attack the granting of building approval on procedural grounds. This creates confusion with purely procedural strategies. The reason for this confusion is that building approval is sometimes granted without complying with the requirements that protect the substantive rights of neighbouring owners, for example when approval is granted for a building that would contravene an applicable restrictive condition without the permission of the neighbour (beneficiary of the substantive right) who benefits from the condition. In such a case, the attack on the approval of the building plans typically focuses on the administrative blunder in granting building approval without the consent of an affected neighbour. However, it remains important to distinguish between substantive and purely procedural strategies. The strategy to protect an existing view that is based on a substantive right to prevent building emerges from a pre-existing substantive right that entitles a property owner to prevent (or at least object against) the approval of a neighbour's building plans. If this strategy is

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<sup>18</sup> Constitution of the Republic of South Africa, 1996. J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 356, referring to *Ex parte Optimal Property Solutions CC* 2003 (2) SA 136 (C), explains that a restrictive condition is considered "property" for purposes of s 25(1) of the Constitution, since it is classified as a praedial servitude. The removal of a restrictive condition therefore amounts to a deprivation of property in terms of s 25(1). Also see the discussion of *Ex parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) in PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5<sup>th</sup> ed 2006) 355-356 and in 3 2 2 1 below. Constitutional aspects regarding the right to a view are examined in Ch 5.

followed, the attack should be focused on the fact that an administrative decision has been taken in conflict with a substantive property right. Purely procedural strategies have a different origin. They arise when there is no substantive right to prohibit building in the first place, but an administrative error was made in the granting of permission to build generally, for example if there was no building control officer employed (as is required) when the responsible local authority approved the plans.<sup>19</sup> Consequently, if the approval of building plans is attacked on the basis of a purely procedural irregularity, the attack can only focus on the administrative irregularity in the process of approving the plans because there is no substantive right (apart from the right that procedures be followed) underlying the attack.

The confusion between how and where the two different strategies apply is apparent from case law such as *Walele v The City of Cape Town and Others*<sup>20</sup> (“*Walele*”) and *True Motives 84 (Pty) Ltd v Madhi and Another*<sup>21</sup> (“*True Motives 84*”). These cases appear to concern purely procedural battles, but in fact, there are two issues involved in both of them. The first issue is whether permission to build was granted in conflict with a substantive right. Therefore, although the attack on the approval of the building plans has an administrative basis (namely an administrator’s decision to approve building plans), it actually concerns a substantive right because the building permission was granted without obtaining the necessary consent, in a situation where such consent was required. The second question that arises is whether section 7 of the National Building Regulations and Building Standards Act

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<sup>19</sup> In *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA) the respondent’s building plans were approved at a time when there was no building control officer employed by the responsible local authority that approved the plans. The plans were therefore approved in conflict with s 5(1), 6(1) and 7(1) of the National Building Regulations and Building Standards Act 103 of 1977. This case is discussed in 3 3 2 1.

<sup>20</sup> *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC).

<sup>21</sup> *True Motives 84 (Pty) Ltd v Madhi and Another (Ethekwini Municipality as Amicus Curiae)* 2009 (4) SA 153 (SCA).

103 of 1977 (“National Building Act”) creates a substantive right (in addition to the other substantive rights mentioned earlier) to prevent building on a neighbouring property. The conflicting decisions in *Walele* and *True Motives 84* adopted different points of view regarding the latter question.

In *Walele* the Constitutional Court confirmed that property owners do not have a right to be informed of or to comment on an application for the approval of building plans relating to neighbouring land when such plans comply with the normal building regulations and the applicable restrictive conditions and zoning scheme.<sup>22</sup> This principle obviously relates only to instances where there is no substantive right, deriving from legislation, the zoning scheme, building regulations or a registered restrictive condition, that would entitle the beneficiary to be informed of building plans that conflict with the right. The case concerned a landowner’s attempt to have the approval of his neighbour’s building plans set aside.<sup>23</sup> Since the complainant did not have any of the categories of substantive rights already mentioned above, the court confirmed that there was no right to be informed of or to object against building plans relating to neighbouring land. In effect, the decision highlights the second question,

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<sup>22</sup> In *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 45, 55-56 and 130 the court confirmed that a neighbouring property owner does not have a right to be heard in (or to inspect) an application for the approval of building plans. In this respect Jafta AJ confirmed the decision in *Odendaal v Eastern Metropolitan Local Council* 1999 CLR 77 (W) (“*Odendaal*”) and rejected the ruling in *Erf 167 Orchards CC v Greater Johannesburg Metropolitan Council* 1999 CLR 91 (W) (“*Erf 167 Orchards*”). In *Erf 167 Orchards* it was held that neighbouring owners indeed have a right to be heard before a local authority approves building plans. See paras 43-45 of *Walele* for the Constitutional Court’s discussion of the conflicting judgments in *Erf 167 Orchards* and *Odendaal*. AJ van der Walt “Regulation of building under the Constitution” (2009) 42 *De Jure* 32-47 at 33 reasons that the Constitutional Court in *Walele* confirmed that, because s 7 of the National Building Act adequately protects the rights of neighbouring landowners, this Act “does not confer on neighbours a blanket right to be heard before building plans are approved”. He further argues that neighbours may indeed have a right to be heard if an application for the approval of building plans involves an amendment of the existing zoning scheme or if the prescribed procedures were not followed when the plans were approved. See also AJ van der Walt *The law of neighbours* (2010) 347.

<sup>23</sup> *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 1. The applicant applied to the Constitutional Court for leave to appeal against the judgment of the Cape High Court. The Cape High Court dismissed his application for an order to review and set aside the City of Cape Town’s decision to approve his neighbour’s building plans for the erection of a four-storey block of flats.

namely whether section 7 of the National Building Act (“the Act”) creates a further, additional kind of substantive right to prevent the erection of buildings on the neighbouring property, or whether reliance on this provision amounts to a purely procedural strategy to prevent such building works.

Section 7(1)(a) of the Act provides that a local authority must approve building plans if it is satisfied that the plans comply with all the requirements of the Act and any other applicable law. Section 7(1)(b)(ii) determines that a local authority shall refuse to approve building plans if it is satisfied that the proposed building will, *inter alia*, cause depreciation of adjoining or neighbouring properties.<sup>24</sup> In *Walele*, the relevant building plans complied with the applicable zoning requirements and legislation and therefore met the requirements set out in section 7(1)(a) of the Act. (This fact, together with the absence of conflicting legislation and restrictive conditions, explains why the neighbouring owners do not have a substantive right to be informed of or to object against the building plans.) However, compliance with section 7(1)(b) and specifically the question whether the relevant local authority was obliged to give neighbouring owners an opportunity to be heard before the approval of the building plans, was in dispute.<sup>25</sup> In terms of the court’s interpretation of section 7, a decision maker may not approve building plans unless she is satisfied that the necessary legal requirements are met and that none of the disqualifying factors will be triggered by the erection of the proposed building.<sup>26</sup> It implies that an applicant is only required to prove “to the satisfaction of the reviewing court” that the erection of the proposed building on a neighbouring property will reduce the value of her own property. This approach sets a low benchmark for rejecting building plans and places

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<sup>24</sup> The wording of s 7(1) of the National Building Act is set out in n 90.

<sup>25</sup> *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 46 and 56.

<sup>26</sup> *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 55.

a light burden of proof on property owners wanting their neighbour's building plans set aside on review. The court reasoned that this approach adequately protects the interests of neighbouring property owners and makes it unnecessary for them to be afforded an opportunity to raise their objections to such plans prior to their approval.<sup>27</sup>

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<sup>27</sup> *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 30-32, 35, 39 and 55-56. The Constitutional Court held that the consideration that a local authority must give to the interests of neighbouring owners in terms of s 7 of the National Building Act protects their interests in such a way that it would be unnecessary to give a neighbour the opportunity to object to an application for the approval of building plans prior to their approval. Despite the fact that the Constitutional Court considered it unnecessary for neighbouring owners to be afforded an opportunity to participate in the process of the approval of building plans, it held that section 3 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") provided such an opportunity. In terms of this provision, an aggrieved party would have the right to have an administrative action reviewed if it detrimentally affected her existing rights or a legitimate expectation. Regarding the requirement that an existing right must have been affected by an administrative action, the court held that the applicant's contention is that the erection of the building (block of flats) would have caused the value of his property to decrease and therefore would have triggered one of the disqualifying factors in s 7(1)(b)(ii). However, even if such a decrease in the property's value could be proven, it would not be the local authority's decision to approve the building plans (the contested administrative action), but the subsequent erection of the building, that would affect the applicant's alleged "right". The court continued that, in terms of s 7 of the National Building Act, the erection of a building that causes a neighbouring property's value to diminish is already a ground for review. Referring to *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA), where the Supreme Court of Appeal held (*obiter*) that a local authority may not approve plans if their execution will cause neighbouring properties' values to decrease, the court in *Walele* held that if the applicant (in *Walele*) had proven that the execution of the plans devalued his property, he could have succeeded in having the approval of the plans set aside on that basis only. Similarly, the applicant would have had the right to have the approval reviewed in terms of s 3 of PAJA if he had proven that he had a legitimate expectation to such a remedy because of an express presentation made by the local authority or in terms of a pre-existing practice. An example of such a pre-existing practice would be if the relevant local authority regularly gave neighbouring owners an opportunity to participate in the process prior to approval. Such a practice might create the (legitimate) expectation that it will be continued in future. The minority judgment in *Walele* (see specifically *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 88, 129-130 and 136) supported the majority's decision that the applicant was not entitled to a hearing prior to the approval of his neighbour's building plans. However, its reasoning differed. According to O'Regan ADCJ, who delivered the minority ruling, a building plan may only be rejected in terms of s 7 of the National Building Act if the proposed building will probably or in fact result in one of the disqualifying factors. It may not be rejected if there is merely a possibility that one of these outcomes will ensue. In terms of this interpretation, s 7 does not provide property owners with the protection against neighbouring building works that the majority's approach suggests it does. Nevertheless, the minority's interpretation confirms that neighbouring owners are not entitled to be heard before building plans are approved. O'Regan ADCJ argued that zoning and town-planning schemes impose legitimate limitations on the right of ownership. A zoning scheme limits the rights of all owners in a specific area, yet at the same time entitle them "to require that neighbouring owners comply with the applicable zoning scheme". J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 354, referring to O'Regan ADCJ's reasoning in *Walele*, explains that, since property owners within a specific area are all required to comply with the applicable zoning scheme, they have a right to require each other to comply with such a scheme and they are entitled to be heard when a neighbour wants to depart from it. Therefore, when a property owner wants to depart from a zoning scheme, or when land in a specific area is re-zoned, neighbouring owners' rights are affected and they have the right to be informed of the departure or the re-zoning. However, since an application for the approval of building plans that complies with the applicable zoning scheme does

“On this interpretation, section 7 creates an adequate self-contained protection which safeguards the rights of owners of neighbouring properties. As a result it becomes unnecessary for such owners to be heard before the approval is granted. The presence of a disqualifying factor precludes the granting of the approval and where the approval is granted despite a disqualifying factor, the process becomes invalid and can be set aside on that ground. Therefore the entitlement to a pre-decision hearing will not arise in such a case, as nobody is entitled to claim a hearing prior to an invalid exercise of public power.”<sup>28</sup>

Van der Walt<sup>29</sup> argues that in *Walele*, the Constitutional Court’s interpretation of section 7 of the Act creates the impression that a landowner has the right to have the approval of building plans reviewed (therefore, that a landowner may have the right to prevent building) if she alleges that the erection of the proposed building will detrimentally affect the market value of her property.<sup>30</sup> In effect, this would mean that section 7(1)(b) provides affected neighbouring owners a substantive right to be protected against building that might affect the value of their properties. However, the decision makes it clear that the obligation placed upon the building authority to reject building plans that might have such a negative effect provides sufficient protection to neighbours and that the affected neighbours themselves therefore do not have to be afforded a right to be informed of and to object against the plans. It can therefore not be deduced from the decision that section 7(1)(b) provides

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not materially or adversely affect the rights of a neighbouring property owner, neighbouring owners are not entitled to inspect building plans if they do not propose a departure from the zoning scheme or the re-zoning of an area. O’Regan ADCJ, in *Walele* at para 136, explained as follows:

“[A]n owner of property in an urban setting knows that his or her neighbours will be entitled to develop their property in line with the relevant zoning plans. It cannot be said therefore that the approval of building plans that are consistent with the applicable town-planning scheme is such as would give rise to a legitimate expectation of a hearing.”

<sup>28</sup> *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 56.

<sup>29</sup> AJ van der Walt *The law of neighbours* (2010) 352-353.

<sup>30</sup> In terms of the interpretation of s 7(1)(b) of the National Building Act that the majority of the Constitutional Court suggested, a local authority has to reject building plans when it is concerned that the building might have one of the negative outcomes that is provided for in s 7(1)(b)(ii). Therefore, a local authority may not approve building plans when there is a (mere) possibility that the proposed building would, for example, affect the market value of neighbouring properties.

landowners with an independent, substantive right to be informed of and to object against building plans relating to neighbouring land purely on the basis that the building works, once completed, might have a negative effect on their properties.

The Supreme Court of Appeal rejected the Constitutional Court's interpretation of section 7(1)(b) in *True Motives 84*.<sup>31</sup> In the latter decision the appellant challenged the approval of building plans in terms of which the first respondent made certain renovations. It was argued that the approval was inconsistent with section 7(1)(b)(ii) of the Act, since the execution of the plans would have harmful consequences for neighbouring properties.<sup>32</sup> Considering the proper scope of the duties that section 7(1)(a) and (b) of the Act imposes on local authorities, the majority concluded that these two subsections make provision for different tests. In terms of section 7(1)(a), the relevant local authority is obliged to refuse approval of plans when it is satisfied that the plans do not comply with the Act or any other applicable law, or when it is doubtful whether or not there is such compliance.<sup>33</sup> Heher JA determined that a local authority should only consider the requirements set out in section 7(1)(b) if it is satisfied that the relevant building plans do comply with the Act and other applicable law.<sup>34</sup> Should section 7(1)(b) indeed be applicable, the relevant local authority would

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<sup>31</sup> In *True Motives 84 (Pty) Ltd v Madhi and Another (Ethekwini Municipality as Amicus Curiae)* 2009 (4) SA 153 (SCA) paras 21-23, 33 and 35-39 the Supreme Court of Appeal held that the Constitutional Court's interpretation of s 7 of the National Building Act in *Walele* was *obiter*. It specifically mentioned that paras 32, 63 and 55 of the *Walele* judgment contained wrong statements in law and were *obiter*.

<sup>32</sup> *True Motives 84 (Pty) Ltd v Madhi and Another (Ethekwini Municipality as Amicus Curiae)* 2009 (4) SA 153 (SCA) para 7. True Motives alleged that the building works would overshadow and intrude upon the privacy of its property.

<sup>33</sup> *True Motives 84 (Pty) Ltd v Madhi and Another (Ethekwini Municipality as Amicus Curiae)* 2009 (4) SA 153 (SCA) paras 17-19. Heher JA stated that a local authority would doubt whether building plans comply with the National Building Act or other applicable law if it is either not satisfied that the plans breach the applicable law or not satisfied that the plans are in accordance with such a law. Section 7(1)(a) of the National Building Act was therefore regarded as laying down a test that only permits a local authority to approve building plans if it is positively satisfied that the plans do comply with the Act as well as with other applicable legislation.

<sup>34</sup> *True Motives 84 (Pty) Ltd v Madhi and Another (Ethekwini Municipality as Amicus Curiae)* 2009 (4) SA 153 (SCA) para 20. Heher JA argued that the conjunction "or" after s 7(1)(b)(i)

in terms of section 7(1)(b)(ii) be compelled to refuse the approval of the plans if it is satisfied that the erection of the proposed building will or will probably cause one of the undesirable outcomes mentioned in section 7(1)(b)(ii)(aa)(aaa)-(ccc) or 7(1)(b)(ii)(bb). However, the local authority may not refuse such approval if there is merely a possibility that one of the undesirable outcomes will eventuate – such an outcome must at least be “probable”.<sup>35</sup> The Supreme Court of Appeal in *True Motives 84* dismissed the appeal because the appellant in that case was unable to prove that the local authority had made a mistake in the legal interpretation or factual application of section 7(1)(b)(ii). There was therefore no basis for the court to interfere with the local authority’s discretion.<sup>36</sup>

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indicates that the inquiry in terms of s 7(1)(b)(ii)(aa) and (bb) should only be undertaken if the building plan complies with the National Building Act and other applicable law (in terms of the requirement set out in s 7(1)(a)).

<sup>35</sup> *True Motives 84 (Pty) Ltd v Madhi and Another (Ethekwini Municipality as Amicus Curiae)* 2009 (4) SA 153 (SCA) paras 21-22.

<sup>36</sup> See *True Motives 84 (Pty) Ltd v Madhi and Another (Ethekwini Municipality as Amicus Curiae)* 2009 (4) SA 153 (SCA) paras 70-91 and 93-97 for the minority interpretation of s 7 of the National Building Act. Jafta JA rejected the majority interpretation because he did not accept that a decision maker is only compelled, in terms of s 7(1)(b), to refuse the approval of building plans if it is satisfied that the erection of the building will definitely or probably lead to harmful consequences. Instead, he followed the approach that a decision maker must reject building plans even when the consideration of the relevant facts merely makes her doubt whether or not to approve. Although Jafta JA followed a different interpretation than the majority, he also concluded that there was compliance with s 7 of the National Building Act. The difference between the majority and the minority approaches in *True Motives 84* has certain implications for neighbouring owners’ involvement in the approval process of building plans. Cameron JA argued that the majority approach to s 7 of the National Building Act would have the practical effect of freeing building approvals from potential statutory challenges. These challenges are a result of the requirements set out in s 7(1)(b)(ii)(aa). While s 7(1)(a) deals with statutory requirements that are “generally capable of sure application”, the application of s 7(1)(b)(ii)(aa) requires a more subjective evaluation, since it deals with the nature and appearance of a proposed building. (Cameron JA referred to s 7(1)(b)(ii)(aaa), but in the context of what he discussed, he probably meant to refer to s 7(1)(b)(ii)(aa)). Since the majority interpretation entailed that a local authority must approve building plans unless it is satisfied that one of the undesirable outcomes will definitely or probably eventuate, a neighbouring owner would only be able to attack such an approval if she can prove that one of these proscribed outcomes will or will probably eventuate. Therefore, a local authority would be able to consider proposed building plans, having regard to both the statutory requirements and the nature and appearance of the building, without having to deal with the input of neighbouring owners. The *amicus* argued that such an interpretation is essential if the legislation is to be “practically workable in hard-pressed local authority town-planning departments”. Conversely, the minority interpretation implies that a neighbour can succeed with a review application directly to court if she can objectively prove that a prohibited outcome exists. See AJ van der Walt “Constitutional property law” (2009) 1 *Juta’s Quarterly Review* para 2 2 3. Van der Walt, referring to para 64 of *True Motives 84*, describes how the Supreme Court of Appeal was split in two with this decision. Heher, Scott,

The respective interpretations given to section 7(1)(b)(ii) by the Supreme Court of Appeal in *True Motives 84* and the Constitutional Court in *Walele*, were summarised as follows by Brand AJ in *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another*.<sup>37</sup>

“[A]ccording to *Walele* the local authority cannot approve plans unless it positively satisfies itself that the proposed building will not trigger any of the disqualifying factors referred to in section 7(1)(b)(ii). If in doubt, the local authority must consequently refuse to approve the plans. According to *True Motives*, on the other hand, a local authority is bound to approve plans unless it is satisfied that the proposed building will probably, or in fact, trigger one of the disqualifying factors referred to in section 7(1)(b)(ii). If in doubt, the building authority must consequently approve the plans.”<sup>38</sup>

The Constitutional Court’s interpretation of section 7 of the National Building Act in *Walele* suggests that a decision maker may only approve building plans when it is satisfied that the relevant legal requirements have been adhered to, and that none of the disqualifying factors in section 7(1)(b)(ii) will ensue once the proposed building

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Cameron and Combrinck JJA opted for a restricted interpretation of the Constitutional Court’s decision in *Walele*, whereas Jafta JA followed a more expansive interpretation of that decision. Nevertheless, all five judges concluded that the appeal should be dismissed. Jafta JA followed a purposive approach to the matter, while he referred to the interpretation given by the majority as literal. He rejected the application of a literal approach, reasoning that this would defeat the purpose of s 7(1)(b)(ii) of the National Building Act and that it would not comply with the obligation that s 39(2) of the Constitution imposes on courts.

<sup>37</sup> *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) para 33. This decision was the Constitutional Court’s response to (dismissal of) an appeal application. The matter was originally heard by the Western Cape High Court, reported as *PS Booksellers (Pty) Ltd v Harrison* 2008 (3) SA 663 (C), and later by the Supreme Court of Appeal, reported as *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* [2010] 2 All SA 519 (SCA).

<sup>38</sup> *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) para 33 (footnotes omitted). The applicants requested the Constitutional Court to clarify what approach should be followed when applying s 7(1) of the National Building Act. However, it was s 7(1)(a) of the Act that was applicable in this case, whereas the uncertainty that existed specifically concerned the interpretation of s 7(1)(b)(ii). AJ van der Walt “Constitutional property law” (2010) 4 *Juta's Quarterly Review* para 2 3 argues that despite the fact that this decision does not provide a solution for the problem that was created by the diverging judgments in *Walele* and *True Motives 84*, it may indicate how similar matters will be approached in future cases.

has been erected.<sup>39</sup> Furthermore, the approval of any plans that facilitate the erection of a building that will cause one of the unwanted outcomes may be set aside on review. The *Walele* decision implies that a property owner who wants to object against building on a neighbouring property only has to prove that the erection of the proposed building will diminish the value of her property to trigger this obligation on the local authority's side. However, this approach to section 7 assumes that the obligations of the building authority sufficiently protects the interests of neighbouring property owners and makes it unnecessary for them to have an opportunity to be informed of and raise their objections to building plans prior to their approval.<sup>40</sup> According to this interpretation, the right of landowners affected by building on neighbouring land is a purely procedural right that can only surface once the building plans had been approved and building has commenced; the objection will assume the form of review of the decision to approve the building plans.

Conversely, the Supreme Court of Appeal in *True Motives 84* determined that a local authority may only reject building plans if it is satisfied that, once the proposed building is erected, it will definitely or probably have one of the undesirable effects. In terms of this approach, a neighbouring owner will also be able to object against approval of the plans after the fact, but the burden of proof is higher in the sense that the objector must show that one of the undesirable effects will in fact eventuate (as opposed to the mere possibility that it might come about).

The *Walele* judgment therefore leaves a wider scope for a property owner to object against approval of building plans on a neighbouring property, since it implies

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<sup>39</sup> *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 54-55.

<sup>40</sup> The Constitutional Court held that the consideration that a local authority must give to the interests of neighbouring owners in terms of s 7 of the National Building Act protects their interests in such a way that it would be unnecessary to give them the opportunity to object to an application for the approval of a building plans.

that an owner will more easily succeed if she can prove that the proposed building works might possibly cause one of the undesirable outcomes.<sup>41</sup> In terms of the Constitutional Court's interpretation of section 7 of the National Building Act in *Walele*, a decision maker may only approve building plans when it is satisfied that the relevant legal requirements have been adhered to, and that none of the disqualifying factors in section 7(1)(b)(ii) will ensue once the proposed building has been erected.<sup>42</sup> Furthermore, the approval of any plans that facilitate the erection of a building that will cause one of the unwanted outcomes may be set aside on review. This interpretation only allows for the approval of building plans when such plans will definitely not have an undesirable effect in terms of section 7(1)(b). However, in terms of the Supreme Court of Appeal's conflicting interpretation of section 7 in *True Motives 84*, a local authority may only reject building plans if it is satisfied that, once the proposed building is erected, it will definitely or probably have one of the undesirable effects. If this latter interpretation is followed, building plans may only be

<sup>41</sup> AJ van der Walt *The law of neighbours* (2010) 347 argues that it was established in *Walele* that

“[i]f approval of the building involves an amendment to or deviation from the normal building regulations or the zoning scheme, or an amendment or removal of restrictive conditions registered in favour of the neighbours, the neighbours should have an existing right in terms of section 3 of PAJA and they should qualify to inspect and object to the plans prior to approval.”

Therefore, the *Walele* decision established that neighbours do not have a right to be informed of or to comment on an application for the approval of building plans, unless such an application involves an amendment to or a departure from the applicable zoning scheme or an amendment or removal of restrictive conditions registered in their favour. Subsequent case law has confirmed a property owner's right to participate in the process prior to the approval of a neighbour's building plans when such plans would affect an existing right of hers. In *Tergniet and Toekoms Action Group and 35 Others v Outeniqua Kreosootpale (Pty) Ltd and Others* unreported case no 10083/2008 (23 January 2009) (C), the court ruled that property owners, as members of a community, have the right to enforce regulatory legislation and applicable zoning scheme provisions in order to protect their rights. This principle was confirmed in *Camps Bay Residents and Ratepayers Association and Others v Augoustides and Others* 2009 (6) SA 190 (WCC) para 16, with specific regard to instances where building plans depart from prescribed regulations. In the latter decision, the court ruled that the relevant local authority should have rejected the first respondent's building plans because no application was made or approval granted for the departure from the zoning scheme regulations. In *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others* 2011 (4) SA 149 (SCA) paras 29 and 36-41 the court held that in terms of the Removal of Restrictions Act 84 of 1967, neighbours and other owners who are favoured by a restrictive condition have to be given notice if building work is to be conducted in conflict with such a condition. See AJ van der Walt *The law of neighbours* (2010) 342.

<sup>42</sup> *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 54-55.

rejected if there is a strong possibility that it may result in one of the undesirable effects mentioned in section 7(1)(b). As was argued earlier, neither of these interpretations creates a substantive right because neither implies that the affected neighbouring owner may insist on being informed of and be allowed to object to building plans prior to their approval. Both interpretations allow only for a procedural objection to approval of the building plans, after the fact, but the Constitutional Court's interpretation arguably makes it easier to succeed with such an objection because the mere possibility that one of the negative effects will ensue should be enough to warrant review of the decision.

Despite the conflicting interpretations of section 7 of the National Building Act in *Walele* and *True Motives 84*, these decisions do provide an answer to the question of whether section 7 creates a substantive right to prevent buildings on neighbouring properties. Read together with other case law concerning the meaning of the phrase "detrimental effect on the value of property",<sup>43</sup> these judgments indicate that an attack on the discretion exercised by a decision maker who approved building plans (that do not otherwise conflict with substantive rights originating in legislation, the zoning scheme, building regulations or restrictive conditions) is a purely procedural strategy that cannot prevent (but could delay) the erection of buildings on a neighbouring property. In such instances, the right to object against (and possibly delay) the erection of buildings on a neighbour's property emerges from the exercise of an administrative discretion and not from a previously existing substantive right.

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<sup>43</sup> *New Adventure Investments 193 (Pty) Ltd v Trustees for the time being of the SAS Trust* [2002] 3 All SA 544 (C); *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D); *Clark v Faraday and Another* 2004 (4) SA 564 (C); *De Kock v Saldanhabaai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006) and *Searle v Mossel Bay Municipality and Others* (1237/09) [2009] ZAWCHC 10 (13 February 2009). See the discussion of these cases in 3 3 3 1.

Therefore, courts are correct when they refuse to grant a property owner a substantive right, based purely on section 7, to prevent building works.<sup>44</sup>

### 3 2 2 Application

#### 3 2 2 1 Restrictive conditions

J van Wyk refers to restrictive conditions as

“conditions registered in title deeds during the process of township establishment by the township developer in terms of which restrictions are placed on the use of land, separate from town planning or land use schemes.”<sup>45</sup>

A restrictive condition can create a substantive right to prevent (or at least object against) the erection of buildings on a neighbouring property that would affect an existing view from the dominant property. Restrictive conditions in title deeds can, for example, restrict the erection of buildings within a specific distance from the street line; place height restrictions on buildings erected on a specific property; limit the area of a property that may be built on; and restrict the use of a property to a single-story dwelling.<sup>46</sup> These limitations may protect the existing, unobstructed view from a neighbouring property<sup>47</sup> and if they do, will result in the effective, substantive

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<sup>44</sup> The courts in *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D); *Clark v Faraday and Another* 2004 (4) SA 564 (C) and *De Kock v Saldanhabaai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006) rejected the argument that s 7 of the National Building Act grants a property owner a substantive right to prevent building works on a neighbouring property in the sense that it prohibits a local authority from approving building plans that will cause one of the unwanted outcomes mentioned in s 7(1)(b). These decisions are discussed in 3 3 3.

<sup>45</sup> J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 309.

<sup>46</sup> J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 68 and 306-307.

<sup>47</sup> In *Myburgh v Jamison* (1861) 4 Searle 8, a condition in the transfer deed of a property prohibited the erection of buildings that would obstruct the view from a specific adjacent property. This constituted a restrictive condition that protected the existing view from a property. See 2 3 2 for a discussion of this case.

protection of the view, since building works that contravene such a restrictive condition are unlawful.<sup>48</sup>

Protection of the existing view from a property in terms of a restrictive condition of this kind can only be limited or forfeited if the neighbouring owner who is prevented from building in terms of the restrictive condition successfully applies for the amendment, qualification or removal of the condition. However, the interests of the beneficiaries of such a restrictive condition are protected against the unwanted alteration or removal of such a condition and it is unlikely that conditions of this nature will be removed or amended purely for the benefit of the affected owner who wants to build.<sup>49</sup>

In *Ex parte Optimal Property Solutions CC*<sup>50</sup> the court ruled that restrictive title deed conditions are similar in character to reciprocal praedial servitudes and that the registration of such servituted rights and obligations amounts to the creation of real rights in property.<sup>51</sup> The rights and duties created by the registration of a restrictive condition will be terminated when the condition ceases to exist, with the result that the removal or amendment of a restrictive condition will affect property rights *inter*

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<sup>48</sup> See *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others* 2011 (4) SA 149 (SCA) para 18 and J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 315. See also *Resnekov v Cohen* 2012 (1) SA 314 (WCC), which concerned an (applicant's) attempt to enforce a restrictive condition that restricted the use of a (respondent's) neighbouring property to a single-storey dwelling. This limitation on the respondent's right to build on his property, which was allegedly inserted to benefit the applicant's tenement, possibly had the effect of protecting the existing view from the applicant's property. However, the court dismissed the applicant's case, on the basis that the condition was a personal servitude that only benefitted the person who owned the property when the condition was inserted, and that the applicant did therefore not have *locus standi*. This decision indicates that the effectiveness of a restrictive condition that is aimed at preventing the erection of buildings that will obstruct the view from a property may be affected by the way in which the condition is interpreted. See the discussion of this case in J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 68-69.

<sup>49</sup> The consent of the beneficiaries of a restrictive condition is required for the removal or amendment of such a condition if it is removed or amended in terms of the common law, while the removal or modification of a restrictive condition in terms of the provisions of the Removal of Restrictions Act 84 of 1967 is only allowed if the beneficiaries of the condition had the opportunity to raise objections.

<sup>50</sup> *Ex parte Optimal Property Solutions CC* 2003 (2) SA 136 (C).

<sup>51</sup> *Ex parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) para 4.

se.<sup>52</sup> The court decided that the loss of property rights due to the removal of a restrictive condition amounts to a deprivation of property in terms of section 25(1) of the Constitution.<sup>53</sup> It therefore decided that, in order to comply with the constitutional requirements for a valid deprivation of property, the removal of restrictive conditions in terms of the common law must be accompanied by effective notice to affected neighbours and may not be granted without the consent of all the affected parties.<sup>54</sup>

Restrictive conditions can also be amended or removed in terms of legislation such as the Removal of Restrictions Act 84 of 1967 (“RORA”), which regulates the administrative removal and modification of restrictive conditions. The consent of affected property owners is not required when a restrictive title deed condition is removed in terms of RORA.<sup>55</sup> Nevertheless, RORA prescribes procedures to ensure the enforcement of affected owners’ rights to be informed of and to object to applications for the amendment or removal of restrictive conditions that affect their land.<sup>56</sup> Therefore, as was established in *Ex parte Optimal Property Solutions CC*, restrictive conditions create property rights that, according to the requirements for the removal or amendment of a restrictive condition in terms of the common law or

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<sup>52</sup> *Ex parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) para 5.

<sup>53</sup> The Constitution of the Republic of South Africa, 1996. See *Ex parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) paras 19-20.

<sup>54</sup> *Ex parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) paras 6 and 20. See the discussion of this decision in PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 355-356.

<sup>55</sup> In *Ex parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) para 21 the court explained that RORA “enables the administrative amendment or deletion of title deed restrictions”. The court reasoned that this statute is law of general application for purposes of s 25 of the Constitution that allows a limitation of a praedial servitude holder’s common law rights to the extent that it does not require the consent of affected owners for such an amendment or deletion.

<sup>56</sup> Section 2(1)(aa) and (dd), read together with ss 2(4)(a)-(c), 3(6), 5(2)(b)(ii) and 5(4) of RORA, determine that affected persons shall be informed of the proposed alteration, suspension or removal of a restriction or obligation that is applicable to a landowner in terms of a restrictive condition. In effect, these provisions confer a right on an affected owner who is the beneficiary of such a condition to be informed of an application for the amendment or removal of a restrictive condition. If such an amendment or removal is approved without notice being given in the way prescribed by section 2(4) of this Act, an affected owner is entitled to appeal. In *Ex parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) para 21 the court reasons that RORA requires the relevant state functionary “to consider what service should be effected on affected property owners”. See J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 330 and 333-335.

RORA, may only be removed if affected property owners have at least been given an opportunity to object to the removal or amendment. A restrictive condition that places a limitation on a property owner that prevents her from building in a manner that would obstruct the existing view from a neighbouring property therefore confers a substantive right on the neighbouring owner to protect her view in the sense that she may enforce the restrictive condition. Furthermore, the possibility of removal or amendment of such a restrictive condition does not derogate from the substantive protection that is provided by a restrictive condition, since such a condition may not be removed or amended without giving affected property owners an opportunity to raise objections. Arguably, the negative effect that removal of the restriction and ensuing building on the neighbouring land may have on their properties (including removal of the existing view) may in certain circumstances be a relevant consideration in the adjudication of their objections.

### 3 2 2 2 *Re-zoning of land*

In the *Walele* decision, O'Regan ADCJ confirmed that neighbours have a right to be consulted when an application for the re-zoning of land is considered.<sup>57</sup> She argued that a zoning scheme limits an owner's right of ownership, but also gives an owner the right to expect other neighbours to comply with the scheme. Therefore, if a property owner wants to use her property within the parameters of the applicable zoning scheme, the rights of neighbouring owners are not materially affected and they do not have to be consulted or heard during the approval of the plans. However, if a property owner submits building plans that require a departure from the scheme, or if the land has to be re-zoned to make approval possible, the rights of

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<sup>57</sup> *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 130.

neighbouring owners are indeed negatively affected and they are entitled to be heard before the plans are approved.<sup>58</sup> If a zoning scheme has the effect of protecting the existing view from an owner's property, she has a substantive right to prevent the obstruction of such a view against building on a neighbouring property in the sense that she may expect her neighbours to comply with the zoning scheme and she may have the right to be informed of and to raise objections when her neighbours apply for departure from the zoning scheme or the re-zoning of their land.

The applicants in the earlier case *Richardson and Others v South Peninsula Municipality and Others*<sup>59</sup> ("Richardson") attacked the approval of the subdivision of the second respondent's property on the ground that the approval process did not comply with the provisions of section 24(2)(a) of the Land Use Planning Ordinance 15 of 1985 ("LUPO") since the local authority approved the plans without advertising the subdivision that was involved in approval of the plans.<sup>60</sup> The applicants therefore

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<sup>58</sup> *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 130 and 136. See also J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 354, 357 and 396.

<sup>59</sup> *Richardson and Others v South Peninsula Municipality and Others* 2001 (3) BCLR 265 (C) 268.

<sup>60</sup> Section 24(1) and (2)(a) of LUPO deals with the application for subdivision of property and provides as follows:

"24

(1) An owner of land may apply in writing for the granting of a subdivision under section 25 to the town clerk or secretary as the case may be.

(2) The said town clerk or secretary shall –

(a) cause the said application to be advertised if in his opinion any person may be *adversely affected* thereby".

In *Richardson and Others v South Peninsula Municipality and Others* 2001 (3) BCLR 265 (C) 272 Yekiso AJ reasoned that the use of the word "shall" in s 24(2) of LUPO indicates that the provisions in this subsection are peremptory and not permissive. He subsequently found that the local authority's (first respondent's) failure to advertise the application for the approval for subdivision also meant that it was not successful in its duty to follow the procedure prescribed in s 24(2)(a) of LUPO. After referring to the constitutional principle of just administrative action and emphasising the importance of administrative legality, Yekiso AJ concluded that the process leading to the approval of the resolution was unlawful. This meant that a right to challenge the validity of the administrative decision accrued to the persons who were adversely affected thereby. AJ van der Walt *The law of neighbours* (2010) 364 n 107 also argues that the requirement of advertising that is set out in s 24(2)(a) of LUPO is compulsory.

had a substantive right<sup>61</sup> that, if enforced successfully, would prevent the erection of buildings that would obstruct the existing view from their property.<sup>62</sup> The second respondent opposed this application, arguing that the applicants only acquired the property after the impugned resolution was adopted and that they were therefore not “affected persons” in terms of section 24(2)(a) of LUPO at the time when the decision was taken. The court rejected this argument and held that an owner’s right to apply for appropriate relief when she is affected by unlawful and procedurally unfair administrative action is incidental to the right of ownership. Therefore, the right to apply for appropriate relief against unjust administrative action is transferred with the ownership of property.<sup>63</sup> The court ruled that the first respondent’s failure to advertise the proposed subdivision amounted to a breach of its duty to ensure lawful and procedurally fair administrative action, because it deprived persons who could be adversely affected by such an application of the right to object or make representations.<sup>64</sup> However, the court considered an order setting aside the approval

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<sup>61</sup> This substantive right is the right of neighbours and other affected owners to have an opportunity to object to an application for subdivision, as provided for in s 24 of LUPO.

<sup>62</sup> *Richardson and Others v South Peninsula Municipality and Others* 2001 (3) BCLR 265 (C) 268 and 269. The first applicant feared that the second respondent would construct a second storey on her (second respondent’s) existing residence. The first applicant emphasised that the existing view from the trust’s property (of which she, as well as the second, third and fourth applicants are trustees) was the principal reason why they had bought it. However, although the applicants never proposed the potential obstruction of the view from their property as a cause of action, they clearly aimed to protect this view, since they stated in their affidavit that the loss of this “spectacular” view would cause a derogation of their property. These fears prompted her to instruct her attorneys to inspect the validity of certain plans pertaining to the dwelling on the second respondent’s property.

<sup>63</sup> *Richardson and Others v South Peninsula Municipality and Others* 2001 (3) BCLR 265 (C) 274 and 275. The right of action actually accrued to the applicants’ predecessor in title because she was an “affected person” in terms of s 24(2)(a) of LUPO. The *Richardson* court decided that, as new owners of the property, the applicants now had this right of action. Yekiso AJ held that the previous owner of Erf 4551 Hout Bay had the rights to lawful and procedurally fair administrative action in terms of s 24 of the Constitution of the Republic of South Africa, Act 200 of 1993 (“Interim Constitution”) (which was applicable at the time the administrative decision was taken) and, in terms of s 7(4) of the Interim Constitution, the right to have standing to apply to an appropriate court if these rights were infringed upon. These rights were considered to be incidental to ownership and were therefore transferred to the applicants when ownership of the property passed. See AJ van der Walt *The law of neighbours* (2010) 364.

<sup>64</sup> *Richardson and Others v South Peninsula Municipality and Others* 2001 (3) BCLR 265 (C) 272 and 275. The local authority’s decision to dispense with the advertising of the subdivision application contravened s 24(2)(a) of LUPO. Section 24(2)(a) requires that an application for

of the subdivision to be an inappropriate remedy.<sup>65</sup> Instead, it ordered that the matter should be remitted to the first respondent to consider imposing height restrictions on the present and future buildings of the subdivided land.<sup>66</sup> Van der Walt considers this decision as an example of courts' "willingness to consider a compromise" if the illegality of a building is the result of a "*bona fide* mistake or oversight".<sup>67</sup> He argues that the applicants had an opportunity to protect the view from their property indirectly, because of an irregularity in the approval of subdivision.<sup>68</sup> It should be clear, however, that the objection in this case (although it was focused on the right to just administrative action) was based on a substantive right to be informed of and to object against the subdivision, and not purely on an administrative oversight.

In *Walele* it was established that a property owner may expect her neighbours to comply with the applicable zoning scheme. This was confirmed in the *Richardson* judgment, which showed that a property owner is entitled to be informed of and to comment on or object against an application for the re-zoning of land. A property owner may therefore rely on the protection of the existing view from her property insofar as the applicable zoning scheme prevents a neighbouring owner from erecting buildings that will interfere with such a view, since she has a substantive right to enforce compliance with, or at least to object against the amendment of such a scheme. The *Richardson* decision also indicates that a successor in title who

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subdivision should be advertised, whereas s 24(2)(b) makes provision for the owner who seeks subdivision to comment on the recommendations and objections of persons that might be affected by the proposed subdivision.

<sup>65</sup> *Richardson and Others v South Peninsula Municipality and Others* 2001 (3) BCLR 265 (C) 277. The court held that an order to set aside the approval for subdivision would cause immense financial consequences for the parties involved because a substantial amount of money had been spent in the course of developing the erven since the subdivision of the original erf had been approved (a dwelling had been erected on Erf 4553 and Erf 7905 had been transferred to new owners).

<sup>66</sup> *Richardson and Others v South Peninsula Municipality and Others* 2001 (3) BCLR 265 (C) 278.

<sup>67</sup> AJ van der Walt *The law of neighbours* (2010) 350.

<sup>68</sup> AJ van der Walt *The law of neighbours* (2010) 349 and 364.

wishes to rely on a substantive right to prevent building as a way to protect the view from her property has the right to do so, because the right to lawful and procedurally fair administrative action is inherent to the ownership of land and is therefore acquired by a successor in title.<sup>69</sup>

### 3 2 2 3 *Departure from a zoning scheme*

In *Muller NO and Others v City of Cape Town and Another*<sup>70</sup> (“Muller”), the applicants succeeded with an application for the review and setting aside of a neighbour’s approved building plans, on the ground that these plans contravened the applicable zoning scheme.<sup>71</sup> The plans provided for alterations to a building that would, once constructed, obstruct the view from the applicants’ property. The applicants showed that the first respondent should not have approved the plans, since they proposed a building that would exceed the lawful height restriction,<sup>72</sup> would derogate from the value of their property;<sup>73</sup> and because they, as affected

<sup>69</sup> AJ van der Walt *The law of neighbours* (2010) 364.

<sup>70</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C).

<sup>71</sup> The applicants were co-trustees of a trust that owned immovable property in Bloubergstrand. The second respondent was a close corporation that owned property that directly adjoined that of the applicants. The building plans were drawn up for the alteration and extension of the existing house on the second respondent’s property. The first respondent was the local authority, the City of Cape Town, which approved the building plans.

<sup>72</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) paras 27, 31 and 36. The applicants contended that the building plans contravened s 7(1)(a) of the National Building Act because the proposed building works would exceed the lawful height limitation. The height limitation was prescribed by zoning scheme regulations that were considered to be “any other applicable law”. Non-compliance with this limitation therefore implied that the plans did not comply with s 7(1) of the Act, in terms of which building plans must comply with applicable law.

<sup>73</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) para 32. The applicants argued that the obstruction of the view from their property would mean that the building plans were unlawfully approved since s 7(1)(b)(ii)(aa)(ccc) of the National Building Act provides that a local authority shall refuse to approve an application for building plans if it is satisfied that the proposed building will probably or in fact derogate from the value of adjoining or neighbouring properties. According to the applicants’ reasoning the obstruction of the view from their property would cause its value to decrease and therefore, in terms of s 7(1)(b)(ii)(aa)(ccc), the local authority should not have approved the plans. The argument that the building plans should not (have) be(en) approved, since they may have resulted in the interference with a neighbour’s enjoyment of her property and consequently have caused her property to depreciate is discussed in 3 3 3. Nevertheless, this decision is also partly discussed

owners, were denied an opportunity to see and object to the plans.<sup>74</sup> On the supposition that their neighbour would comply with the applicable zoning requirements and specifically the prescribed height limitation, the applicants were unconcerned when their neighbour commenced with alterations to the existing buildings on its property. However, when the building works reached what the applicants considered an unacceptable height, they caused investigations to be conducted into the approval of their neighbour's building plans.<sup>75</sup> They discovered that the local authority that approved the plans used the wrong method for determining the height that the building works would reach and that it therefore did not realise that the proposed alterations would cause the buildings to exceed the relevant height restriction as laid down in the zoning scheme.<sup>76</sup> Building works that exceed the prescribed height limitation constitutes a departure from the applicable zoning scheme. Neighbouring owners have a right to be informed of and to object to

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here, as an example of a substantive right to prevent the erection of buildings that can be used as an alternative strategy to protect the existing view from a property.

<sup>74</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) paras 5, 20, 33, 62, 68 and 76. The applicants argued that they were denied an opportunity to object to or comment on the relevant plans, despite the fact that the first respondent initially advised them that they will have such an opportunity. In response to the question why they did not afford the applicants an opportunity to comment on the plans, the first respondent commented that they found the plans to be compliant with the applicable zoning scheme regulations. The court held that the approval of the plans without giving the applicant's an opportunity to object or comment, in circumstances where they ought to have been given such an opportunity, was procedurally unfair. This procedural irregularity was one of the court's grounds for ruling that the plans were wrongly approved. The applicants' complaint that they were not given notice of the application for the approval of the plans does not seem to be based on the ground that the plans' departure from the relevant zoning scheme entitled them to an opportunity to be heard. Instead, it is based on the reasoning that they should have been given an opportunity to be heard because the potential effect that the proposed construction would have on the amenity enjoyed on the applicants' property was evident.

<sup>75</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) para 11.

<sup>76</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) paras 55, 57, 58, 61, 64, 67 and 68. The zoning scheme regulations that applied to the property in question expressly provided a method for the measuring of a building's height. However, this method was not used by the local authority when it considered the second respondent's building plans. The use of an incorrect method to determine the height of the proposed constructions constituted a formal shortcoming in the process through which these building plans were approved. The *Muller* decision is therefore also discussed in 3 3 2 as an example of a case where a formal shortcoming in the approval of building plans stalled the erection of a building that would obstruct the existing view from a neighbouring property.

building plans that propose such a departure.<sup>77</sup> The applicants, who were denied the opportunity to see and object to the plans, therefore had a substantive right to attack their approval. Consequently, they had the opportunity to protect the view from their property either temporarily or permanently. If the approval of their neighbour's building plans was reviewed but confirmed to be lawful, the existing view from their property would only have been protected for the time that it took for the appeal proceedings to be conducted (therefore temporarily). However, if the applicants could indicate that there were sufficient reasons why the plans should not have been approved and should never be approved, their appeal would succeed and the approval would be set aside permanently. The court held that there indeed were enough reasons indicating that the plans should not have been approved.<sup>78</sup> Consequently, the applicants succeeded in having the approval of their neighbour's building plans set aside and therefore permanently prevented the construction of unlawful buildings that would obstruct the existing view from their property. Their view was therefore protected insofar as the applicable zoning scheme prevented buildings that would exceed the prescribed height limitation.

### 3 2 2 4 *Legislation prohibiting building works*

The decision in *Transnet Ltd v Proud Heritage Properties*,<sup>79</sup> ("*Transnet*") introduced the possibility of using "statutory duty" as a basis for the (possibly permanent and absolute) protection of an existing view. In terms of section 74 of the National Ports Act, the National Ports Authority is, *inter alia*, responsible for maintaining adequate and efficient lighthouses to assist in the navigation of ships. In *Transnet* the first

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<sup>77</sup> See 3 2 1 for a discussion of a neighbouring owner's right to be heard when building plans that depart from the applicable zoning scheme are considered for approval.

<sup>78</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) paras 76-78.

<sup>79</sup> *Transnet Ltd v Proud Heritage Properties* (405/08) [2008] ZAECHC 155 (5 September 2008).

respondent's development of its property posed a threat to the applicant's duty to assist in the navigation of ships because the finished building works would have the effect of obstructing a lighthouse signal. The court considered the applicant's statutory duty to operate and maintain the lighthouse as an indication of the fact that it had a clear right not to have the view to the lighthouse signal obstructed.<sup>80</sup> The statute therefore created a (substantive) legal right or duty to keep the line of sight to the lighthouse clear. Accordingly, the applicant was entitled to prevent neighbouring owners from building (higher) in a way that would obstruct the view to its property.<sup>81</sup> This judgment illustrates that courts may be willing to recognise that a property owner has a substantive right to an unobstructed view if she has a statutory obligation to protect a direct line-of-view to a specific property.<sup>82</sup>

### 3 2 3 Remedies

The existing view from a property is at least protected insofar as normal building regulations, the applicable zoning scheme and restrictive conditions prevent the erection of buildings that may obstruct it. Therefore, in a situation where a property owner plans to erect or has erected a building that does not comply with these requirements or limitations, neighbouring owners have a right to be informed of and

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<sup>80</sup> *Transnet Ltd v Proud Heritage Properties* (405/08) [2008] ZAECHC 155 (5 September 2008) paras 11 and 13.

<sup>81</sup> This case is distinguishable from the other cases discussed in this chapter, because it involves the obstruction of the view to, and not from, a property. Nevertheless, it corresponds with the other cases in the sense that it concerns the right to protect an existing, unobstructed view against obstruction caused by another owner's building works.

<sup>82</sup> AJ van der Walt *The law of neighbours* (2010) 373 discusses *Transnet* in the context of case law on sunlight, natural light, the free flow of air and privacy. He considers direct line-of-sight views, together with access to direct sunlight and free flow of air, to play an important role in the modern day use of land for sun or wind power and contends that lighthouse signals rely on direct line-of-sight views. He argues that the modern day uses of views require a reconsideration of the Roman-Dutch law conception that a view is only an incidental advantage of landownership.

to object to the departure. The *Muller* decision<sup>83</sup> shows that in instances where a substantive right is used to prevent building works that do not comply with these regulations the existing view from a property may be protected to the extent that the applicable building regulations, zoning scheme or restrictive conditions prohibit building works that would interfere with such a view. However, if the procedural irregularity is attributable to a *bona fide* mistake or oversight, courts will probably try to reach a compromise to ensure that neighbours' interests are indeed (at least partly) protected, despite the fact that they had not been given an opportunity to comment on or object against the plans before they were approved. In *Richardson*,<sup>84</sup> the process of approving building plans that involved the subdivision of a property was not repeated to enforce affected owners' right to be heard, but their interest in preventing the subdivision, namely that it would result in the erection of buildings that would obstruct the view from their property, was nevertheless protected to a certain extent. The court ordered that the relevant local authority should consider imposing height restrictions on the existing and future buildings on the subdivided land.<sup>85</sup> Such height limitations would prevent the obstruction of the existing view from the affected neighbours' property.

Furthermore, the *Transnet* judgment<sup>86</sup> indicates that in instances where a property owner has a statutory right or duty to protect the undisturbed view to or from her property, courts may be prepared to enforce such a right or duty, even if it would prevent neighbouring owners from exercising their right to develop their properties

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<sup>83</sup> See the discussion of *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) in 3 2 2 3.

<sup>84</sup> *Richardson and Others v South Peninsula Municipality and Others* 2001 (3) BCLR 265 (C), discussed in 3 2 2 2.

<sup>85</sup> *Richardson and Others v South Peninsula Municipality and Others* 2001 (3) BCLR 265 (C) 278. See the discussion of this judgment by AJ van der Walt *The law of neighbours* (2010) 349-350.

<sup>86</sup> *Transnet Ltd v Proud Heritage Properties* (405/08) [2008] ZAECHC 155 (5 September 2008), examined in 3 2 2 4.

within the parameters provided by restrictive conditions, zoning schemes and building regulations.

Therefore, a property owner (A) can prevent the erection of a neighbour's (B's) building works that would obstruct the existing view from her property with a substantive right in terms of which she was entitled to be informed of, to comment on, and sometimes required to consent to the relevant building plans, but was denied such an opportunity. In some cases, A's right to object can amount to a veto,<sup>87</sup> while in other instances her objection may be overruled either by a court<sup>88</sup> or by a local authority.<sup>89</sup> If A insists on having an opportunity to see, object against or grant permission to the approval of B's building plans, courts have to enforce A's right to see, object or consent to the relevant plans if the approval involves removal or amendment of a restrictive condition, amendment of the existing zoning scheme or compliance with statutory duties or obligations. Accordingly, they have to ensure that the correct procedure is followed, implying that the approval process has to be repeated and that this time around, neighbours have to be informed of the application, and must be given an opportunity to see, comment and in some cases, to approve of the proposed building plans. If the neighbours then provide sufficient reasons why the plans should not be approved, for example why the applicable zoning scheme should not be departed from, or if they have to consent to the approval, but withhold such permission, the obstruction of the views from their

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<sup>87</sup> A's right to object may amount to a veto of the approval of B's building plans if A has a statutory duty to prevent the obstruction of a line of view to a lighthouse, or if B applied for the removal of a restrictive condition in terms of the common law. Instances where an affected owner may prevent the erection of buildings on a neighbouring property are discussed in 3 2 1, 3 2 2 1 and 3 2 2 4.

<sup>88</sup> A's objections against B's building plans may be overruled by a court or another state functionary if B's application included an application for the removal of a restrictive condition in terms of RORA, since it was held in *Ex parte Optimal Property Solutions* CC 2003 (2) SA 136 (C) para 21 that the removal of a restrictive condition in terms of RORA may be granted notwithstanding objections that were raised by affected landowners. See 3 2 2 1.

<sup>89</sup> A's objections would, for example, be overruled by a local authority if it grants B's application for a departure from the relevant zoning scheme despite her (A's) objections.

properties will be prevented permanently. If they do not provide sufficient reasons, or if they are not entitled to veto the approval, the plans may be approved, possibly with qualifications or restrictions. In the latter instance, the neighbours could at least have succeeded in stalling the building works that would obstruct their views until the plans were properly approved, unless the unlawful building works have already reached a height that obstruct their views.

### **3 3 Procedural strategies**

#### **3 3 1 Basis of procedural strategies to prevent building**

Case law indicates that South African property owners have used provisions in the National Building Act to prevent the erection of buildings on neighbouring land in instances where they did not have substantive rights to prevent such building works, in the sense that the proposed building complies with and does not depart from any existing legislation, the zoning scheme or restrictive conditions. Very often, these strategies rely on purely procedural shortcomings in the process of considering and granting permission to build. Section 5(1), read together with sections 6(1) and 7(1) of the National Building Act, for example requires that a building control officer must be appointed and compels a local authority to consider such an officer's recommendations in the process of approving building plans. If a building plan has been approved without complying with the obligatory provisions set out in sections 5(1), 6(1) and 7(1), the irregularity in the administrative process through which the plans were approved would render such a decision (approval) unlawful. An attack on the approval procedure could thus be used to frustrate or delay the erection of

building works that might interfere with an existing view, even though the objector had no substantive right to be informed of or object against approval of the plans.

The procedural strategies often rely on section 7(1)(b)(ii) of the National Building Act, which provides a list of factors that, if present, would disqualify building plans from approval.<sup>90</sup> Section 7(1)(b)(ii)(aa)(ccc) specifically directs a local authority to refuse to approve an application for building plans if it is satisfied that the erection of the proposed building “will probably or in fact derogate from the value of adjoining or neighbouring properties”. This provision gives a local authority a discretionary power and has been applied to attack the approval of building plans that would allow the erection of buildings that are otherwise completely lawful but will interfere with the existing views from neighbouring properties. Two different strategies, based on these provisions in the National Building Act, have been employed in attempts to protect hitherto undisturbed views.

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<sup>90</sup> Section 7(1) of the National Building Act reads as follows:

“7. Approval by local authorities in respect of erection of buildings.

(1) If a local authority, having considered a recommendation referred to in section 6(1)(a) –

(a) Is satisfied that the application in question complies with all the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;

(b) (i) Is not so satisfied; or

(ii) Is satisfied that the building to which the application in question relates –

(aa) is to be erected in such a manner or will be of such nature or appearance that –

(aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;

(bbb) it will probably or in fact be unsightly or objectionable;

(ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;

(bb) will probably or in fact be dangerous to life or property, such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal”.

One strategy is to contest the approval of building plans on the basis of irregularities in the approval process. Such irregularities may include instances where a property owner builds without any building plans; situations where a building is constructed in terms of building plans, but the plans have not been approved properly or in accordance with the applicable zoning scheme; and cases where there are properly approved building plans, but the buildings are not constructed according to the approved plans. If one of these procedural irregularities occurs, the erection of the building or structure is unlawful and the construction can thus be delayed through a procedural attack on the approval process. However, these procedural irregularities can usually be corrected if the plans are again submitted for approval and the correct procedure is followed. Therefore, the success of such a purely procedural attack on the approval of building plans that would allow the construction of buildings that will interfere with an existing view is mostly temporary.

A second strategy in which the provisions of the National Building Act are used to prevent the construction of building works is where an owner questions the discretion exercised when a decision maker decides to approve building plans that, once executed, would obstruct the existing views from her property. When a litigant attacks a decision maker's discretion in an attempt to protect the existing view from her property, she would typically argue that the view from her property contributes to the property's market value and that the decision maker was therefore, in terms of section 7(1)(b)(ii)(aa)(ccc), obliged to refuse the approval of the building plans that proposed the erection of buildings that would obstruct such a view.<sup>91</sup> This argument

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<sup>91</sup> The way in which a court interprets s 7(1)(b)(ii)(aa)(ccc) of the National Building Act plays an important role in its decision about whether or not such an application should be successful. In this regard, see *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 54-56, where the Constitutional Court interpreted this section, and see *True Motives 84 (Pty) Ltd v Madhi and Another (Ethekwini Municipality as Amicus Curiae)* 2009 (4) SA 153 (SCA) paras 20-24, 33-39, 46-48 and 94-97, for the interpretation given by the Supreme Court of Appeal.

might seem to suggest that section 7 of the National Building Act creates a substantive right to prevent the erection of buildings on a neighbouring property. However, according to case law there is no reason why a decision maker should acknowledge the enjoyment of the existing views from neighbouring properties as a substantive right when considering an application for the approval of building plans that otherwise comply with all applicable legislation and the zoning scheme.<sup>92</sup>

Conflicting decisions such as *Walele*<sup>93</sup> and *True Motives 84*<sup>94</sup> created some confusion regarding the interpretation of section 7.<sup>95</sup> Case law shows that, in principle, a substantive right to prevent the erection of buildings on a neighbouring property only exists where the beneficiary had a substantive property right to be informed of, to object against, and in some cases to withhold permission for the approval of a neighbour's building plans.<sup>96</sup> Conversely, other cases indicate that the right to object against a neighbour's building works in terms of section 7 only comes into existence once a local authority has exercised its discretion in a certain way (namely to grant approval of such building plans), which shows that an attempt to prevent the erection of buildings on a neighbouring property in terms of this section amounts to a strategy that is purely based on procedural considerations.<sup>97</sup>

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<sup>92</sup> See the discussions of *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D); *Clark v Faraday and Another* 2004 (4) SA 564 (C) and *De Kock v Saldanhaabai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006), discussed in 3 3 3 1 and 3 3 3 2.

<sup>93</sup> *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC).

<sup>94</sup> *True Motives 84 (Pty) Ltd v Madhi and Another (Ethekwini Municipality as Amicus Curiae)* 2009 (4) SA 153 (SCA).

<sup>95</sup> See the discussion of these decisions in 3 2 1.

<sup>96</sup> The discussions of *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) in 3 2 2 3; *Richardson and Others v South Peninsula Municipality and Others* 2001 (3) BCLR 265 (C) in 3 2 2 2 and *Transnet Ltd v Proud Heritage Properties* (405/08) [2008] ZAECHC 155 (5 September 2008) in 3 2 2 4 indicate that these decisions show examples of instances where property owners have pre-existing, substantive rights to prevent the erection of buildings on neighbouring properties.

<sup>97</sup> In *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D); *Clark v Faraday and Another* 2004 (4) SA 564 (C) and *De Kock v Saldanhaabai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006) property owners wanted to object against the approval of their neighbours' building plans, in terms of section 7 of the National Building Act, on the ground that the relevant local authorities should not have approved the plans. These decisions are discussed in 3 3 3 1 and 3 3 3 2.

If a property owner attacks a potential threat against her existing view on the basis of irregularities in the process for approving a neighbour's building plans, she only has to prove that there was non-compliance with a prescribed procedural requirement and that the approval was therefore unlawful.<sup>98</sup> Conversely, if she attacks a decision maker's exercise of a discretion in approving the building plans, interpretation of the provisions that grant the decision maker such a discretion comes into play.

### 3 3 2 Procedural shortcomings

#### 3 3 2 1 Application

The Supreme Court of Appeal decision in *Paola v Jeeva NO and Others*<sup>99</sup> ("*Paola*") concerns a property owner's attempt to attack a purely procedural shortcoming in the approval of a neighbour's building plans as a strategy to prevent building works that would obstruct the existing view from his property.<sup>100</sup> The approval of the building

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<sup>98</sup> The National Building Act prescribes certain prerequisites for the construction of a building to be valid. This includes that building plans must be submitted for approval by the relevant local authority (s 4) and that the local authority shall either grant or refuse approval of the plans after considering recommendations made by a building control officer (ss 5 to 7). In *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA) an application for setting aside a local authority's decision to approve a neighbour's building plans was successful because there was no building control officer in the local authority's service when the application was approved. Therefore, the process did not comply with the requirements set out in ss 5(1), 6(1) and 7(1) of the National Building Act.

<sup>99</sup> *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA). The court *a quo*'s decision is discussed in 3 3 3.

<sup>100</sup> This case came before the Supreme Court of Appeal as an appeal against the dismissal of the appellant's application for the review and setting aside of the third respondent's decision to approve building plans for a neighbouring property. The building plans were submitted by the first and second respondents, who were the trustees of a trust that owned a property adjacent to that of the appellant. Originally, in *Paolo v Jeeva NO and Others* 2002 (2) SA 391 (D), the appellant (then the applicant) attacked the third respondent's (local authority's) approval of the building plans on the following grounds: Firstly, the appellant contended that in terms of s 7(1)(b)(ii)(aa)(ccc) of the National Building Act, the third respondent may not have approved the plans, since the proposed building's size and position would probably or in fact cause the value of the appellant's property to decrease. Secondly, it was maintained that the relevant official failed to apply her mind properly when she gave consideration to the plans. Thirdly, it was argued that the plans did not comply with the town planning regulations regarding requirements that are set for rear spaces. After the dismissal of the application

plans contravened section 5(1) of the National Building Act, which requires local authorities to appoint building control officers, and sections 6(1) and 7(1) that further require a local authority to consider the recommendations of such an officer, since no building control officer was employed by the relevant local authority at the time when the plans in question were approved.<sup>101</sup> The court held that the appointment of a building control officer and a local authority's consideration of such an officer's recommendations constitute jurisdictional facts that are prerequisites for the lawful exercise of the statutory power to approve building plans.<sup>102</sup> The Supreme Court of Appeal consequently set the approval of the building plans aside on the ground that they were approved in terms of an unlawful administrative process.<sup>103</sup>

Kidd discusses *Paola inter alia* with regard to the implication of the administrative irregularity.<sup>104</sup> Dealing with the court's assessment of the validity of the building plans, he argues that the court should have taken the intention of the legislature into account. He reasons that the objective of regulating the appointment and functions of a building control officer in sections 5 and 6 of the National Building Act is to maintain building standards. This objective will be served equally well

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in the court *a quo*, the appellant discovered that the third respondent did not have a building control officer employed when the first and second respondents' building plans were approved.

<sup>101</sup> *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA) paras 6-7.

<sup>102</sup> *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA) paras 11-16. In terms of s 5(1) of the National Building Act a local authority must appoint a building control officer. Section 6(1)(a) of the Act provides that one of the functions of a building control officer is to make recommendations to a local authority regarding building plans, while s 7(1) requires a local authority to consider such recommendations when deciding whether or not to approve an application for building plans. In *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) paras 14 and 34, Brand AJ followed the reasoning in *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA) para 11. The judge commented that s 7(1) of the National Building Act "requires a recommendation by the building control officer as a precondition for any decision to be taken by the City on an application for approval in terms of s 4". Brand AJ also referred to the fact that in both *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 55 and *True Motives 84 (Pty) Ltd v Madhi and Another* 2009 (4) SA 153 (SCA) para 21 the majority and the minority judgments accepted that in terms of a decision taken under s 7(1) of the National Building Act, "recommendation" is a jurisdictional fact.

<sup>103</sup> *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA) para 16.

<sup>104</sup> M Kidd "The view I behold on a sunshiny day": *Paola v Jeeva NO* (2005) 122 SALJ 556-562 at 556-558.

whether recommendations made by a building control officer or by a person with the same skills and expertise as a building control officer are considered before building plans are approved. The fact that the building plans in *Paola* had not been considered by a building control officer did therefore not necessarily constitute the absence of a jurisdictional fact that rendered the building plans invalid. He concludes that the Supreme Court of Appeal probably followed a too rigid approach in *Paola*, since the administrative process for the approval of the building plans did indeed serve the objective of maintaining building standards.<sup>105</sup>

The Supreme Court of Appeal in *Paola* set the local authority's decision to approve the first and second respondents' building plans aside on the basis that there was a procedural shortcoming. Consequently, the first and second respondents could not continue with the erection of the proposed building. This effectively prevented the obstruction of the existing view from the appellant's property. However, because it was merely a procedural irregularity that temporarily stalled the approval of the building plans, the prevention of the interference with the existing view from the appellant's property was only temporary, since the shortcoming can be rectified and the plans could subsequently be approved lawfully, without the neighbours being able to object.<sup>106</sup> This would be true of most, if not all, purely procedural attacks of this kind.

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<sup>105</sup> M Kidd "The view I behold on a sunshiny day": *Paola v Jeeva NO* (2005) 122 SALJ 556-562 at 557-558.

<sup>106</sup> M Kidd "The view I behold on a sunshiny day": *Paola v Jeeva NO* (2005) 122 SALJ 556-562 at 558.

## 3 3 2 2 Remedies

The *Muller* decision,<sup>107</sup> like the Supreme Court of Appeal's decision in *Paola*,<sup>108</sup> shows that a procedural shortcoming in the process of approving building plans may prevent the obstruction of the existing view from a property.<sup>109</sup> In both these judgments, the courts set the approval of building plans aside because procedural irregularities rendered the approval processes unlawful. The courts' rulings had the same effect in both cases, namely that the view from a neighbouring property was indirectly protected because the building plans, in terms of which a building that would interfere with such a view would be erected, were set aside. However, although these orders resulted in the protection of the existing views from the respective properties, such protection was only temporary since the procedural irregularities could be rectified. In a case where a court sets the approval of building plans aside on a mere formal shortcoming, it may, as was the case in *Paola*, temporarily prevent interference with the existing view from a neighbour's property. However, such an irregularity can be rectified and the neighbour whose view will be affected by the proposed construction will still neither have the right to be informed if the plans are resubmitted nor will she have the right to object against such plans, provided they comply with all the formal and procedural requirements. Therefore, in cases where there has been a formal irregularity but where no substantive right of another person was affected, plans may be resubmitted and approved without informing neighbours of the "repeat procedure" or giving them the opportunity to

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<sup>107</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C).

<sup>108</sup> *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA), discussed in 3 3 2 1.

<sup>109</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) paras 55, 57, 58, 61, 64, 67 and 68. The court in *Muller* set aside the approval of the second respondent's building plans, *inter alia*, on the ground that the local authority that approved the plans used the wrong method for determining the height of the proposed building works. The *Muller* decision is more extensively discussed in 3 2 2 3 as an example of a neighbouring owner's right to be heard when a building plan involves a departure from the applicable zoning scheme, and in 3 3 3 as an illustration of the argument that the existing view from a property contributes to the property's value.

participate in the (second) approval process. This means that the benefits that neighbours may derive from building plans being set aside because of purely procedural irregularities will probably at most result in the temporary “protection” of an existing view.

### 3 3 3 Questioning a decision maker’s discretion

#### 3 3 3 1 Application

The court in *New Adventure Investments 193 (Pty) Ltd v Trustees for the time being of the SAS Trust*<sup>110</sup> (“*New Adventure Investments*”) indirectly indicated that the view from a property is a factor that contributes to the property’s value. The plaintiff instituted action against the defendant for cancellation of a deed of sale since the defendant sold him a piece of property without informing him that a development was planned for the property right in front of the object of the sale. He also argued that a prospective buyer of a sea fronting property would be influenced by the fact that a development that would obstruct the views from such a property is planned for a neighbouring property.<sup>111</sup> He alleged that the defendant’s fraudulent non-disclosure of this information constituted a sufficient basis for cancellation of the contract.<sup>112</sup>

The court concluded that the view from the sale property was of great importance to a prospective purchaser and to the plaintiff in particular.<sup>113</sup> It decided

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<sup>110</sup> *New Adventure Investments 193 (Pty) Ltd v Trustees for the time being of the SAS Trust* [2002] 3 All SA 544 (C).

<sup>111</sup> The property in this case was situated in Sea Point and had a magnificent view of the Atlantic Seaboard.

<sup>112</sup> *New Adventure Investments 193 (Pty) Ltd v Trustees for the time being of the SAS Trust* [2002] 3 All SA 544 (C) paras 1-3.

<sup>113</sup> *New Adventure Investments 193 (Pty) Ltd v Trustees for the time being of the SAS Trust* [2002] 3 All SA 544 (C) paras 6 and 35-37. The court had to determine whether there was a legal duty on the defendant to inform the plaintiff that an application was lodged for the proposed development. It further had to decide whether or not the non-disclosure of this information constituted fraudulent misrepresentation. According to the court’s reasoning, fraudulent non-

that the erection of the proposed block of flats would seriously impede this view and that the plaintiff's decision to contract would have been affected if he had knowledge of the fact that there was a real possibility of such a development. The non-disclosure was therefore considered to be germane to the sale of the property.<sup>114</sup> The court granted judgment in favour of the plaintiff on the grounds that the defendant deliberately and with the intention of inducing him to conclude the contract, withheld certain material facts from him, and that the defendant failed in his legal duty to disclose this information.<sup>115</sup> The court therefore acknowledged that the existing view from a property may be of significant importance in cases where the value of the affected property is at stake. In view of the wording of section 7(1)(b)(ii) of the National Building Act, this decision might create the impression that an attack on the approval of building plans could be construed around the argument that the plans may not be approved if the building will derogate from neighbouring properties' value by destroying their existing views.

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disclosure can give rise to the cancellation of a contract if, *inter alia*, the fact that is not disclosed is material to the contract. In determining whether knowledge of the application for the proposed development was material to the contract, the court considered the circumstances of this specific case. It focused on the question whether the disclosure of this information before the conclusion of the contract would have prevented the plaintiff from concluding the contract. If the court decided in favour of the plaintiff, in other words, if the court concluded that there was a legal duty on the defendant to disclose the information about the proposed development to the plaintiff and that the non-disclosure thereof constituted fraudulent misrepresentation, the defendant's counterclaim (defendant counterclaimed breach of contract on the side of the plaintiff or, in the alternative, repudiation of the contract by the plaintiff) would fail. However, if the court's decision was against the plaintiff, the court would have had to determine whether the plaintiff's actions amounted to a breach of contract or repudiation of the contract.

<sup>114</sup> *New Adventure Investments 193 (Pty) Ltd v Trustees for the time being of the SAS Trust* [2002] 3 All SA 544 (C) paras 37, 42 and 43. Moosa J stated that, in order to determine the materiality of the non-disclosure in this particular case, the court had to determine whether or not the non-disclosure of the application for proposed development was germane to the sale of the property. He concluded that the information that the defendant failed to disclose was indeed a material fact. Moosa J considered the plaintiff's conduct, namely that he cancelled the contract when he became aware of the potential threat to the panoramic view, as a confirmation of the fact that the non-disclosure was germane to the sale of the property.

<sup>115</sup> *New Adventure Investments 193 (Pty) Ltd v Trustees for the time being of the SAS Trust* [2002] 3 All SA 544 (C) para 69. This discussion only focuses on the court's consideration of the materiality of the information that was not disclosed to the plaintiff. The focus is on this aspect of the judgment because the information that was not disclosed concerned the potential obstruction of the view from a property.

In the *a quo* decision in *Paola v Jeeva NO and Others*,<sup>116</sup> the Durban and Coast Local Division considered the possibility of protecting the view from one owner's property against obstruction caused by the erection of a building on her neighbour's property.<sup>117</sup> The applicant maintained that view is a factor that should be taken into account when determining the value of a property<sup>118</sup> and that the approval of the respondents' building plans was inconsistent with section 7(1)(b)(ii) of the National Building Act ("the Act") because the execution of the plans would cause the obstruction of the view from his property and consequently cause the property to depreciate. According to the applicant's interpretation of this provision, the value of a property includes a value that is attributable to the view from the property. Therefore, a local authority should consider whether or not a proposed building would obstruct the view from a neighbouring property before approving the relevant building plans. Conversely, the respondents argued that view has no value for planning purposes and that the development of the first and second respondents' property should therefore not be prohibited in order to preserve the applicant's view. The respondents also considered the application of section 7(1)(b)(ii)(aa)(ccc) of the Act and contended that this provision concerns the general effect that the erection of a building would have on neighbouring or adjoining properties, and not only its effect on a specific property.<sup>119</sup>

The court rejected the applicant's interpretation of section 7(1)(b)(ii) of the Act, reasoning that if the applicant's interpretation was followed, property owners would

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<sup>116</sup> *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D).

<sup>117</sup> The first and second respondents were the trustees of a trust that owned property adjacent to the applicant's property. The local authority was the third respondent. The applicant in this case lodged an application for the first and second respondents' building plans to be set aside. These building plans, which were approved by the local authority, provided for the construction of a double-storey residence on the first and second respondents' property.

<sup>118</sup> *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D) 395.

<sup>119</sup> *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D) 403-404.

be treated according to the order in which their respective properties were developed.<sup>120</sup> Such an interpretation would result in the arbitrary treatment of owners and would therefore be inconsistent with the constitutional demands for the promotion of equality and rationality.<sup>121</sup> The court approved of the respondents' argument that protection of the right to an existing view<sup>122</sup> would cause chaos and confusion in the world of property development.<sup>123</sup> Furthermore, the protection of the right to a view may harm the effective administration of justice by creating a new category of claims. Accordingly, the application was dismissed.<sup>124</sup>

The applicant in the court *a quo*'s decision in *Paola* did not have a substantive right to protect the existing view from his property, since this view was not protected with a servitude or a restrictive condition and he was not aware of any procedural or substantive irregularities regarding the approval of his neighbour's building plans. Consequently, he relied on the argument that the erection of a building that will obstruct the existing view from his property will affect the property's market value.<sup>125</sup> When the court rejected this argument, the applicant instituted appeal

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<sup>120</sup> If s 7(1)(b)(ii) of the National Building Act is interpreted the way in which the applicant suggested, namely that view attributes to the value of a property, it would have the effect that an owner who develops her property first would be able to object to the building plans of an owner who wants to develop her property later, since it would be difficult for a developer later in time not to cause a decrease in the value of the first developer's property.

<sup>121</sup> *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D) 404 and 406. Kondile J referred to *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 156, where Ackermann J concluded that "Arbitrary action or decision-making is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way."

<sup>122</sup> The applicant's interpretation of s 7(1)(b)(ii) of the National Building Act effectively promoted a right to a view.

<sup>123</sup> This was the professional opinion of architect Elphick, who was instructed by the first and second respondents. See *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D) 397 and 406. A similar argument was made by Lord Blackburn in the English case *Dalton v Angus* (1881) 6 AC 740 (HL) 24 para C ("*Dalton v Angus*"), who reasoned that prospect should not be acquired through prescription because such a way of acquiring the right to have a view would inhibit the development of towns. According to Lord Blackburn, the acknowledgment of a right to a view would have a negative effect on urban development. The decision in *Dalton v Angus* is examined in Ch 4.

<sup>124</sup> *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D) 406.

<sup>125</sup> This argument was based on s 7(1)(b)(ii)(aa)(ccc) of the National Building Act, which prohibits a local authority to approve building plans if their execution will cause a neighbouring property to depreciate.

proceedings.<sup>126</sup> During the appeal, it became apparent that there was indeed a purely procedural irregularity that rendered the approval of the plans unlawful from the outset. The Supreme Court of Appeal set the approval of the second respondent's building plans aside because of this procedural irregularity. However, the court also commented on whether or not building plans that propose a building that would obstruct the existing view from a neighbouring property cause a "derogation from the value" of a neighbouring property that renders them (the plans) unfit for approval in terms of section 7(1)(b)(ii)(aa)(ccc) of the Act.<sup>127</sup> The court was of the opinion that the word "value" should be given its ordinary meaning of market value and that the wording used by the legislature cannot be understood to exclude the value that flows from a view that can be enjoyed from a property. Therefore, if it is clear that the execution of certain building plans will cause a depreciation of an adjoining property, the plans should, according to the wording of section 7(1)(b)(ii)(aa)(ccc) of the Act, not be approved.<sup>128</sup> This interpretation of section 7 of the Act, namely that a local authority may only approve building plans if it is satisfied

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<sup>126</sup> *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA). The appeal decision is discussed in 332.

<sup>127</sup> *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA) paras 17, 19 and 20. The court was requested by counsel for all the parties to give its opinion on this matter. The appellant's argument was that, in terms of s 7(1)(b)(ii)(aa)(ccc) of the National Building Act, the third respondent may not have approved the proposed building plans. The reason for this was that the position and height of the proposed building would impair upon the view from the appellant's property and thereby cause its value to decrease. The court mentioned that it was emphasised by appellant's council that the appellant did not contend to have the right to a view. Rather, he argued that he had the right that plans for a neighbouring property may not be passed unless all the necessary statutory requirements have been complied with. The first and second respondents argued that the obstruction of the view from a property should not be taken into account for the purpose of establishing whether or not a proposed building would cause neighbouring properties to depreciate. The respondents further relied on the fact that the appellant did not have a servitude of prospect registered over the property of the first and second respondent and that the proposed building plans for the latter's property complied with the requirements that were set out in the town planning regulations.

<sup>128</sup> *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA) para 23. This opinion contravened the finding of the court *a quo* in *Paolo v Jeeva* 2002 (2) SA 391 (D) 406. Kondile J, in the court *a quo*, dismissed the notion that the pleasurable view from a property should be afforded protection because it may attribute to the value of a property. He reasoned that if the view from a property was afforded such protection, it may have the unwanted effect of leading to a multiplicity of actions.

that none of the undesirable outcomes mentioned in section 7(1)(b)(ii) will eventuate, may therefore have created the impression that a property owner has an indirect right to the existing view from her property.

Van der Walt<sup>129</sup> submits that the Supreme Court of Appeal's decision in *Paola* is often mistakenly cited as authority for the proposition that South African courts regard the view from a property as an actionable right. In fact, the court did not make a binding ruling on this issue, since the *ratio* of the decision concerned the purely procedural shortcoming regarding the non-appointment of a building control officer.<sup>130</sup> Kidd argues that the decision in *Paola* does not "constitute a radical new direction for neighbour law".<sup>131</sup> According to Kidd, there are certain instances where the "social utility of a development should outweigh the market value of a particular property".<sup>132</sup> He argues that, in terms of the Supreme Court of Appeal's judgment in *Paola*, section 7(1)(b)(ii)(aa)(ccc) of the Act compels a local authority to reject building plans if such plans will have a negative effect on the market value of a neighbouring property. The decision to reject such plans will therefore take place without any consideration being given to the wider social interests that may be

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<sup>129</sup> AJ van der Walt *The law of neighbours* (2010) 364.

<sup>130</sup> In *True Motives 84 (Pty) Ltd v Madhi and Another (Ethekwini Municipality as Amicus Curiae)* 2009 (4) SA 153 (SCA) paras 25-35 the Supreme Court of Appeal held that the remark made by the court in *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA) regarding the protection of the view from a property was *obiter*. In *Searle v Mossel Bay Municipality and Others* (1237/09) [2009] ZAWCHC 10 (13 February 2009) para 13 the Cape High Court agreed that the judgment in *Paola* did not establish a right to an existing view. In this regard, see AJ van der Walt *The law of neighbours* (2010) 366, 371 and 376. PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5<sup>th</sup> ed 2006) 127 cites *Paola* as authority for the principle that a property owner is not entitled to claim a right to a view. However, KM Kritzinger "Right to a view? Re *Paola v Jeeva* Case no 475 / 2002 SCA" (2004) 67 *THRHR* 150-153, reasons that *Paola* established that a property owner does have the right to protect the view from her property.

<sup>131</sup> M Kidd "The view I behold on a sunshiny day': *Paola v Jeeva NO*" (2005) 122 *SALJ* 556-562 at 556.

<sup>132</sup> M Kidd "The view I behold on a sunshiny day': *Paola v Jeeva NO*" (2005) 122 *SALJ* 556-562 at 562.

served by the development.<sup>133</sup> Since the Supreme Court of Appeal's consideration of section 7 of the Act merely resulted in an *obiter* remark, this ruling did not establish the possible obstruction of the existing view from a neighbouring property as a factor that must be taken into account when a local authority decides whether or not to approve building plans. The decision can therefore not be considered authority for the proposition that section 7 creates a substantive right to prevent the erection of a building on a neighbouring property. This conclusion is underlined by subsequent decisions.

The applicant in *Clark v Faraday and Another*<sup>134</sup> ("Clark") also argued that the relevant local authority should have refused to approve his neighbour's building plans, since section 7(1)(b)(ii)(aa)(ccc) of the National Building Act prohibits a local authority from approving building plans if it appears that the execution of those plans may cause a neighbouring property to depreciate.<sup>135</sup> The court ruled that section 7(1)(b)(ii) should be interpreted restrictively to prevent it from having the effect of prohibiting the erection of a building purely because it would cause the obstruction of the view from a neighbouring property.<sup>136</sup> According to Van der Westhuizen AJ, the (indirect) protection of the right to a view would be in conflict with the rules and

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<sup>133</sup> M Kidd "The view I behold on a sunshiny day': Paola v Jeeva NO" (2005) 122 SALJ 556-562 at 561. Kidd proposes that this potential problem should be dealt with in the following ways: Firstly, "value of adjoining properties" should be interpreted as the value of the community as a whole. Secondly, the National Building Act should be amended to ensure that a decision maker considers the social utility of a proposed development as a positive factor to be weighed against the negative impact that the development may have on the market value of a particular neighbouring owner's property. He comments that his first proposition is not a good solution, since it is a "strained" interpretation and does not give effect to the plain meaning of the words.

<sup>134</sup> *Clark v Faraday and Another* 2004 (4) SA 564 (C).

<sup>135</sup> The neighbour whose building plans were approved was the first respondent and the local authority that approved the plans was the second respondent. AJ van der Walt *The law of neighbours* (2010) 367 argues that the applicant's argument, namely that the approval of the building plans should be set aside because building plans may not be approved if it appears that the proposed building would cause the value of a neighbouring property to decrease, is based on the *obiter* part of the Supreme Court of Appeal's decision in *Paola*.

<sup>136</sup> *Clark v Faraday and Another* 2004 (4) SA 564 (C) 576. The court ruled that the provisions of the National Building Act should be interpreted and understood within the context of legal principles and rules regulating the development of urban areas.

regulations regarding the creation and extinction of praedial servitudes. Moreover, he reasoned that such protection would impair an owner's common law right to build as high as she likes, within the formal restrictions laid down by law and in the applicable zoning and building regulations. The application for an urgent interdict to halt the first respondent's building works was consequently dismissed.<sup>137</sup>

In an attempt to protect the existing view from his property, the applicant in *De Kock v Saldanhaabai Munisipaliteit en Andere*<sup>138</sup> ("De Kock") also focused on the exercise of a local authority's discretionary powers.<sup>139</sup> The applicant reasoned that the local authority was obliged, in terms of section 7(1)(b)(ii)(aa)(ccc) of the National Building Act, to reject the second and third respondent's building plans, since the execution of these plans would cause the obstruction of the pleasant view from his property, which would have the effect of causing a decrease in the value of his

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<sup>137</sup> *Clark v Faraday and Another* 2004 (4) SA 564 (C) 577. W Freedman "Paradise lost? The obstruction of a pleasant view and the law of nuisance" in SV Hoor & PJ Schwikkard (eds) *The exemplary scholar: Essays in honour of John Milton* (2007) 162-184 at 172 asserts that the court in *Clark* was not hesitant to reject the interpretation of s 7(1)(b)(ii)(aa)(ccc) of the National Building Act given by the Supreme Court of Appeal in the *Paola* decision.

<sup>138</sup> *De Kock v Saldanhaabai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006).

<sup>139</sup> *De Kock v Saldanhaabai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006) paras 25 and 30-32. The applicant and the second and third respondents were neighbouring owners in the harbour town of Saldanha. In March 2004 the second and third respondents applied to the local authority (first respondent) for the approval of building plans. In response, the applicant made certain objections. These objections were based on the argument that the second and third respondents' proposed building work would block the applicant's view of the ocean, harbour and town, and would thereby cause the value of his property to decrease. Despite these objections, the local authority granted its approval of the building plans. The applicant objected a second time but again the local authority rejected the objections because the building plans did comply with the municipality's building regulations and zoning scheme. The first respondent dismissed the applicant's objections because it was legally unfounded and untenable; no servitude of view or privacy was registered to the applicant's advantage; and because the disapproval of the building plans under these circumstances would deprive the second and third respondents of the right to develop their property. The applicant then applied for the review and setting aside of the local authority's decision to approve the building plans. He argued that the local authority's decision was unlawful because it did not apply its mind in order to give thorough consideration to the objections. Klopper AJ conceded that, in terms of s 7(1)(b)(ii)(bb) of the National Building Act and in terms of PAJA, the first respondent was obliged to give consideration to the applicant's objections.

property.<sup>140</sup> Klopper AJ concluded that, given the judgment in *Clark* and the Supreme Court of Appeal's decision in *Paola*, the value that is referred to in section 7 of the National Building Act is the market value of a property. Market value is based on the price that an informed and willing buyer is prepared to pay to an informed and willing seller for the relevant property. The judge argued that an informed buyer would realise that a property owner does not have an inherent right to a view and would therefore not attach much value to the existing view from a property.<sup>141</sup> He ruled that the local authority did give due consideration to the applicant's objection that the proposed building would cause a decrease in the value of his property in terms of section 7(1)(b)(ii)(aa)(ccc), thereby confirming that the right to an existing view from a property is not indirectly acknowledged by this provision.<sup>142</sup> By implication, section 7(1)(b)(ii)(aa)(ccc) of the National Building Act does not compel a local authority to consider, when deciding whether or not to approve building plans, that the execution of such plans might interfere with a neighbour's existing view. Therefore, according to the *De Kock* court's interpretation of section 7 of the Act, a local authority is obliged to approve building plans if they

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<sup>140</sup> *De Kock v Saldanhaabai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006) paras 36-50. The applicant attacked the local authority's decision to approve building plans in respect of a neighbouring property, arguing that the erection of the proposed building would obstruct the view from and hinder the flow of light to his property; cause the value of his property to decrease because of the obstruction of the existing view; and infringe upon his privacy. The court rejected the first argument on the basis that a property owner does not have an inherent right to an unobstructed view. It also rejected the applicant's third contention on the basis that privacy is not absolute and may be limited as long as the limitation is reasonable and justifiable. The court in *De Kock* considered the common law right to develop one's property in terms of municipal building regulations and zoning schemes to be a justifiable limitation of another owner's right to privacy. The applicants in *Sergio Mateus Pais Mamede and Others v The Strategic Executive: Department of Housing, City Planning, Land and Environmental Planning of the City of Tshwane and Others* (10864/02) [2009] ZAGPHC 37 (25 February 2009) 10 raised a similar argument about the infringement of their privacy. They argued that once the fourth respondent's building works were completed, one would have a view from his property into and over their property. The court found this allegation to be unsubstantiated, since the fourth respondent fitted obscured glass in the windows that would overlook the applicants' property and thereby ensured that their privacy would remain intact.

<sup>141</sup> *De Kock v Saldanhaabai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006) paras 43-45.

<sup>142</sup> *De Kock v Saldanhaabai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006) paras 46-47.

comply with the relevant legal provisions.<sup>143</sup> This finding is in line with the judgment in *Clark*. In both of these cases the respective courts refused to set aside properly approved building plans. Therefore, these judgments confirm that section 7(1)(b)(ii)(aa)(ccc) of the National Building Act does not give a property owner a right to prevent the obstruction of a building that would obstruct the existing view from her own property.

The court in *Searle v Mossel Bay Municipality and Others*<sup>144</sup> (“*Searle*”) evaluated the finding in *Paola*, considered the definition and implications of the word “value” in section 7 of the National Building Act and commented on the Constitutional Court’s decision in *Walele*.<sup>145</sup> It stated that the Supreme Court of Appeal’s judgment in *Paola* was misunderstood inasmuch as it was considered authority for the proposition that section 7 absolutely prohibits a local authority from approving building plans if the execution of such plans would cause the obstruction of the existing view from a neighbouring property.<sup>146</sup> According to the *Searle* court’s interpretation of section 7, a local authority has a statutory duty to enforce the applicable legislation and zoning scheme when deciding whether or not to approve building plans.<sup>147</sup> Furthermore, despite the fact that section 7(1)(b)(ii)(aa)(ccc) of the National Building Act prohibits a local authority from approving building plans if their

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<sup>143</sup> *De Kock v Saldanhabaai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006) para 46.

<sup>144</sup> *Searle v Mossel Bay Municipality and Others* (1237/09) [2009] ZAWCHC 10 (13 February 2009).

<sup>145</sup> In *Searle*, the court was requested to grant an interdict that would prohibit the second and third respondents from continuing with their building works. The focus of this discussion is on the court’s evaluation of previous case law to establish the scope and application of s 7(1)(b)(ii) of the National Building Act.

<sup>146</sup> *Searle v Mossel Bay Municipality and Others* (1237/09) [2009] ZAWCHC 10 (13 February 2009) para 14. See also AJ van der Walt *The law of neighbours* (2010) 371.

<sup>147</sup> *Searle v Mossel Bay Municipality and Others* (1237/09) [2009] ZAWCHC 10 (13 February 2009) para 10.

execution will result in a decrease of another property's value, this provision does not indirectly afford a property owner a right to the existing view from her property.<sup>148</sup>

The argument that section 7(1)(b)(ii)(aa)(ccc) does not indirectly give a property owner a right to a view was strengthened by the court's definition of the word "value" as it appears in this particular provision. Referring to the Supreme Court of Appeal decision in *Paola*, the *Searle* court decided that for these purposes, the value of a property is its "market value". "Market value", it was held, is determined on the assumption that a notional willing seller and purchaser would be informed about the existing or potential advantages and disadvantages of the relevant property. A notional willing buyer of a property with a view of the ocean will therefore take the possibility that this view may be obstructed into consideration before determining the price that she is willing to pay.<sup>149</sup>

The court's interpretation of "market value" resembles that of the court in *De Kock*. In the latter case, the court also considered that the word "value" in section 7 of the National Building Act refers to the market value of property, which is based on the price that an informed and willing buyer is prepared to pay to an informed and willing seller of a specific property. Similar to the court's contention in *Searle*, namely that a notional informed buyer would be aware of the potential advantages and disadvantages of the property that she wishes to buy, the court in *De Kock* argued that a willing and informed buyer would be aware of the fact that the owner of

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<sup>148</sup> *Searle v Mossel Bay Municipality and Others* (1237/09) [2009] ZAWCHC 10 (13 February 2009) para 12.

<sup>149</sup> *Searle v Mossel Bay Municipality and Others* (1237/09) [2009] ZAWCHC 10 (13 February 2009) para 13. See also *True Motives 84 (Pty) Ltd v Madhi and Another (Ethekewini Municipality as Amicus Curiae)* 2009 (4) SA 153 (SCA) paras 30 and 120, and AJ van der Walt *The law of neighbours* (2010) 376.

property does not have an inherent right to or protection of the view from a property and would therefore not attach much value to it.<sup>150</sup>

The Constitutional Court confirmed this definition and implications of the word “value” in section 7. In *Camps Bay Ratepayers’ and Residents’ Association and Another v Harrison and Another*,<sup>151</sup> it explained the applicability of the word “value” within the context of this provision, confirming that it refers to “market value”. Market value, it was held, is determined by the price that an informed buyer will pay an informed seller, taking into account the potential risks that threaten the subject property. The Constitutional Court specifically referred to the potential risk that the view from a property may be obstructed by later development on a neighbouring property. Where such a view directly affects the value of the property (for example, a sea fronting property), the informed buyer would give due consideration to the potential that it may be obstructed and adjust the price that she is willing to pay accordingly. The court continued that an informed buyer would also consider the limitations that may be applicable to such a potential new development. However, limitations that restrictive conditions, town planning and zoning schemes and legislation impose on a neighbour’s building works would usually not affect the market value of a property, because it would effectively be a realisation of a risk that was already accounted for. The Constitutional Court concluded that this interpretation of the word “value” in section 7 implies that development (building work) on property A that affects an attribute that was previously enjoyed from property B will not, in itself, diminish the value of property B.<sup>152</sup> It held that section

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<sup>150</sup> *De Kock v Saldanhabaai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006) paras 44-45.

<sup>151</sup> *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) paras 38-40.

<sup>152</sup> The court added that this would be the case as long as the new development complies with legal restrictions.

7(1)(b)(ii) only comes into play when a new building complies with legally imposed restrictions, but its unattractive or intrusive appearance exceeds the legitimate expectations of the parties to the hypothetical sale. In other words, this provision will not protect a property owner if the value of her property has depreciated because of reasonable and lawful development on a neighbouring property, but only if such a development exceeds her legitimate expectations.<sup>153</sup>

In *Muller*,<sup>154</sup> the applicants also raised an argument based on section 7(1)(b)(ii)(aa)(ccc) of the National Building Act in an attempt to prevent building works on a neighbouring property that would interfere with the existing view from their property. Besides objecting against their neighbour's approved building plans on certain substantive and procedural grounds,<sup>155</sup> the applicants in *Muller* reasoned that the first respondent acted in breach of its obligations, provided for in section 7(1)(b)(ii)(aa)(ccc) of the National Building Act, when it approved the plans. They argued that this provision prohibits the approval of building plans if their execution will cause a decrease in the value of a neighbouring property. They contended that the approved plans would indeed affect the value of their property negatively, since they provided for building works that would, once constructed, interfere with the view from their property.<sup>156</sup>

Yekiso J held that although ownership is an extensive right, it is nevertheless subject to law of general application, such as the various town planning ordinances,

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<sup>153</sup> *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) para 40.

<sup>154</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C).

<sup>155</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) paras 5, 20, 31-33, 36, 62, 68 and 76. The applicants' right to prevent their neighbour's building works, which was based on the fact that they were denied an opportunity to see the plans before they were approved, is discussed in 3 2 3 and their argument that the building plans should not have been approved because the proposed building would exceed the lawful height restriction is examined in 3 3 2.

<sup>156</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) para 32.

the National Building Act, as well as the applicable zoning scheme regulations.<sup>157</sup> He stressed that one property owner cannot be deprived of the right to develop her property to its optimal level because another owner insists on the continued enjoyment of a pleasurable amenity. He added, however, that a property owner may not contravene the law or affect the rights of a neighbouring property owner when she exercises the right to develop her property. Neighbouring owners' rights include "an amenity which may lawfully be enjoyed therefrom".<sup>158</sup> Since the second respondent's building plans proposed building works that exceeded the prescribed height restriction, he contravened the applicable zoning scheme in the exercise of his right to develop his property. Therefore, although he was entitled to develop his property to its optimal level, the approved building plans provided for a development (building extension) that would exceed this "optimal level". The court accordingly upheld the applicants' contention that the building plans should not have been approved because the proposed building would decrease the value of their property insofar as it will exceed the prescribed height limitations.<sup>159</sup> Van der Walt argues that the decision in *Muller* is a case-specific decision

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<sup>157</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) paras 72-74.

<sup>158</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) para 74. This remark was made within the context of assessing whether or not the building plans should have been approved. It appears as if Yekiso J implied that the view from a property may be regarded as an amenity that enjoys a form of protection against the development of a neighbouring property.

<sup>159</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) para 75. The court concluded that the decision to approve the building plans was in contravention of s 7(1)(b)(ii)(aa)(ccc) of the National Building Act. It reasoned that s 7(1)(b)(ii)(aa)(ccc) prohibits the approval of building plans if their execution will probably or in fact cause a decrease in the value of a neighbouring property. The execution of the building plans in *Muller* would have resulted in building works that exceeded the height limitation and obstructed the view from the applicants' property. The court therefore concluded that the first respondent failed to have regard to the provisions of s 7(1)(b)(ii)(aa)(ccc) when it approved the plans. If it did consider this provision, it would have realised that the value of the applicants' property would decrease because the part of the building work that would have exceeded the height limitation would obstruct the view from the applicants' property. The approval of the building plans was consequently declared invalid, since it did not comply with the procedure set out in s 7(1)(b)(ii)(aa)(ccc).

“to the effect that a decision to approve building plans that had been taken in a procedurally invalid manner and that allow for deviations from the applicable legislative and regulatory framework should be invalidated and set aside if the affected owner can show that the building, once completed, would detract from the value of her property”.<sup>160</sup>

The decision therefore indicates that the approval of building plans that would cause a decrease in the value of a neighbouring property may be set aside if it was procedurally invalid or if the plans depart from the applicable legislation or zoning scheme. Van der Walt emphasises that the approval of building plans will only be set aside on the ground that they will cause a decrease in the value of a neighbouring property (in terms of section 7(1)(b)(ii)(aa)(ccc) of the National Building Act), if there was an irregularity in the approval process or if the plans do not comply with applicable legislation and regulations.<sup>161</sup> Therefore, the *Muller* ruling does not imply that section 7(1)(b)(ii)(aa)(ccc) of the Act prohibits the approval of building plans purely because they will result in the erection of a building that will obstruct the view from a neighbouring property.

In terms of the Constitutional Court’s interpretation of section 7 in *Walele*, a decision-maker may only approve building plans when it is satisfied that the relevant legal requirements have been adhered to, and that none of the disqualifying factors in section 7(1)(b)(ii) will ensue once the proposed building has been erected. Furthermore, the approval of any plans that facilitate the erection of a building that will cause one of the unwanted outcomes, for example if the building would depreciate a neighbouring property, may be set aside on review.<sup>162</sup> Accordingly, in order to have the approval of building plans set aside, an applicant would for

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<sup>160</sup> AJ van der Walt *The law of neighbours* (2010) 369.

<sup>161</sup> AJ van der Walt *The law of neighbours* (2010) 369.

<sup>162</sup> *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 54-55.

instance only have to prove that the erection of the proposed building would diminish the value of her property. This approach to section 7 sets a low benchmark for rejecting building plans, since it prohibits a decision maker from approving building plans unless she is satisfied that the necessary legal requirements are met and that none of the disqualifying factors will be triggered by the erection of the proposed building.<sup>163</sup> Furthermore, it sets a light burden of proof for property owners wanting to have their neighbour's building plans set aside on review.<sup>164</sup>

The court in *Searle* considered the two-phase inquiry used in *Walele*.<sup>165</sup> If satisfied that the relevant building plans comply with the applicable legislation and regulations, a decision maker would make a second inquiry in terms of section 7(1)(b)(ii)(aa) of the National Building Act. Binns-Ward AJ (in *Searle*) reasoned that the nature of this second step is that of a "sensitivity assessment" because it entails that consideration is given to the interests of neighbouring property owners in order to ensure that the erection of the proposed building would not negatively affect their properties. It is aimed at determining whether or not an applicant's use of her property, as provided for in the building plans, is reasonable in terms of the effect that it will have on her neighbours. He rejected the minority decision in *Walele* to the extent that it held that building works that comply with the applicable legislation and zoning regulations would not cause derogation from the value of neighbouring properties.<sup>166</sup>

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<sup>163</sup> *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 55.

<sup>164</sup> The court in *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 55 suggested that an applicant is only required "to prove to the satisfaction of the reviewing court" that the erection of the proposed building on a neighbouring property will reduce the value of her own property.

<sup>165</sup> *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC). In *Searle v Mossel Bay Municipality and Others* (1237/09) [2009] ZAWCHC 10 (13 February 2009) para 13 n 2, the *Walele* approach to s 7 of the National Building Act is discussed in detail.

<sup>166</sup> *Searle v Mossel Bay Municipality and Others* (1237/09) [2009] ZAWCHC 10 (13 February 2009) para 13 n 2; *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 130-132. In *Camps Bay Residents' and Ratepayers' Association and Others v Augoustides and*

### 3 3 3 2 Remedies

In the *New Adventure Investments* judgment,<sup>167</sup> the court indirectly acknowledged that in certain circumstances the view from a property may contribute to the property's market value. However, the court *a quo* in *Paola*,<sup>168</sup> as well as the courts in *Clark*<sup>169</sup> and *De Kock*<sup>170</sup> ruled that section 7(1)(b)(ii)(aa)(ccc) of the National Building Act does not compel a local authority to consider the possibility that the execution of building plans may obstruct the view from a neighbouring property. By implication, this provision does not create a substantive right to prevent the approval of building plans, and consequently the erection of building works on a neighbouring property, if such plans comply with any applicable legislation, building regulations and the relevant zoning scheme. Nevertheless, the *Muller* decision<sup>171</sup> created the impression that there is a qualification to this rule in the sense that section 7(1)(b)(ii)(aa)(ccc) does indeed prohibit the approval of building plans if they contravene legislation or the applicable zoning scheme and their execution will result in the obstruction of the view from neighbouring properties (and therefore cause a decrease in the value of the property). In *Muller*, the court decided that the relevant building plans would cause neighbouring properties to depreciate because they did not comply with the prescribed height limitations. It therefore only accepted that the

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*Others* 2009 (6) SA 190 (WCC) para 13 the court referred to the "sensitivity assessment" that the court in *Searle* explained with reference to the *Walele* approach to s 7 of the National Building Act. See also AJ van der Walt *The law of neighbours* (2010) 354-355.

<sup>167</sup> *New Adventure Investments 193 (Pty) Ltd v Trustees for the time being of the SAS Trust* [2002] 3 All SA 544 (C). See the discussion of this ruling in 3 3 3 1.

<sup>168</sup> *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D). This decision is discussed in 3 3 3 1.

<sup>169</sup> *Clark v Faraday and Another* 2004 (4) SA 564 (C), examined in 3 3 3 1.

<sup>170</sup> *De Kock v Saldanhaabaai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006), discussed in 3 3 3 1.

<sup>171</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C). See 3 3 3 1.

proposed building would cause the neighbouring property to depreciate insofar as it would exceed the prescribed height limitations.<sup>172</sup>

The *Muller* decision should be considered carefully. In this judgment, the decision to set aside the approval of the relevant building plans was based on the irregular approval of the plans,<sup>173</sup> and not on the fact that the completed building would possibly cause the value of a neighbouring property to depreciate.<sup>174</sup> The decision does not imply that the approval of building plans may be refused on the basis that such plans would cause a depreciation of neighbouring properties. It merely confirms that a formal shortcoming in the process of approving building plans<sup>175</sup> or building plans that contravene the applicable legislation, zoning scheme or building regulations may render the approval of such plans unlawful.<sup>176</sup>

The decision of the court *a quo* in *Paola*<sup>177</sup> as well as the rulings in *Clark*<sup>178</sup> and *De Kock*<sup>179</sup> indicate that courts have been reluctant to acknowledge the obstruction of the existing view from a property as a factor that may decrease the value of the property and therefore render building plans that will cause such an obstruction unfit for approval.<sup>180</sup> These rulings indicate that there is no remedy for a property owner who attempts to prevent the erection of buildings on a neighbouring property with an attack on the relevant local authority's decision to approve building plans. Local

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<sup>172</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) para 75.

<sup>173</sup> See 3 3 2 2 and 3 2 2 3.

<sup>174</sup> AJ van der Walt *The law of neighbours* (2010) 368-369. Van der Walt reasons that the court in *Muller* protected the applicants against the negative impact that the unlawful approval procedure had and not the impact of the obstruction of their view. He adds that even if their view was not blocked by the construction, the plans could have been reviewed because they were wrongfully approved.

<sup>175</sup> See the discussion of this case in 3 3 2 2.

<sup>176</sup> See the discussion in 3 2 2 3.

<sup>177</sup> *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D). This decision is discussed in 3 3 3 1.

<sup>178</sup> *Clark v Faraday and Another* 2004 (4) SA 564 (C).

<sup>179</sup> *De Kock v Saldanhaabaai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006).

<sup>180</sup> See the discussion of *Clark v Faraday and Another* 2004 (4) SA 564 (C) and *De Kock v Saldanhaabaai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006) in 3 3 3 1.

authorities do not consider the fact that such building plans may amount to a depreciation of the value of neighbouring properties, since property owners do not have a substantive right – nor is such a right created by section 7 of the National Building Act – to prevent the erection of buildings on neighbouring properties if they are not entitled to do so in terms of a servitude, restrictive condition, legislation, building regulations or the applicable zoning scheme. To the extent that some decisions<sup>181</sup> seem to indicate that a property owner (A) has indeed been successful in preventing the erection of a building on a neighbouring property (B) because such a building would cause a decrease in the value of her (A's) property they have in actual fact been decided on a different basis, namely the unlawfulness of the building plans themselves or an irregularity in the approval of the plans.<sup>182</sup> Section 7 of the National Building Act does therefore not create a substantive right to prevent the erection of buildings purely on the basis of the fact that such buildings would interfere with the existing, unobstructed view from a neighbouring property.

### 3 4 Conclusion

In the absence of a servitude to protect the undisturbed, existing view from a property, alternative strategies can be used to prevent the erection of buildings that will interfere with such a view. Case law shows that South African property owners mainly use one of three alternative strategies that may result in the protection of their existing views. The effectiveness of these strategies depends on whether or not they are based on a substantive right to prevent building works on a neighbouring

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<sup>181</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) and *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA)

<sup>182</sup> See the discussion of *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) and *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA) in 3 3 2 2.

property; a purely procedural shortcoming during the approval of a neighbour's building plans; or an attack on the discretion exercised when a decision maker approved such plans.

The most successful alternative strategy to prevent the obstruction of the view from one's property is to rely on a substantive right, flowing from one's right of ownership, to be informed of, to comment on, and sometimes to object against or even prevent the erection of building works on a neighbouring property. Such a substantive right can be enforced when a neighbour's application for the approval of her building plans involves the removal or amendment of a restrictive condition; would require the re-zoning or subdivision of land in the vicinity; entails a departure from the applicable zoning scheme; or when a property owner that would be affected by such an approval has a statutory duty to protect the direct line of view to or from a specific property. In these circumstances, a property owner is entitled to be informed of and to comment on (and possibly to object against) applications for the approval of neighbours' building plans. In some cases, where the approval of a building plan may only be granted with the consent of affected property owners, it also entitles an affected owner to withhold permission for the approval of a neighbour's building plans. Therefore, such a substantive right gives an owner the opportunity to raise objections against and, in some instances, to refuse to consent to proposed building plans that may interfere with the existing views from their properties. A substantive right also entitles the beneficiary landowner to appeal against the approval of neighbours' building plans if they had been denied such an opportunity.

A substantive right to prevent the erection of building works on neighbouring properties may be an effective remedy to permanently protect the existing view to or from a property if the holder of such a right can provide sufficient reasons why the

proposed building works should not be erected. In *Muller NO and Others v City of Cape Town and Another*,<sup>183</sup> the court indicated that a substantive right to prevent the erection of buildings on a neighbouring property can indeed be employed to prevent the obstruction of the existing view from a property, at least insofar as the applicable building regulations, zoning scheme or restrictive conditions prohibit building works that would interfere with such view. Furthermore, the decision in *Transnet Ltd v Proud Heritage Properties*<sup>184</sup> shows that a court will be prepared to enforce a substantive statutory right or duty to protect an undisturbed, existing view even if it will permanently prevent neighbouring owners from exercising their right to develop their properties.

A less effective strategy to prevent the obstruction of the existing view from one's property is to object to the approval of a neighbour's building plans on the ground that there was a procedural shortcoming in the approval process. In both *Muller NO and Others v City of Cape Town and Another*<sup>185</sup> and the Supreme Court of Appeal's decision in *Paola v Jeeva NO and Others*,<sup>186</sup> the approval of building plans was declared unlawful and set aside on the basis of procedural irregularities in the approval processes. The irregular approval of building plans does not entitle neighbouring owners to raise objections that may result in an absolute prohibition against the proposed building works. Therefore, an objection to a procedural shortcoming will merely temporarily stall building works and prevent the obstruction of neighbours' views until the irregularity has been rectified. This strategy is therefore less effective than the strategy based on a substantive right to prevent the erection

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<sup>183</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C).

<sup>184</sup> *Transnet Ltd v Proud Heritage Properties* (405/08) [2008] ZAECHC 155 (5 September 2008).

<sup>185</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C).

<sup>186</sup> *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA). The court *a quo*'s decision is discussed in 3 3 3.

of building works, since it can only result in the temporary protection of the existing view from a property.

The least useful strategy to prevent the erection of a building that would obstruct the view from one's property is based on an attack of a local authority's discretion to approve building plans. This attack is based on the argument that the existing view from a property contributes to the property's market value and that section 7(1)(b)(ii)(aa)(ccc) of the National Building Act prohibits a local authority to approve building plans that will cause a decrease in the value of a neighbouring property. This strategy has been rejected in the court *a quo* in *Paola v Jeeva NO and Others*<sup>187</sup> as well as in the rulings in *Clark v Faraday and Another*<sup>188</sup> and *De Kock v Saldanhaabai Munisipaliteit en Andere*.<sup>189</sup> However, in an *obiter* remark in the Supreme Court of Appeal's judgment in *Paola v Jeeva NO and Others*<sup>190</sup> the court suggested that building plans should, according to the wording of section 7(1)(b)(ii)(aa)(ccc) of the National Building Act, not be approved if it is clear that their execution will cause a decrease in the value of an adjoining property. This may have created the impression that a property owner has an indirect right to the existing view from her property. Furthermore, in *Muller NO and Others v City of Cape Town and Another*,<sup>191</sup> the court upheld the applicants' argument that their neighbour's building plans should not have been approved because the proposed building would cause a decrease in the value of their own property. Nevertheless, the court only accepted

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<sup>187</sup> *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D), discussed in 3 3 3 1.

<sup>188</sup> *Clark v Faraday and Another* 2004 (4) SA 564 (C), discussed in 3 3 3 1.

<sup>189</sup> *De Kock v Saldanhaabai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006), discussed in 3 3 3 1.

<sup>190</sup> *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA).

<sup>191</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C).

that the proposed building would cause the neighbouring property to depreciate insofar as it would exceed the prescribed height limitations.<sup>192</sup>

A property owner who wants to protect the existing view from her property will only attack a local authority's discretion to approve a neighbour's building plan as a strategy of last resort. Her first option will be to rely on a substantive right to prevent a neighbour's building works, or an attack on a procedural irregularity in the approval of her neighbour's building plans. The strategy based on a substantive right is based on a pre-existing property right to prevent the erection of buildings on a neighbouring property, while the strategy in terms of which a procedural irregularity is attacked is based on the right to lawful administrative action. Both a pre-existing right to prevent building and a right to lawful administrative action must be enforced by courts. Conversely, the strategy to question an administrator's decision to approve building plans relies on a court's willingness to pass judgment on an administrator's exercise of her discretion. Courts are generally unwilling to acknowledge the existing view from a neighbouring property as a factor that should be considered when a decision maker decides whether or not to approve building plans. Therefore, the latter strategy is the least effective way of protecting the view from a property in the sense that there can be no certainty that a court will order that approved building plans should be set aside or re-approved on the basis of the discretion exercised by a decision maker.

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<sup>192</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) para 75.

## Chapter 4:

# Comparative law

### 4 1 Introduction

Like South African law, neither English nor Dutch law recognises an inherent right to the existing view from a property. However, like South African law, property owners in both of these foreign legal systems may have substantive rights to prevent obstruction of the existing views from their properties. In South African law, a servitude or a restrictive condition may give a property owner a substantive right to prevent the obstruction of the existing view from her property.<sup>1</sup> Similarly, a restrictive covenant in English law<sup>2</sup> and a praedial servitude (*erfdienstbaarheid*) in Dutch law,<sup>3</sup> both of which are based on agreements between the property owners, may entitle the beneficiary property owners to prevent the obstruction of the existing views from their properties. Furthermore, English case law suggests that there may be exceptions to the rule that a property owner does not have an inherent right to the existing view from her property. The possibility of such an exception in South African case law is considered in chapter 2. In Dutch law, a property owner can also rely on the existing view from her property insofar as the current situation is protected by statutory building regulations.<sup>4</sup> Moreover, a property owner in Dutch law may use an alternative strategy, based either on a claim in nuisance (*hinder*)<sup>5</sup> or on an action in

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<sup>1</sup> The substantive rights created in terms of servitudes and restrictive conditions are discussed in Ch 2 and Ch 3 respectively.

<sup>2</sup> See 4 2 2 1.

<sup>3</sup> See 4 3 2 1.

<sup>4</sup> See 4 3 2 2.

<sup>5</sup> See 4 3 2 3.

terms of the doctrine of abuse of rights (*misbruik van recht*),<sup>6</sup> to prevent the obstruction of the existing view from her property.

English law and Dutch law were chosen for a comparative study of the right to a view because these two systems have the same point of departure as South African law, namely that a property owner does not have an inherent right to the existing view from her property. In this chapter, the possibility of protecting the unobstructed, existing view from a property in these foreign systems is considered using the same methodology that was used to establish how the existing view from a property may be protected in South African law. This methodology involves that the general position regarding the right to a view is established and that possible substantive rights or alternative strategies to prevent the obstruction of a pleasant view are investigated. These aspects regarding the protection of an unobstructed, existing view from a property in English and Dutch law are considered to establish to what extent they confirm the position regarding the protection of a right to a view in South African law and whether these systems also provide alternative strategies, in the absence of an inherent right to the existing view from a property, to protect the unobstructed, existing view from a property.

## **4 2 The right to a view in English law**

### **4 2 1 No inherent right to a view**

English law does not recognise an inherent right to the existing view from a property.<sup>7</sup> This rule is based on the reasoning that an unobstructed view across

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<sup>6</sup> See 4 3 2 4.

<sup>7</sup> This was established in early case law, such as *Bland v Moseley* (1587) 9 Co Rep 58a; *William Aldred's Case* (1610) 9 Co Rep 57b, 77 ER 816; *Butt v Imperial Gas Company* (1866) 2 Ch App 158 and *Dalton v Angus & Co* (1881) All ER 1 (HL), and confirmed in later decisions such as *Hunter v*

neighbouring properties is an incidental benefit<sup>8</sup> and that the recognition of an inherent right to the existing, unobstructed view from a property would inhibit urban development. The principle that a right to the existing view from a property does not naturally flow from the right of ownership is therefore based on similar grounds in South African and English law.<sup>9</sup>

Early English case law established and justified the position that a property owner does not have an inherent right to the existing view from her property. According to the ruling in *William Aldred's Case*<sup>10</sup> (“*Aldred's case*”), the obstruction of prospect is not actionable, since prospect is not a necessity but only a matter of delight.<sup>11</sup> Conversely, the court considered the obstruction of the flow of light and air to a property as actionable because the flow of light and air constitutes a necessary attribute of property. It was therefore ruled that the erection of a pigpen on the

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*Canary Wharf Ltd* (1997) HL 677 and *Gilbert v Spoor and Others* (1983) Ch 27. In determining whether or not interference with a television signal should be acknowledged as constituting private nuisance, the House of Lords (now the Supreme Court) in *Hunter v Canary Wharf Ltd* (1997) HL 677 considered the argument that such an interference is similar to the obstruction of a pleasant view. The court considered authorities on the matter of having an undisturbed prospect from one's property and confirmed that English law does not recognise a right to a view. K Gray & SF Gray *Land law* (6<sup>th</sup> ed 2009) 536-538 discuss the protection of a beautiful prospect in the context of the public regulation of land. Their discussion involves an overview of contrasting features of “property absolutism”, which characterised property law in the Victorian era, and community-oriented practices of land use that are applied in modern times. They explain that, historically, a private landowner could use her property without considering community interests. An example of the effect of the absolutist concept of ownership is that a property owner was free to do on her property as she pleased. She could therefore erect a building without considering the fact that this may obstruct the pleasant prospect from her neighbour's property. The common law did not provide for the preservation of the delightful view from one's property by means of an easement of an undisturbed view. It could only be protected by way of a “bargained restriction” in terms of which one neighbour undertook not to develop her property in a way that would cause the view from the other's property to be obstructed. However, since the socially beneficial use of land is regarded as an important aim of modern English land law, public and private regimes ensure much wider protection for community or neighbour interests. This is illustrated by the fact that planning controls may now have the effect of protecting a beautiful vista in certain circumstances, as was the case in *Gilbert v Spoor and Others* (1983) Ch 27, discussed in 4 2 2 1.

<sup>8</sup> See *Dalton v Angus & Co* (1881) All ER 1 (HL) 24C. This decision is discussed below.

<sup>9</sup> The justifications for not recognising the existing view from a property as an inherent part of the right of ownership are discussed in Ch 2 and Ch 6. The concept of ownership is not recognised in English law as such. However, in the context of English law, this chapter refers to “ownership” when describing that which is the closest equivalent to the civil law concept of ownership. See K Gray “Property in thin air” (1991) 50 *Cambridge LJ* 252-307; K Gray & SF Gray *Land law* (6<sup>th</sup> ed 2009) 56; and AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 106 and 135.

<sup>10</sup> *William Aldred's Case* (1610) 9 Co Rep 57b, 77 ER 816.

<sup>11</sup> *William Aldred's Case* (1610) 9 Co Rep 57b at 59a, 77 ER 816 at 821.

property adjoining that of the applicant's was actionable, since it obstructed the flow of air and light to the applicant's property.<sup>12</sup> Lord Chelmsford LC's reasoning in *Butt v Imperial Gas Company*<sup>13</sup> confirmed that interference with an existing, unobstructed view from a property is not actionable. He argued that the obstruction of the view to a specific property is analogous to the obstruction of the view from a property, which is not considered a legal injury.<sup>14</sup>

In *Dalton v Angus*,<sup>15</sup> Lord Blackburn also concluded that a right to a view cannot arise *ex lege* and that such a right can only be established by an agreement between property owners.<sup>16</sup> Although this case primarily concerned lateral support, the court drew interesting comparisons between the right to lateral support and the right to light and it considered the differences between the right to light and the right to a view.<sup>17</sup> Lord Blackburn relied on the reasoning of Wray CJ in *Bland v Moseley*<sup>18</sup> as authority for the argument that the right to light is inherently different from the right to a view and that these two "attributes" are therefore not to be afforded the same degree of protection.

Wray CJ, in *Bland v Moseley*,<sup>19</sup> admitted that it is "a great commendation of a house" to have a large undisturbed outlook, but contended that whilst a free flow of

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<sup>12</sup> *William Aldred's Case* (1610) 9 Co Rep 57b at 59a-59b, 77 ER 816 at 821-822. The court referred to the decision in *Bland v Moseley* (1587) 9 Co Rep 58a, where it was held that the obstruction of the flow of air and light to a property is actionable because the flow of light and air to a property constitutes a necessary attribute of property.

<sup>13</sup> *Butt v Imperial Gas Company* (1866) 2 Ch App 158.

<sup>14</sup> *Butt v Imperial Gas Company* (1866) 2 Ch App 158 at 161. In this judgment it was held that the erection of a gasometer on the defendant's property was not unlawful, despite the fact that it obstructed the view to the applicant's business premises and advertising board. Lord Chelmsford rejected the plaintiff's argument that the obstruction of the view to his workplace will harm his business, arguing that the view to his premises would only have attracted passers-by and that he would therefore not lose any established customers.

<sup>15</sup> *Dalton v Angus & Co* (1881) All ER 1 (HL).

<sup>16</sup> *Dalton v Angus & Co* (1881) All ER 1 (HL) 24G.

<sup>17</sup> *Dalton v Angus & Co* (1881) All ER 1 (HL) 10B-C, 20A-C, 23D-I, 25A-I, 26A, 31H-I and 32-33.

<sup>18</sup> *Bland v Moseley* (1587) 9 Co Rep 58a. In *Dalton v Angus & Co* (1881) All ER 1 (HL) 24A-C, Lord Blackburn referred to the judgment of Wray CJ in *Bland v Moseley* (1587) 9 Co Rep 58a.

<sup>19</sup> *Bland v Moseley* (1587) 9 Co Rep 58a. See also *Dalton v Angus & Co* (1881) All ER 1 (HL) 24A-C.

light and air to a property is a necessity, an unobstructed view is merely a delight. He therefore confirmed that a property owner does not have a right to an unobstructed view.<sup>20</sup> Accordingly, he held that the obstruction of prospect is not actionable, despite the fact that damages may be recovered for obstructing the flow of air or light to a property. Even though Lord Blackburn reached the same conclusion in *Dalton v Angus*,<sup>21</sup> his reasoning differed from that of Wray CJ. Lord Blackburn argued that a right to light can ensure the protection of the flow of light to a property by merely imposing a burden on one adjacent property. However, the protection of a pleasant view often requires that burdens should be imposed on an undefined and large number of properties that are in the line of sight of such a view. Since a right to light can mostly be defined easily without imposing a burden on too many properties, it can be acquired by way of prescription. Conversely, a right to have an unobstructed prospect cannot be acquired through prescription, because such a right would impose a vague burden on a multitude of properties.<sup>22</sup> These contrasting features of the right to a view and the right to light caused Lord Blackburn to infer that the right

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<sup>20</sup> *Dalton v Angus & Co* (1881) All ER 1 (HL) 24A–D.

<sup>21</sup> *Dalton v Angus & Co* (1881) All ER 1 (HL).

<sup>22</sup> *Dalton v Angus & Co* (1881) All ER 1 (HL) 24D–G. Lord Blackburn based his reasoning on that of Lord Hardwicke in *Attorney-General v Doughty* (1752) 2 Ves Sen 453. Lord Hardwicke reasoned that the flow of light through a window can be protected by only prohibiting or regulating building works located close to such a window. However, the view from a property can often only be protected if owners of properties in a large and undefined area are prohibited from erecting structures that would spoil such a view. Consequently, the recognition of a right to a view would inhibit urban development. See also *Dalton v Angus & Co* (1881) All ER 1 (HL) 24B–D, 25A–I, and 26A for the reasoning that supports Lord Blackburn's opinion, namely that the right to lateral support is more analogous to the right to light than to the right to a view. He concluded that both the flow of natural light to and lateral support of properties are necessary for the enjoyment of properties and should therefore be protected as rights that may be acquired through prescription. Conversely, the right to a view is not essential for the enjoyment of a property. Furthermore, lateral support and a natural flow of light to a property only require that burdens be placed on properties that are directly adjacent to the dominant tenement. However, the right to have a view may entail a prohibition against the erection of structures on properties not only directly adjacent to but also in the line of sight of the pleasant view.

to a view would only originate from an agreement between property owners, and would not arise *ex lege*.<sup>23</sup>

The court in *Re Penny and the South Eastern Railway Co*<sup>24</sup> held that the obstruction of the view from a property is not actionable, and thereby implied that a property owner does not have an inherent right to the undisturbed, existing view from her property.<sup>25</sup> In this decision, the court drew a comparison between the loss that an owner suffers when the existing view from her property is obstructed by later constructions on a neighbouring property and the infringement of a property owner's privacy when her property is overlooked from a neighbour's property. It reasoned that if a claim for compensation for such overlooking was successful, a property owner would be equally entitled to damages if the existing view from her property was spoiled by development on a neighbouring property.<sup>26</sup>

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<sup>23</sup> *Dalton v Angus & Co* (1881) All ER 1 (HL) 24G. The decision in *Easton v Isted* (1901) E 1151 illustrates how an actual agreement between neighbours can create a right to a view. In this case, neighbouring property owners concluded an agreement in terms of which the one owner acknowledged that his neighbour allowed him to "overlook" (in)to his property by annually paying him an amount of money. The agreement was therefore aimed at recognising a property owner's right to the existing, unobstructed view over (into) her neighbour's property and not at preventing the erection of structures that would obstruct an existing prospect. The possibility of protecting the existing view from a property by way of an agreement is examined in 4 2 2.

<sup>24</sup> *Re Penny and the South Eastern Railway Co* (1857) 119 ER 1390.

<sup>25</sup> *Re Penny and the South Eastern Railway Co* (1857) 119 ER 1390 at 1395. The court had to determine whether a property owner's right to have a view overlooking her neighbour's premises unlawfully infringed upon such neighbour's privacy. Mr Penny, the owner of some properties adjacent to the North Kent Railway, claimed damages from the constructors of the railroad. He alleged that his privacy was being disturbed by the view that people had from the railway over his back windows and garden. Mr Penny's claim for damages was also based on contentions that the passing trains caused constant noise, vibration and annoyance. He argued that these injuries, together with the fact that his premises - as well as that of his tenants - were overlooked by passengers and workmen on the railway and railway platform, caused a decrease in the value of the rentals he received and necessitated repairs to the houses. The court ruled that there is no action for overlooking into another owner's premises in English law. In a judgment that also concerned the overlooking of another property, *Tapling v Jones* (1865) 144 ER 1067 at 1074, it was also established that a property owner does not have a right against a neighbour who has an (overlooking) view of her garden or "pleasure-grounds". The court explained that such overlooking was acceptable because the owner whose premise was being overlooked had the right to erect a structure that would shut out windows with such an intruding view. See also K Gray & SF Gray *Elements of land law* (5<sup>th</sup> ed 2009) 109-110 and K Gray & SF Gray *Land law* (6<sup>th</sup> ed 2009) 537.

<sup>26</sup> *Re Penny and the South Eastern Railway Co* (1857) 119 ER 1390 at 1394-1395. In this case, the "development" on the relevant neighbouring property was the construction of a railway. Lord Campbell CJ held that although compensation could be claimed for actual injury caused to the plaintiff's

In a more recent judgment, *Hunter v Canary Wharf Ltd*,<sup>27</sup> (“*Hunter*”) the House of Lords (now the Supreme Court) revisited the principles that are applicable when right-of-view questions arise. The right to a view was not directly at issue in this case, but the Lords regarded the obstruction of a pleasant view to be analogous to interference with television reception, which was the basis of one of the claims. In a comparative investigation, the court considered the rules regulating the protection of an undisturbed prospect and confirmed that these rules are still applicable.<sup>28</sup>

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property during the construction of the railway, damages could not be claimed in respect of a decrease in a property’s value due to it being overlooked by persons from a railway or a railway platform. Lord Campbell CJ reasoned as follows:

“Where would you draw the line? Would the obstruction, by the railway, of a view from the windows of a house, entitle the owner to compensation, on the ground that his property was ‘injuriously affected by the execution of the works?’”

Wightman J was also of the opinion that compensation need not be paid because of the injury the property suffered due to it being overlooked by the railway. Crompton J followed the same reasoning as Campbell CJ. He also compared the claim for compensation for overlooking with a claim for compensation for “the obstruction of a distant prospect,” concluding that if the compensation for overlooking was awarded, it would make it impossible to determine “where such claims would end”. See the discussion of this decision by K Gray “Property in thin air” (1991) 50 *Cambridge LJ* 252-307 at 262-263.

<sup>27</sup> *Hunter v Canary Wharf Ltd* (1997) HL 677. The case was also heard by the Court of Appeal in *Hunter v Canary Wharf Ltd* (1997) AC 655.

<sup>28</sup> The plaintiffs occupied dwellings in the London Docklands area. This area was designated as an “urban development area and enterprise zone” for the benefit of the environment. Building and construction work in the area led to two actions being instituted by the plaintiffs. The first action was a claim in nuisance against Canary Wharf Ltd. In the original actions it was alleged that the erection of a tower by Canary Wharf Ltd interfered with the plaintiffs’ television reception, which caused damage for them, since they suffered a loss of enjoyment of television and their licence fees were wasted. The second action, a claim for damages for negligence and nuisance, was instituted against the London Docklands Development Corporation in respect of deposits of dust on their properties. These dust deposits were the result of the construction of a link road. Appeals in both actions were heard by the Court of Appeal and the House of Lords. This chapter focuses on the question of whether or not interference with television reception is capable of constituting an actionable private nuisance. In determining the answer for this question, the courts investigated the similarities between the obstruction of a pleasant view and interference with television reception. Their reasoning involved an exposition of the rules and principles regarding the right to a view. In the Court of Appeal, *Hunter v Canary Wharf Ltd* (1997) AC 655 at 664H and 665-666, Pill LJ dismissed the plaintiffs’ appeal in the action based on the interference with their television reception. The defendants argued that the obstruction of a television signal is analogous to the loss of a view and that neither of these “disturbances” is actionable. Pill LJ considered the analogy between the obstruction of a television signal and the obstruction of a pleasant view to be “compelling” and concluded that neither is actionable. In both instances the users or owners of property are deprived of something that they previously enjoyed as “a part” of their property. If a television signal is obstructed, the enjoyment of television reception is lost. Similarly, when a pleasant view is obstructed, the enjoyment of such an amenity of one’s property is lost. Pill LJ recognised that television plays an important role in modern society but nevertheless dismissed the argument that interference with television reception constitutes an actionable nuisance. He concluded that the old authorities’ justifications for not giving the

The plaintiffs<sup>29</sup> were dissatisfied with the Court of Appeal's ruling that interference with television reception does not constitute an actionable private nuisance. Consequently, they argued before the House of Lords that there is no authority for the notion that the law of nuisance does not provide protection for matters of recreation or entertainment.<sup>30</sup> They criticised the Court of Appeal's comparison between interference with television reception and the obstruction of a pleasant view, arguing that an action for nuisance for an interference with television reception would not be against public policy in the same way that such an action for interference with view would be. Television signals, they reasoned, are "consumed" by the public and replaceable, while a (specific) prospect is unique and irreplaceable.<sup>31</sup> The "protection" of a television signal therefore does not prevent development because it can be replaced or restored without prohibiting development or demolishing the building(s) that disrupt(s) it. Conversely, the effective protection of the view from a property requires a perpetual prohibition on the development of properties that might obstruct such a view. Accordingly, a successful action for nuisance for the obstruction of view would be against public policy, since it would impede development, while the same action for interference with a television signal would not be against public policy because it would not hinder development.<sup>32</sup>

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undisturbed view from a property the protection of an enforceable right are both sound and applicable to modern conditions.

<sup>29</sup> Hunter and Others, the plaintiffs in the original action regarding the interference with television reception will be referred to as "plaintiffs" in the discussion of the decisions of the Court of Appeal and the House of Lords, while Canary Wharf Ltd, the defendant in this original action, will be referred to as "defendants" throughout the discussion.

<sup>30</sup> *Hunter v Canary Wharf Ltd* (1997) HL 677 at 680H and 681A.

<sup>31</sup> *Hunter v Canary Wharf Ltd* (1997) HL 677 at 680H, 681A–E and 682. In the Court of Appeal, the plaintiffs argued that the analogy between the loss of television signal and the loss of a view is misconceived. They reasoned that interference with a television signal can constitute an actionable nuisance although the obstruction of a view cannot. Conversely, the defendant argued that these two situations are similar and that interference with a television signal is not capable of constituting an actionable nuisance for the same reason that the obstruction of a pleasant view is not unlawful.

<sup>32</sup> *Hunter v Canary Wharf Ltd* (1997) HL 677 at 680H and 681A–E.

The defendant remained steadfast in its argument that interference with television reception is analogous to interference with view. It argued that neither of these interferences should be actionable in nuisance because both can be caused without an action being performed on another's property. If the mere presence of a building that interferes with a neighbour's pleasurable amenity is considered to constitute an actionable nuisance, too heavy a burden would be placed on urban developers.<sup>33</sup>

In the judgment of the House of Lords, Lord Goff reiterated that a property owner has the right to erect structures on her property as she pleases.<sup>34</sup> Referring to *Attorney-General v Doughty*<sup>35</sup> and *Fishmongers' Co v East India Co*,<sup>36</sup> he confirmed that this entitlement is not restricted by the fact that building works on one owner's property may cause the obstruction of the view from a neighbour's property.<sup>37</sup> He further established that the mere presence of a building on a neighbouring property cannot constitute an actionable nuisance.<sup>38</sup> By implication, the erection of a building that causes the obstruction of the existing view from a neighbouring property or an

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<sup>33</sup> *Hunter v Canary Wharf Ltd* (1997) HL 677 at 682B–E.

<sup>34</sup> *Hunter v Canary Wharf Ltd* (1997) HL 677 at 685–686. Lord Goff qualified this statement by mentioning that the entitlement to build on one's property is subject to planning regulations. In *Hunter v Canary Wharf Ltd* (1997) HL 677 at 709B–H, Lord Hoffmann, referring to *William Aldred's Case* (1610) 9 Co Rep 57b, 77 ER 816 and *Dalton v Angus & Co* (1881) All ER 1 (HL), stated that the enjoyment of a pleasant prospect cannot be protected as a right that is acquired by prescription and emphasised that a landowner's entitlement to erect structures as she pleases is only restricted in very specific circumstances.

<sup>35</sup> *Attorney-General v Doughty* (1752) 2 Ves Sen 453.

<sup>36</sup> *Fishmongers' Co v East India Co* (1752) 1 Dick 163.

<sup>37</sup> In *Hunter v Canary Wharf Ltd* (1997) HL 677 at 685C–F, Lord Goff ruled that a property owner may, within the limits posed by planning controls (and in the absence of easements in the cases of the flow of air and light), erect any structure on her property, even if such structure(s) will obstruct her neighbour's view or restrict the flow of air or light to her neighbour's property. This illustrated the "scope" of an owner's right to erect buildings on her property. A landowner who wants to develop her property therefore does not have to take into consideration the possibility that such a development may interfere with a neighbour's enjoyment of her property.

<sup>38</sup> *Hunter v Canary Wharf Ltd* (1997) HL 677 at 685G–H and 686A–C. This is the position if there is no easement that protects the attribute that is lost by the presence of such a building. Should there be an easement, neighbouring owners may be restricted in the actions that they are allowed to perform on their properties.

interference with a neighbour's television signal is not actionable in nuisance.<sup>39</sup>

Accordingly, it was ruled that the obstruction of a television signal does not constitute an actionable harm and the appeal was dismissed.

English case law therefore indicates that a property owner does not have an inherent right to the existing, undisturbed view from her property.<sup>40</sup> In English law,

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<sup>39</sup> *Hunter v Canary Wharf Ltd* (1997) HL 677 at 685G–H and 686A–C. Lord Goff of Chieveley concurred with the Court of Appeal, ruling that interference with a television signal that is caused by the mere presence of a building is not capable of constituting private nuisance. Lord Lloyd of Berwick agreed with the Court of Appeal and with Lord Goff on this point. See *Hunter v Canary Wharf Ltd* (1997) HL 677 at 699B–H and 700A–C. Lord Lloyd specifically agreed with the Court of Appeal in the sense that there is a close analogy between a building that interferes with view and a building that interferes with television reception. According to him, the obstruction of the view from a property is an example of “*damnum absque injuria*”. VG Hiemsta & HL Gonin *Trilingual legal dictionary* (3<sup>rd</sup> ed 2006) 174 translate “*damnum absque injuria*” as “damage without an unlawful act, without legal injury”. Lord Lloyd explained that a property owner does not have a right to a view unless such a view is protected by way of a restrictive covenant. Therefore, as described by this maxim, the obstruction of a pleasant view may cause a property owner to suffer a loss without infringing upon her rights. Lord Hoffmann was also of the opinion that there are similarities between interference with television signal, interference with the flow of light, air or the passage of radio signals, and the obstruction of view. See *Hunter v Canary Wharf Ltd* (1997) HL 677 at 708H and 709A–B. Although Lord Cooke of Thorndon agreed that in this case the action for nuisance allegedly caused by the interference with the plaintiffs' television reception should not succeed, his reasoning was not based on the analogy between the loss of view and the loss of television reception. Instead, his judgment focused on the principles of the reasonable user and give and take. He argued that the limitations imposed on the height of buildings by modern town planning instruments make it inaccurate to state that a property owner enjoys rights to her property “*usque ad coelum et ad inferos*” (“the owner of the land is the owner of the sky above and everything contained in the soil below the surface...”). According to Lord Cooke, the acceptable community standard for building works in a modern planning regime can be ascertained by considering the actions instituted against neighbouring developers that exceed the applicable height restrictions. It appears that Lord Cooke suggests that if a developer complied with planning controls when she erected a building, but the presence of the building nevertheless hinders a neighbour's television reception, the nuisance caused by the loss of television signal is not actionable, since the developer acted reasonably. See *Hunter v Canary Wharf Ltd* (1997) HL 677 at 719F–H and 720–723A for Lord Cooke's discussion of whether or not interference with television reception constitutes an actionable nuisance. Lord Hope of Craighead also regarded the obstruction of view as similar to the interruption of radio and television signals. Since a property owner is entitled to build on her property as she pleases, the landowner's loss of amenity due to the presence of a building on a neighbouring property does not constitute an actionable nuisance. See *Hunter v Canary Wharf Ltd* (1997) HL 677 at 726B–H and 727A–E for Lord Hope's opinion on the interference with a television signal.

<sup>40</sup> This rule was stated explicitly in *Dalton v Angus & Co* (1881) All ER 1 (HL) and implied by decisions such as *William Aldred's Case* (1610) 9 Co Rep 57b at 59a, 77 ER 816 at 821; *Butt v Imperial Gas Company* (1866) 2 Ch App 158; *Re Penny and the South Eastern Railway Co* (1857) 119 ER 1390 and *Hunter v Canary Wharf Ltd* (1997) HL 677, which determined that the obstruction of an existing view does not constitute an actionable nuisance. See also RA Buckley *The law of nuisance* (2<sup>nd</sup> ed 1996) 37 and J Pugh-Smith, G Sinclair & W Upton *Neighbours and the law* (5<sup>th</sup> ed 2009) 56, where the principle that the obstruction of an existing view does not amount to an actionable nuisance was stated with reference to the following judgments: *William Aldred's Case* (1610) 9 Co Rep 57b at 59a, 77 ER 816 at 821; *Butt v Imperial Gas Company* (1866) 2 Ch App 158; *Harris v De Pinna* (1886) 33 Ch D 238 at 262 CA; *Leech v Schweder* (1874) 9 Ch App 463 at 474–475 and *Browne v Flower* (1911) 1 Ch 219 at 225, per Parker J. According to J Murphy *The law of nuisance* (2010) 6, there are various forms of actionable nuisance. K Kennedy *Neighbour disputes: Law and practice* (2009) 98–99 distinguishes between

the existing view from a property does not form part of the right of ownership and any interference with this aesthetically pleasing attribute is classified as *damnum absque injuria* – “damage without an unlawful act and without legal injury”.<sup>41</sup> Nevertheless, there are instances where a property owner in English law, like in South African law, will have a substantive right to prevent the erection of buildings on a neighbouring property and thereby prevent the obstruction of the existing, unobstructed view from her own property. Restrictive covenants and easements may possibly be applied to regulate building works on a neighbouring property in a way that would protect an existing view. These measures are considered below to establish which of them, if any, may create a pre-existing substantive right to prevent the erection of building works that will interfere with the existing view from a property.

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two different types of nuisance. The consequences of one owner’s unreasonable use of her property that has an adverse effect on another owner’s property constitute one category of nuisance, while interferences with rights or easements benefitting a property fall into a second category of nuisance. However, there is no *numerus clausus* of nuisance, in other words nuisances are not restricted to these categories. Kennedy explains that the detriment that was allegedly suffered determines how a court deals with a specific nuisance. The damage that was caused can either involve physical damage to a neighbouring property, or that a neighbour’s enjoyment of her property is reduced without physical damage to the property itself. Kennedy argues that a court will carry out a balancing exercise when it considers a nuisance claim that is based on the fact that a property owner suffered damage in her enjoyment of her property. In terms of such an exercise, a court will consider, amongst other things, whether or not the defendant used her property in a normal way. Referring to *Southwark London Borough Council v Mills* (2001) 1 AC 1, Kennedy explained that a court is unlikely to find that nuisance has been caused by an owner who used her property in a way that is “recognisable and acceptable to most people”. One could therefore probably assume that a court would not easily conclude that a property owner who lawfully erected a building on her property caused a nuisance to her neighbour whose view is obstructed by such building works.

<sup>41</sup> The court in *Bland v Moseley* (1587) 9 Co Rep 58a classified the obstruction of the existing view from a property as *damnum absque injuria* – “damage without an unlawful act and without legal injury” (transl VG Hiemsta & HL Gonin *Trilingual legal dictionary*, 3<sup>rd</sup> ed 2006 at 174). In its justification, the court compared the obstruction of a pleasant view with the obstruction of the flow of air and light to a property. It reasoned that whilst a supply of light and air to a property is a necessity, the view from it is merely a pleasurable attribute. Therefore, interference with a free flow of light or air is actionable in nuisance, but no actionable right arises in instances where a pleasant view is obstructed. Following this principle, the court in *William Aldred’s Case* (1610) 9 Co Rep 57b at 58b, 77 ER 816 at 821 ruled that interference with or the flow of air to a property that was caused by the erection of a pigpen was actionable.

## 4 2 2 Protection of an existing, unobstructed view

### 4 2 2 1 Restrictive covenants

Gray and Gray define a restrictive covenant as

“an agreement between two estate owners limiting the use of the land of one for the benefit of the other.”<sup>42</sup>

A restrictive covenant is acquired through express grant by one owner to another.<sup>43</sup>

The primary purpose of such agreements is to protect attributes of properties that promote “urban planning and civilised coexistence”.<sup>44</sup> This device can therefore be used to protect the existing, unobstructed view from a property. However, the importance of restrictive covenants in the context of land-use planning has been reduced by the extension of planning controls that place restrictions on the use of land.<sup>45</sup> Nevertheless, planning controls do not override existing restrictive covenants.

A property owner wanting to develop her property must therefore ensure that her proposed development is in line with any applicable restrictive covenants and also with planning controls.<sup>46</sup> A neighbouring property owner is not generally entitled to be informed of an application for planning permission. A right to be notified of such an application will only exist under certain circumstances.<sup>47</sup> This corresponds with the

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<sup>42</sup> K Gray & SF Gray *Elements of land law* (5<sup>th</sup> ed 2009) 255. B McFarlane *The structure of property law* (2008) 883 and 840 describes a restrictive covenant as a persistent right against the servient freehold or lease that allows the owner of the dominant property to prevent the owner of the servient property from using her land in a specific way.

<sup>43</sup> B McFarlane *The structure of property law* (2008) 883 and 840.

<sup>44</sup> K Gray & SF Gray *Land law* (6<sup>th</sup> ed 2009) 127.

<sup>45</sup> C Harpum, S Bridge & M Dixon *Megarry & Wade: The law of real property* (7<sup>th</sup> ed 2008) 1378.

<sup>46</sup> C Harpum, S Bridge & M Dixon *Megarry & Wade: The law of real property* (7<sup>th</sup> ed 2008) 1378.

<sup>47</sup> Section 65(1)(a) of the Town and Country Planning Act 1990 provides that “[a] development order may make provision requiring notice to be given of any application for planning permission ... “. In virtue of s 59 of this Act, a development order may either itself give planning permission, or may provide for such permission to be granted by a local authority; s 57(1) requires planning permission for any “development” of land and s 55(1) defines “development” as *inter alia* the carrying out of building. Consequently, building permission must be granted by or in terms of a development order, which may - but not have to - require that the public must be notified of the application. See also JC Blackhall *Planning law and practice* (3<sup>rd</sup> ed 2005) 379.

position in South African law, where a property owner may only erect a building on her property if such a building will not contravene any restrictions imposed in terms of a private agreement, such as a servitude, or any restrictions in terms of public planning regulation, such as a restrictive condition, a zoning scheme, building regulations or other legislation prohibiting building works on the relevant property.<sup>48</sup>

In English law a property owner (A) can protect the existing view from her property by way of a restrictive covenant that limits her neighbour's (B's) right to build on her (B's) property in a way that would obstruct the existing view from A's (dominant) property. However, a restrictive covenant that limits B's right to build can only be imposed with B's consent.<sup>49</sup> If B does agree to the creation of such a covenant in favour of A's property, A and her successors in title will have a substantive right, in terms of the covenant, against B and her successors in title to prevent the obstruction of the existing view from the dominant tenement. Such a restrictive covenant will entitle A to prevent building works on B's property that would otherwise have been acceptable in terms of public planning controls. A similar rule applies in South African law where a privately imposed servitude or restrictive condition may place more restrictions on a property owner's right to build than are provided for in the applicable zoning scheme, building regulations and other legislation. Therefore, similar to the position in South African law, a property owner in English law who wants to have more protection for the existing view from her property than the protection that exists in terms of public planning controls can

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<sup>48</sup> Restrictions on building works in South African law are discussed in Ch 3.

<sup>49</sup> A restrictive covenant in English law can be created as an agreement between two private property owners or as a "section 106 agreement" between local planning authority and a private person. The purpose of a "section 106 agreement" is to restrict or regulate the development or use of specific land. See K Gray & SF Gray *Elements of land law* (5<sup>th</sup> ed 2009) 256-257 with regard to "section 106 agreements".

create a restrictive covenant that is similar to a restrictive condition and a servitude in South African law.<sup>50</sup>

English case law confirms that a property owner can have a substantive right, based on a restrictive covenant, to protect the unobstructed, existing view from her property. In the *Hunter* decision, Lord Lloyd suggested that a restrictive covenant may give a property owner a legal right to a view.<sup>51</sup> Similarly, Lord Hoffmann mentioned a covenant, together with an easement, as the only two ways of restraining a neighbouring owner's right to build on her property.<sup>52</sup> Case law indicates that there have indeed been instances where property owners have employed restrictive covenants to protect amenities, including view, of their properties.<sup>53</sup> The decision in *Re Buchanan - Wollaston's Conveyance*<sup>54</sup> ("*Re Buchanan*") shows that attributes of property, such as the unobstructed view from a property, can be protected by way of a private agreement between property owners. In this case, four property owners jointly bought a piece of property adjacent to their houses in an attempt to preserve the amenities of their properties.<sup>55</sup> They also executed a deed in terms of which the use of this parcel of land was restricted in

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<sup>50</sup> C Harpum, S Bridge & M Dixon *Megarry & Wade: The law of real property* (7<sup>th</sup> ed 2008) 1378. J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 309 and 319-322 argues that in a situation where there is a conflict between the provisions of a restrictive condition and a town planning or land use scheme, the restrictive condition will take precedence over the zoning and planning schemes. It should be kept in mind that a restrictive covenant in English law differs from restrictive conditions in South African law in the sense that an English law restrictive covenant constitutes an agreement between two private property owners while the term "restrictive conditions", as it is used here with reference to South African law, refers to conditions that a township developer registers in the title deeds of properties during the process of township establishment. In this sense, English law restrictive covenants are similar to South African servitudes, which are also created in terms of agreements between two private property owners.

<sup>51</sup> *Hunter v Canary Wharf Ltd* (1997) HL 677 at 699.

<sup>52</sup> *Hunter v Canary Wharf Ltd* (1997) HL 677 at 709. An easement of light or air, which may be acquired by way of grant or prescription, will have the effect of limiting a neighbouring owner's (the owner of the servient property's) right to build. The possibility of using an easement to protect an existing view is discussed in 4 2 2 2.

<sup>53</sup> *Re Buchanan - Wollaston's Conveyance* (1939) 2 All ER 302; *Gilbert v Spoor and Others* (1983) Ch 27 and *Dennis and Others v Davies* [2008] EWHC 2961 (Ch).

<sup>54</sup> *Re Buchanan - Wollaston's Conveyance* (1939) 2 All ER 302.

<sup>55</sup> *Re Buchanan - Wollaston's Conveyance* (1939) 2 All ER 302 at 302 and 304.

order to prevent the other properties from suffering any nuisance or detriment.<sup>56</sup> Consequently, pursuant to that deed, the joint property was not to be used in a manner that would cause nuisance or annoyance to, or a depreciation of, the owners' respective properties. Furthermore, the deed prohibited the erection of any structure without consent from all the other parties to the contract.<sup>57</sup> The deed effectively constituted a private agreement to protect the existing views from the properties.

The decisions in *Gilbert v Spoor and Others*<sup>58</sup> (“*Gilbert*”) and *Dennis and Others v Davies*<sup>59</sup> (“*Dennis*”) confirmed that it is possible to preserve a specific view by way of a restrictive covenant. Both these cases illustrate how a restrictive covenant can protect the amenity of view by prohibiting a property owner from using her property in a manner that would cause nuisance or annoyance to a neighbour. Although the obstruction of a pleasant view would not naturally be regarded as an actionable nuisance, the annoyance and nuisance experienced because of such an obstruction will be considered unlawful if a restrictive condition specifically prohibits the acts causing the nuisance or annoyance.

In the *Gilbert* case, the court acknowledged that an undisturbed view over a landscape may be valuable and advantageous to a landowner. This conclusion was reached in the context of a property development where a restrictive covenant benefitted owners of adjacent properties. The applicant was the owner of a piece of property in a building scheme. Properties in this scheme were subject to a covenant restricting the erection of buildings to one dwelling house per property. In 1976 the applicant was granted permission to erect two more houses on his property. He

<sup>56</sup> *Re Buchanan – Wollaston’s Conveyance* (1939) 2 All ER 302 at 302 and 304-305.

<sup>57</sup> *Re Buchanan – Wollaston’s Conveyance* (1939) 2 All ER 302 at 305.

<sup>58</sup> *Gilbert v Spoor and Others* (1983) Ch 27.

<sup>59</sup> *Dennis and Others v Davies* [2008] EWHC 2961 (Ch).

subsequently applied to the Lands Tribunal to have the covenant amended or discharged.<sup>60</sup> However, a restriction imposed by a covenant may only be modified or discharged if it does not “secure to persons entitled to the benefit of it any practical benefit of substantial value or advantage ...”.<sup>61</sup> The tribunal held that the effect of the modification or discharge of the covenant and the subsequent erection of two additional buildings by the applicant would obstruct the view from other properties in the scheme. Such an obstruction would deprive the persons entitled to benefit from the covenants of a “practical benefit of substantial value or advantage”.

On appeal, the applicant contended that the view was not a “practical benefit”, since it was not visible from the objectors’ properties.<sup>62</sup> The Court of Appeal rejected this argument, stating that the “practical benefit” requirement<sup>63</sup> was not limited to restrictive covenants that applied to specific pieces of land. Therefore, the pleasant view did not have to be enjoyed from the objectors’ properties to be considered a “practical advantage” to those objectors for purposes of this provision. According to the court’s reasoning, the obstruction of the view would indeed have a negative effect on the objectors’ properties, since it would be injurious to the estate as a whole.<sup>64</sup>

The ruling in *Gilbert*<sup>65</sup> indicates that courts may be willing to acknowledge that in certain circumstances, an undisturbed view over the property of another is valuable and to the benefit of a property owner. It also shows that an unobstructed

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<sup>60</sup> Section 84 (1)(aa)(1A) of the Law of Property Act 1925 authorises the Lands Tribunal to, on application, modify or discharge a restriction “arising under covenant or otherwise”. Their power in this regard is subject to certain conditions, one of which is that the restriction to be modified or discharged may not have the effect of securing to the persons entitled to it “any practical benefits of substantial value or advantage to them”.

<sup>61</sup> Section 84(1)(aa)(1A) of the Law of Property Act 1925.

<sup>62</sup> Successors in title to the purchasers of other properties within the building scheme made objections to the applicant’s application for the amendment or discharge of the covenant.

<sup>63</sup> This requirement arises from s 84(1)(aa)(1A) of the Law of Property Act 1925.

<sup>64</sup> *Gilbert v Spoor and Others* (1983) Ch 27.

<sup>65</sup> *Gilbert v Spoor and Others* (1983) Ch 27 at 33 and 35.

view of a scenic landscape does not have to be enjoyed directly from a property to be considered valuable to the owner. A property can also benefit from a pleasant view even if such a view can only be observed from a nearby spot. Moreover, the decision indicates that restrictive covenants can be imposed to prevent the erection of buildings that would obstruct the existing views from neighbouring properties. Therefore, although a property owner does not have an inherent right to the existing, unobstructed view from her property, she may, in terms of a restrictive covenant, prevent the erection of buildings that would obstruct such a view.

Similarly, in the *Dennis* judgment<sup>66</sup> the Chancery Division held that the defendant's proposed extension of the building on his property would interfere with the claimants' views of a river and cause them unwarranted annoyance.<sup>67</sup> At first glance, this ruling appears to be in disagreement with the decision in *Hunter*,<sup>68</sup> where

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<sup>66</sup> *Dennis and Others v Davies* [2008] EWHC 2961 (Ch). This decision was confirmed by the Court of Appeal in *Dennis and Others v Davies* [2009] EWCA Civ 1081. The discussion of this case focuses on the ruling of the Chancery Division. The Court of Appeal dismissed the matter on appeal, without considering or deciding upon any new arguments. Therefore, it effectively confirmed the ruling of the Chancery Division.

<sup>67</sup> Such an annoyance would be unwarranted because the properties were protected against, amongst other things, annoyance and nuisance. The facts of *Dennis and Others v Davies* [2008] EWHC 2961 (Ch) can be summarised as follows: Both the claimants' and the defendant's properties were situated in a building development on the banks of the River Thames. This development was characterised by views of the river that could be enjoyed from all the properties. (These facts appear somewhat similar to those in the South African case *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004), discussed in 2.4, where the applicants' property was also situated on the bank of a river and the view of the river was considered to be a feature of the property. In *Dennis and Others v Davies* [2008] EWHC 2961 (Ch) paras 1-6 and 80-81, the defendant's plan to extend an existing building on his property posed a threat to the views enjoyed from the claimant's properties. Consequently, they claimed that the defendant's proposed building works was unwarranted since they would not comply with the applicable restrictive covenants. The court was asked to enforce the relevant restrictive covenants to prevent the defendant from building. These covenants prohibited the extension or erection of buildings without the prior approval of building plans by the so-called Management Company. Furthermore, they required houses to be used for residential or ancillary purposes only, and prohibited the use of properties in a manner that would cause annoyance or nuisance to other owners or occupiers in the estate or neighbourhood. It was submitted to the defendant that the common law position should be considered. However, Behrens J decided not to apply common law principles, since the claimants' claim was based on the enforcement of covenants. Instead, he argued that one has to apply a reasonableness test when determining whether or not the defendant's proposed building plans would cause annoyance for the claimants. Considering how an "ordinary sensible English inhabitant" would experience the extension of the defendant's building, Behrens J ruled that such building works would have the prohibited effect of causing annoyance.

<sup>68</sup> *Hunter v Canary Wharf Ltd* (1997) HL 677 is discussed in 4.2.1.

the common law was applied to establish the principle that interference with the enjoyment of a property does not constitute nuisance. However, there were specific reasons why the court in *Dennis* decided not to apply the common law and consequently did not follow the principle laid down in *Hunter*. Firstly, the common law principle that a property owner may use (build on) her property as she pleases did not apply because the use of the relevant properties were regulated by restrictive covenants.<sup>69</sup> Secondly, the buildings in the estate were specifically designed to provide each property with a view of the river. After considering the opinion of a reasonable person and specifically taking into account that the view of the river was an important feature of the properties in the estate, the court held that the obstruction of the claimants' views would cause them annoyance.<sup>70</sup> Since the covenant proscribed any act that would cause other owners in the estate nuisance or annoyance, the defendant was prohibited from extending his building.

It would be inaccurate to argue that the court in *Dennis* departed from the principle laid down in the *Hunter* ruling. The judgment in *Dennis* merely indicates that there may be an exception to the principle established in *Hunter*, namely that interference with a delightful attribute of property does not constitute an actionable nuisance. In terms of this exception, there may be instances where a pleasurable characteristic of property is protected in such a way that interference with it does indeed constitute an actionable nuisance. For example, restrictive covenants that restrict the uses of a certain group of properties may have the effect of preventing

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<sup>69</sup> These covenants prohibited the use of one's property in a manner that may cause annoyance or nuisance for a neighbouring landowner. In *Hunter v Canary Wharf Ltd* (1997) HL 677 at 685D–H, 686A–H, 699B–H, 700A–C, 708H, 709A–C and 727A–B, the House of Lords ruled that since a property owner is entitled to erect structures on her property as she pleases, the erection of a building will not constitute an actionable nuisance for interfering with the enjoyment of a neighbour's property. The court specifically stated that the obstruction of the view from a property due to the mere presence of a building on a neighbouring property is not actionable.

<sup>70</sup> Behrens J ruled that the extension of the defendant's building would only interfere with the views from the properties of three of the claimants.

interference with the enjoyment of specific attributes of the properties in the group. Any acts that a court considers to be in contravention of such covenants, like the obstruction of the pleasant views from the other properties in the group, will be actionable. The case can therefore be read in one of two ways. Firstly, it can be seen as an example of an instance where a property owner (A) has a substantive right, in terms of a restrictive covenant, to prevent her neighbour (B) from using (building on) her (B's) property in a way that would obstruct the existing view from A's property. Secondly, the decision can be interpreted as an indication that there may be an exception to the principle that a property owner does not have an inherent right to the existing view from her property. In terms of this exception, there may be instances where a specific group of properties were designed to enhance surrounding views and where a property owner (A) in such a development may indeed have a substantive right, based on the specific design and lay-out of the properties in the development, to prevent a neighbour (B) from using (building on) her (B's) property in a way that would interfere with A's existing view. However, the exception dealt with in this case does not overrule the principle that the right to an existing, unobstructed view does not naturally flow from the right of ownership. The decision merely shows there may be exceptional circumstances, for example where a development is specifically designed to ensure that each of the property owners enjoy an unobstructed view of the surroundings, where the existing view from a property is indeed considered to be inherently part of the right of ownership. The South African decision, *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others*,<sup>71</sup> seems to indicate that a similar exception to the

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<sup>71</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004).

principle that a property owner does not have an inherent right to the existing view from her property may exist in South African law.<sup>72</sup>

The decisions in *Hunter, Re Buchanan - Wollaston's Conveyance*,<sup>73</sup> *Gilbert v Spoor and Others*<sup>74</sup> and *Dennis and Others v Davies*<sup>75</sup> show that the existing, unobstructed view from a property may be protected with a restrictive covenant in English law. They also illustrate that there are different ways of constructing this mechanism so as to protect a pleasant view. A restrictive covenant may for example place a height limitation on buildings to be constructed on a property or it may prohibit an owner from using her property in a way that would cause nuisance or annoyance for a neighbour.<sup>76</sup> Any of these constructions may have the effect of preventing the obstruction of the view from a neighbouring property. However, although the obstruction of an existing view may be prevented by a restrictive covenant, the protection of such a view depends on how strictly the covenant is enforced by a court. If a restrictive covenant preventing the obstruction of a view is enforced absolutely, for instance if a court orders that the part of a building that exceeds the imposed height limitation should be demolished, the view enjoyed from a neighbouring property will be afforded protection in terms of a property rule. Conversely, if a court decides not to enforce such a restrictive covenant and only awards damages to the owner whose view was protected by such a covenant, that

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<sup>72</sup> See the discussion of *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) in 2 4.

<sup>73</sup> *Re Buchanan – Wollaston's Conveyance* (1939) 2 All ER 302.

<sup>74</sup> *Gilbert v Spoor and Others* (1983) Ch 27.

<sup>75</sup> *Dennis and Others v Davies* [2008] EWHC 2961 (Ch).

<sup>76</sup> The courts in *Gilbert v Spoor and Others* (1983) Ch 27 and *Dennis and Others v Davies* [2008] EWHC 2961 (Ch) ruled that the obstruction of the views enjoyed from the properties in the respective cases were prohibited by the applicable restrictive covenants. These covenants prevented owners from using their properties in ways that would cause other owners nuisance or annoyance. The courts considered the obstruction of pleasurable views as having the prohibited effect of causing nuisance and annoyance to other owners.

view will only have been protected with a liability rule.<sup>77</sup> In both the *Gilbert* and the *Dennis* rulings the courts enforced restrictive covenants preventing the obstruction of existing views absolutely. It therefore appears that in English law, a property owner's (A's) substantive right, which flows from a restrictive covenant, to prevent a neighbour (B) from erecting buildings that will obstruct the existing view from her (A's) property, is generally enforced with a property rule.

#### 4 2 2 2 Easements

Easements have close affinities with restrictive covenants and restrictive covenants have been described as negative easements. However, easements differ from restrictive covenants in the sense that easements may be acquired by prescription, while it is not possible to acquire restrictive covenants in this way. Furthermore, the content of easements is relatively restricted, whereas the creation of restrictive covenants is less restricted as far as the permissible content of such devices is concerned.<sup>78</sup> Easements are traditionally divided into three categories, namely positive easements; negative easements; and easements that confer a right to do something on one's own property that would otherwise be regarded as a private nuisance.<sup>79</sup> These devices can be acquired through prescription or by way of an implied exercise of one owner's power to give another an easement.<sup>80</sup>

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<sup>77</sup> The difference between protection of property rights in terms of property rules and liability rules is discussed in Ch 6. Even where amenities such as air or light are protected by way of (negative) easements, their protection will depend on courts' decisions. In a case where the flow of light to a property is obstructed despite being protected by an easement of light, such a flow of light will only be protected in terms of a property rule if a court absolutely enforces the easement, in other words, if the court were to order that a building that interferes with the flow of light must be demolished.

<sup>78</sup> K Gray & SF Gray *Elements of land law* (5<sup>th</sup> ed 2009) 597. Easements and restrictive covenants can also be distinguished from one another in the sense that easements are enforceable in law and in equity, while restrictive covenants are only enforceable in equity.

<sup>79</sup> J Gaunt & J Morgan *Gale on easements* (18<sup>th</sup> ed 2008) 3-4. The word "easement" stems from the old French word *aisement*, which has been replaced by the modern word "servitude". The meaning of

A negative easement is part of an exceptional category of easements that prohibit the owner of the servient property from using her property in a particular way (rather than giving the owner of the dominant property the right to use the servient property).<sup>81</sup> Gaunt and Morgan define a negative easement as a right to receive something from a neighbour's property without the neighbour interfering with or obstructing it.<sup>82</sup> In terms of this definition, it seems as if a negative easement can be created to prevent a property owner from erecting buildings on her property that would interfere with the existing view from a neighbouring property. In South African law a negative servitude, similar to a negative easement in English law, can be created to give the owner of the dominant property a substantive right to prevent the obstruction of the existing view from her property.<sup>83</sup> However, although there is strictly speaking no closed list of recognised easements in English law, there are strong indications that certain benefits of land, including the right to a view, cannot form the basis of an easement, and that in fact only a limited number of negative easements are recognised.<sup>84</sup> This principle was confirmed by the court in *Browne v*

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*aisement* is "convenience" or "accommodation". B McFarlane *The structure of property law* (2008) 837 defines easements as property rights that exist "only in relation to land". An easement supplements one property owner's ownership by allowing her to make specific use of another owner's nearby land, which in turn results in a restriction of the latter owner's ownership.

<sup>80</sup> B McFarlane *The structure of property law* (2008) 883 and 840.

<sup>81</sup> K Gray & SF Gray *Elements of land law* (5<sup>th</sup> ed 2009) 596.

<sup>82</sup> J Gaunt & J Morgan *Gale on easements* (18<sup>th</sup> ed 2008) 4. Rights to light, air and support of water are mentioned as examples of negative easements.

<sup>83</sup> The categorisation of easements in English law, together with the fact that what is in English law referred to as an "easement" is called a "servitude" in French and Scottish law, appears to indicate that English law easements are similar to servitudes in South African law. See n 79.

<sup>84</sup> K Gray "Property in thin air" (1991) 50 *Cambridge LJ* 252-307 at 261, referring to *William Aldred's Case* (1610) 9 Co Rep 57b at 58b, 77 ER 816 at 821, argues that the right to protect a view is not recognised in the law of easements. K Gray & SF Gray *Elements of land law* (5<sup>th</sup> ed 2009) 617-619 reason that the categories of negative easements are "virtually closed". B McFarlane *The structure of property law* (2008) 838-839 agrees, arguing that easements of light, air and support are the only recognised negative easements. J Gaunt & J Morgan *Gale on easements* (18<sup>th</sup> ed 2008) 3-4 mention certain "limiting characteristics" regarding an easement. These characteristics include that an easement is a right that cannot exist on its own, since it is appurtenant to "other land of the proprietor of the right"; an easement is a proprietary and not a personal right; an easement should be distinguished from a *profit a prendre* in the sense that an easement does not confer a right to take something from a servient tenement, whereas a *profit a prendre* gives one the right to take something that is capable of ownership from another's land; the proprietor is not given exclusive use of the

*Flower*,<sup>85</sup> which ruled that the pleasant view from a property may not be protected by way of an easement of prospect. The court had to determine whether the erection of a staircase giving its users a view into bedrooms in the plaintiffs' flat breached a covenant for the quiet enjoyment of the neighbouring property.<sup>86</sup> In his judgment, Parker J mentioned that it was difficult to find an easement that has been interfered with by the construction of the staircase, since English law does not recognise an easement of view or privacy.<sup>87</sup>

According to McFarlane, courts will consider the content of a right to determine whether or not it constitutes an easement. If a court has previously recognised this type of right as an easement, the content question will be easily answered. In instances where a right is claimed to be an easement but has not been afforded such recognition by a court before, the court will consider whether certain

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servient tenement in terms of an easement; and there are some advantages that cannot exist as easements. These advantages (that cannot exist as easements) include the right to a view; the right to privacy; protection from the weather and the right to television reception. Gaunt and Morgan mention that other measures, such as restrictive covenants or the law of nuisance, may provide protection for these advantages. However, case law has indicated that the existing view from a property cannot be protected in terms of the law of nuisance. See *William Aldred's Case* (1610) 9 Co Rep 57b at 59a, 77 ER 816 at 821; *Butt v Imperial Gas Company* (1866) 2 Ch App 158; *Re Penny and the South Eastern Railway Co* (1857) 119 ER 1390 and *Hunter v Canary Wharf Ltd* (1997) HL 677 at 685G–H and 686A–C. See the discussions of these cases in 4 2 1.

<sup>85</sup> *Browne v Flower* (1911) 1 Ch 219.

<sup>86</sup> This staircase was erected on a neighbouring property. The facts of this case resemble those in *Re Penny and the South Eastern Railway Co* (1857) 119 ER 1390 ("*Re Penny*") where it was held that the plaintiff, whose premises were overlooked by the users of a railway, did not have an action against the constructors of the railway. The court in *Re Penny* laid down the principle that no action lies for disturbing a property owner's privacy by overlooking her property. Indirectly, it also confirmed that the obstruction of the view from a property is not actionable.

<sup>87</sup> *Browne v Flower* (1911) 1 Ch 219 at 225 and 227. Parker J mentioned that the fact that a property is developed before the development of neighbouring properties does not give the owner of such a property a right to the undisturbed view over undeveloped properties. Parker J explained that the buyer of property cannot reasonably expect the seller not develop the land she retained in a way that may interfere with the view from the land she sold to the buyer. It would indeed be "unreasonable" of a property owner to assume that the person from whom she bought the property "was undertaking restrictive obligations which would prevent his using land retained by him for a lawful purpose ... merely because his so doing might affect the amenities of the property he had sold". Parker J reasoned that a buyer has the opportunity to bargain for the rights that she deems necessary for the comfort of her property.

requirements for an easement are met.<sup>88</sup> McFarlane further argues that the enjoyment of a view cannot be defined well enough to qualify as an easement.<sup>89</sup> This reasoning is not entirely convincing because it indeed seems possible to define a specific view. The content of an easement of view can, for instance, state the specific “object” that has to be in the right holder’s line of sight when standing on a specific place, and that the owner of the servient property is prohibited from erecting any structure on her property that might interfere with this sightline. Furthermore, land surveyors may circumscribe fairly easily the view that is sought to be protected. An easement of view can therefore specifically define the part of the servient property that is not to be used in order to protect the view from the dominant property. However, although it seems possible to circumscribe a specific view that should be protected, there is no example of a view being defined well enough to form a suitable content for an easement.<sup>90</sup>

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<sup>88</sup> According to B McFarlane *The structure of property law* (2008) 838, a court would consider a right to be an easement if it has the following characteristics:

“It allows B [one owner] to make specific, limited use of A’s [another owner’s] land; *and* [i]t enhances B’s Freehold or Lease (ie it benefits B’s land); *and* [i]t lasts forever (like a Freehold) or for a limited period (like a Lease); *and* [i]t is not a right to exclusive control of A’s land; *and* [i]t does not impose a positive duty on A; *and* [w]hen created, it was not intended to be only a personal right against A ...”

<sup>89</sup> B McFarlane *The structure of property law* (2008) 839-841 argues that when determining whether a right should be protected as an easement, courts will consider whether the relevant right allows the right-holder to make use of the land of another; whether the use was related to adjacent land or whether it was specific and limited. Referring to the requirement that a right must allow one property owner to make a specific and limited use of another owner’s property to be able to qualify for protection in terms of an easement, McFarlane discusses the ways in which such uses can be circumscribed. For example, using another owner’s property for the passing of air to one’s own property will only be considered an easement if the air passes through a defined channel. In the same way, an easement of light will only exist if it relates to light that “flows” over the servient property and enters a specific window of the dominant property. If the use cannot be defined in such specific terms, for example if there is only a general right to receive air flowing over one property to another, or a general right to a supply of light passing over another owner’s property, it will not be possible to consider such rights as easements. Nevertheless, rights to light and air can give rise to easements if their contents are well defined. Accordingly, the content of an easement of air is the use of specific air (that “part” of the air that flows through the defined channel) and the content of an easement of light is the use of the specific light entering through a particular window.

<sup>90</sup> Despite the fact that the view from a property cannot directly be protected by way of an easement, it may arguably be afforded indirect protection through an easement of light or air. Often the protection of a specific view from a property means that owners of a large area of land are prohibited from

### 4 2 2 3 Conclusion

The position regarding the protection of an unobstructed, existing view from a property in English law corresponds with the position in South African law. In English law, a property owner does not have an inherent right to the existing view from her property, but case law shows that a property owner may, in terms of a restrictive covenant, acquire a substantive right to prevent the obstruction of such a view.<sup>91</sup> Case law also indicates that there may be circumstances where the existing view from a property in a specific development forms such an important part of the use and enjoyment of the property that the owner of this property has an inherent substantive right, based on the specific design of the properties in the development, to prevent the obstruction of the view.<sup>92</sup> It seems unlikely that the existing view from a property can be protected by a negative easement. The position in South African law is very similar. South African law does not acknowledge the existing view from a property as an inherent right that naturally flows from ownership either.

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erecting structures on their properties. However, there may be instances where a property owner only desires the preservation of a particular view or sight, which would only require that a burden be placed on a close-by property. In such circumstances, an easement of light or air that prevents the erection of buildings may have the concomitant and incidental effect of preserving this particular view. See J Gaunt & J Morgan *Gale on easements* (18<sup>th</sup> ed 2008) 349 for a discussion of the effects that an easement of light may have. Easements of light and air may effectively prevent a landowner from having a view overlooking her neighbour's premises. Gaunt and Morgan explain that although a property owner generally has the right to erect a building on her own property that has windows overlooking her neighbour's property, she would not be entitled to erect such a building if her neighbour's land benefits from an easement that prevents such a building work. Furthermore, if there is no such an easement and a building with windows opening onto a neighbour's property is erected, the neighbour may obstruct the windows at any time during a period of 20 years. (The acquisition of a right to light through prescription can be prevented if a structure obstructing the light supply is erected within 20 years after the construction of the building that has the benefit of a supply of light.) Therefore, although the principle is that a property owner is entitled to a view overlooking her neighbour's property, such an entitlement is subject to the possibility that an easement may prevent her from having a view and it may be lost if the neighbour exercises her right to erect buildings on her property in a way that obstructs such a view.

<sup>91</sup> The decisions in *Hunter v Canary Wharf Ltd* (1997) HL 677 at 699, *Re Buchanan – Wollaston's Conveyance* (1939) 2 All ER 302, *Gilbert v Spoor and Others* (1983) Ch 27 and *Dennis and Others v Davies* [2008] EWHC 2961 (Ch) established that the existing view from a property can be protected with a restrictive covenant. See 4 2 2 1.

<sup>92</sup> See the discussion of *Dennis and Others v Davies* [2008] EWHC 2961 (Ch) in 4 2 2 1.

Nevertheless, just as a property owner in English law can protect the existing view from her property with a restrictive covenant, a South African property owner can have a substantive right, based on a servitude, a restrictive condition, a zoning scheme or building regulations, to prevent the erection of neighbouring buildings that will obstruct her existing view.<sup>93</sup> Furthermore, there are also indications that a South African property owner may indeed have an inherent right to prevent interference with the existing, unobstructed view from her property if such a view forms an important part of the use and enjoyment of her property.<sup>94</sup>

### **4 3 The right to a view in Dutch law**

#### **4 3 1 No inherent right to a view**

Dutch law does not acknowledge an inherent right to the existing, unobstructed view from a property either. However, in terms of the Dutch legal system a property owner (A) may have a substantive right to prevent a neighbouring owner (B) from using her (B's) property in a way that will interfere with the existing view from A's property. Such substantive rights can be based on praedial servitudes (*erfdienstbaarheden*)<sup>95</sup> and on statutory provisions.<sup>96</sup> A can also prevent the erection of a building on B's property if she can prove that the erection of the building will cause unlawful nuisance for her, or that it will amount to abuse of B's property rights (*misbruik van*

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<sup>93</sup> The possibility of protecting the existing view from a property with a servitude is discussed in 2 3 2. See Ch 3 regarding the protection of the existing view from a property in terms of a restrictive condition, a zoning scheme or building regulations.

<sup>94</sup> See the discussion of *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) in 2 4.

<sup>95</sup> See 4 3 2 1.

<sup>96</sup> See 4 3 2 2.

*recht*).<sup>97</sup> Furthermore, and in contrast with both South African and English law, in terms of Dutch planning law A will also have the opportunity to protect the existing view from her property insofar as such protection may be implied by her right to be informed of, see and comment on B's building plans before they are approved.<sup>98</sup> In Dutch law, a property owner can therefore rely on a servitude or on legislation or, in the absence of a servitude and legislation, she can use an action based on nuisance or on the doctrine of abuse of right, or her opportunity to comment on B's building plans, to prevent B's building works and consequently protect the existing, unobstructed view from her property if and insofar as such building works would have obstructed the existing view from such a property.

Apart from protecting an existing view against obstruction caused by building works on a neighbouring property, a property owner may also have the opportunity to prevent her view from being obstructed by a neighbour's trees or hedges. In terms of neighbour law, a property owner may have the opportunity to prevent the planting or enforce the removal of trees and hedges close to the border lines of neighbouring properties and thereby protect the existing view from her property.<sup>99</sup> Since trees and hedges may either obstruct or contribute to the existing view from a property, the statutory provisions<sup>100</sup> that regulate the planting and removal of trees and hedges may be used to prevent the obstruction or preserve the existing view from a property.<sup>101</sup>

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<sup>97</sup> The possibility of protecting the existing view from a property with an action based on nuisance is discussed in 4 3 2 3, and the possibility of protecting such a view with an action based on the doctrine of abuse of rights is discussed in 4 3 2 4.

<sup>98</sup> See 4 3 2 5.

<sup>99</sup> AC Wibbens-de Jong *Burenrecht: Monografieën BW B26* (4<sup>th</sup> ed 2009) 47.

<sup>100</sup> BW 5:42 contains rules that regulate the planting of trees and hedges close to a border line.

<sup>101</sup> BW 5:42.1 determines that trees may not be planted closer than two meters from the border line between two properties, while a distance of half a meter apply to shrubs and hedges. However, in terms of BW 5:42.3, a property owner may not protest against trees or hedges on a neighbouring property if their height is lower than the dividing wall between the properties. The

### 4 3 2 Protection of an existing, unobstructed view

#### 4 3 2 1 *Praedial servitudes* (Erfdienstbaarheden)

A praedial servitude (*erfdienstbaarheid*)<sup>102</sup> in Dutch law can be defined as a burden on one immovable property, the servient tenement (*dienende erf*), in favour of another immovable property, the dominant tenement (*heersende erf*).<sup>103</sup> It may place an obligation on the servient owner to endure or not to perform a specific action on, above or beneath one or both of the properties, but it may not compel her to give or to do something.<sup>104</sup> However, a praedial servitude may place an obligation on the servient owner to maintaining buildings, works (*werken*) or plants that are partly or entirely located on her property.<sup>105</sup>

Property owners have a large measure of freedom to determine the contents of a praedial servitude; consequently, the contents of praedial servitudes often involve

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rules determining where trees and hedges may be planted do not apply when a property owner has permitted her neighbour to plant closer than the prescribed distances or when the neighbouring property is a public “water” or a public road. BW 5:42.2 explains how the prescribed distances should be determined and BW 5:42.4 determines how damages should be calculated when BW 5:42 has been violated. AC Wibbens-de Jong *Burenrecht: Monografieën BW B26* (4<sup>th</sup> ed 2009) 43-44 refers to justifications for prohibiting the planting of trees and hedges within a specified distance from the border of a neighbouring property. In terms of these justifications, such a specified distance protects the enjoyment of a view from and the flow of light and air to a property, it limits the amount of leaves and fruit that are shed onto a neighbour’s property and it prevents that the ground of a neighbouring property is stripped of food and water and consequently sterilised.

<sup>102</sup> HJ Snijders & EB Rank-Berenschot *Goederenrecht* (4<sup>th</sup> ed 2007) 539 mention that, especially in older publications, the word *servituut* is used as a synonym for praedial servitude (*erfdienstbaarheid*).

<sup>103</sup> This is the way that a praedial servitude is defined in BW 5:70.1. See KFM Berger *Burenrecht, mandeligheid en erfdienstbaarheden* (4<sup>th</sup> ed 2001) 12 and HJ Snijders & EB Rank-Berenschot *Goederenrecht* (4<sup>th</sup> ed 2007) 539. See also AC Wibbens-de Jong *Mandeligheid en erfdienstbaarheden: Monografieën B27 BW* (3<sup>rd</sup> ed 2006) 23-25, where the creation of a praedial servitude is discussed.

<sup>104</sup> KFM Berger *Burenrecht, mandeligheid en erfdienstbaarheden* (4<sup>th</sup> ed 2001) 134–136 and 138 argues that there are exceptions to the rule that a praedial servitude may not burden the owner of the servient property. These exceptions include that a praedial servitude may indeed compel the owner of the servient property to perform an action when the deed of grant (*akte van vestiging*) determines that there is an obligation on the owner of the servient tenement to erect buildings or other works or to plant. Should the contents entail such a burden, the relevant buildings, works or plants must be situated partly or entirely on the servient tenement. See BW 5:71.1.

<sup>105</sup> BW 5:71.2 determines that a praedial servitude may involve an obligation to maintain the servient property.

a deviation from the rules of neighbour law.<sup>106</sup> For example, a praedial servitude often prohibits the owner of the servient tenement from doing something on her property that she would otherwise have done or compels her to endure an act that the owner of the dominant tenement performs on her property that would otherwise have been unlawful.<sup>107</sup> The creation of a praedial servitude may be subject to the requirement that the owner of the dominant tenement should pay the owner of the servient tenement an amount of money.<sup>108</sup>

In Dutch law, praedial servitudes<sup>109</sup> can be created to protect the existing, unobstructed views from properties. For example, a praedial servitude may give the owner of the dominant tenement (A) a substantive right to prevent the owner of the servient tenement (B) from erecting structures on her (B's) property that exceeds a certain height limitation. Such a servitude may have the effect of preventing the erection of buildings on B's property that will obstruct the existing view from A's property. A praedial servitude may also entitle A to have windows or other openings (allowing her to enjoy the view from her property) in her walls closer to B's property than the distance allowed in terms of the normal rules of neighbour law.<sup>110</sup> Such a servitude entitles A to insert windows that would give her a view over B's property (and compels B to endure this act of A) and effectively gives A a substantive right to

<sup>106</sup> According to HJ Snijders & EB Rank-Berenschot *Goederenrecht* (4<sup>th</sup> ed 2007) 543, neighbouring owners' respective entitlements with regard to the view from a property, a right of way, the flow of water and the flow of light may be regulated in the contents of a praedial servitude.

<sup>107</sup> HJ Snijders & EB Rank-Berenschot *Goederenrecht* (4<sup>th</sup> ed 2007) 544. See also AC Wibbens-de Jong *Mandeligheid en erfdiensbaarcheden: Monografieën B27 BW* (3<sup>rd</sup> ed 2006) 32.

<sup>108</sup> This requirement is set out in BW 5:70.2. See KFM Berger *Burenrecht, mandeligheid en erfdiensbaarcheden* (4<sup>th</sup> ed 2001) 129. This obligation will be provided for in the deed of grant (*de akte van vestiging*). See also HJ Snijders & EB Rank-Berenschot *Goederenrecht* (4<sup>th</sup> ed 2007) 545.

<sup>109</sup> HJ Snijders & EB Rank-Berenschot *Goederenrecht* (4<sup>th</sup> ed 2007) 543 mention that respective property owners' entitlements with regard to a view (*uitzicht*) is often set out in the contents of a praedial servitude. See also AC Wibbens-de Jong *Mandeligheid en erfdiensbaarcheden: Monografieën B27 BW* (3<sup>rd</sup> ed 2006) 20.

<sup>110</sup> BW 5:50.1 prohibits a property owner from having windows; openings in walls; balconies or other similar structures within a distance of two meters from the border line of a neighbouring property. See WHM Reehuis & AHT Heisterkamp with GE van Maanen & GT de Jong *Pitlo Het Nederlands burgerlijk recht Vol 3 Goederenrecht* (12<sup>th</sup> ed 2006) 445 and the discussion of this restriction in 4 3 2 2.

have a view over B's property that she would otherwise not have had.<sup>111</sup> Furthermore, the view from A's property may be preserved with a praedial servitude that compels B to maintain her (B's) property.<sup>112</sup> For example, A may have a substantive right, in terms of a praedial servitude, to compel B to maintain trees and hedges on her (B's) property to either ensure that they do not obstruct the existing view from A's property, or that they continue to contribute to the pleasant view from A's property.<sup>113</sup>

#### 4 3 2 2 Statutory protection

Statutory regulation prohibits a property owner from having windows; openings in walls; balconies or other similar structures within a distance of two meters from the border line of a neighbouring property.<sup>114</sup> However, overlooking a neighbour's premises through or from such openings or structures will be lawful if the neighbour granted permission for such "building works".<sup>115</sup> There are also instances where the

<sup>111</sup> Apart from a praedial servitude that may give a property owner a view that she would not have had if she complied with the restrictions on inserting windows or other openings closer to a neighbouring property than the prescribed distance, a property owner who has an opening or a window that does not comply with the prescribed distances may acquire a right to keep the view from such (unlawful) windows or openings unobstructed through prescription. See WHM Reehuis & AHT Heisterkamp with GE van Maanen & GT de Jong *Pitlo Het Nederlands burgerlijk recht Vol 3 Goederenrecht* (12<sup>th</sup> ed 2006) 445.

<sup>112</sup> HJ Snijders & EB Rank-Berenschot *Goederenrecht* (4<sup>th</sup> ed 2007) 543 and 545. See BW 5:71.2. See also AC Wibbens-de Jong *Mandeligheid en erfdienstbaarheden: Monografieën B27 BW* (3<sup>rd</sup> ed 2006) 32.

<sup>113</sup> AC Wibbens-de Jong *Burenrecht: Monografieën BW B26* (4<sup>th</sup> ed 2009) 47.

<sup>114</sup> BW 5:50.1. BW 5:50.3 explains how the distance referred to in this provision (two meters) must be measured. See further KFM Berger *Burenrecht, mandeligheid en erfdienstbaarheden* (4<sup>th</sup> ed 2001) 71.

<sup>115</sup> BW 5:50.1 provides that

"[o]ne is prohibited from having windows, other wall openings, balconies or similar building works closer than two meters from a neighbour's border line, if such openings or building works provide a view of the neighbour's property. However, these openings or constructions may be erected if the affected neighbour consented to it."

*(Tenzij de eigenaar van het naburige erf daartoe toestemming heeft gegeven, is het niet geoorloofd binnen twee meter van de grenslijn van dit erf vensters of andere muuropeningen, dan wel balkons of soortgelijke werken te hebben, voor zover deze op dit erf uitzicht geven.)*

Dutch civil code provides that a property owner may not prevent her neighbour from having openings or structures within a distance of two meters from the border line.<sup>116</sup>

This restriction on having windows or other openings within a certain distance from a neighbouring property prevents the act of overlooking a neighbour's premises

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Relying on case law, WHM Reehuis & AHT Heisterkamp with GE van Maanen & GT de Jong *Pitlo Het Nederlands burgerlijk recht* Vol 3 *Goederenrecht* (12<sup>th</sup> ed 2006) 445 explain that the words “*andere muuropeninge*” in BW 5:50 probably refer to doors, while constructions like balconies and flat roofs that are visibly intended to be used as a roof terrace or garden may fall into the category of “*soortgelijke werken*”. In an older source that refers to a previous Dutch civil code, JPH Suijling *Inleiding tot het burgerlijk recht* Vol 5: *Zakenrecht* (1940) 221-222, it is mentioned that according to the old civil code, a property owner was prohibited from having an opening closer than a certain specified distance that would give her a view over her neighbour's property. Balconies and other open constructions that extended from a property were equated with openings (including windows) in the sense of providing a prospect over a neighbour's property and therefore also had to comply with certain requirements regarding where they should be erected. Interestingly, it was specifically commented that roof gardens did not have to comply with these requirements, since they could not be seen as “extending” from a property. In his discussion of the words “windows, other wall openings, balconies or similar building works” (*vensters of andere muuropeningen, dan wel balkons of soortgelijke werken*) in the context of BW 5:50, AC Wibbens-de Jong *Burenrecht: Monografieën BW B26* (4<sup>th</sup> ed 2009) 53–54 remarks that a roof garden is not considered to be a building work similar to a balcony. Furthermore, referring to Hof Arnhem 8 February 2005, *LJN AS7586*, Wibbens-de Jong states that case law indicates that it is not the intention of a property owner that determines whether a structure on her property should be regarded as a “other building work” in terms of BW 5:50. Instead, this will be determined by the purpose for which the relevant structure is useful with reference to its nature and construction. See FHJ Mijnsen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 5 Zakenrecht: eigendom en beperkte rechten* (15<sup>th</sup> ed 2008) 192. See also RJJ van Acht *Burenrecht* (1990) 128–133 for a discussion of a property owner's entitlement to grant her neighbour permission to make openings or windows in her wall or plant trees and hedges within the prohibited distance of two meters from the borderline. See also AC Wibbens-de Jong *Burenrecht: Monografieën BW B26* (4<sup>th</sup> ed 2009) 51-52; FHJ Mijnsen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 5 Zakenrecht: eigendom en beperkte rechten* (15<sup>th</sup> ed 2008) 191–192 and PC van Es *De actio negatoria: Een studie naar de rechtsvorderlijke zijde van het eigendomsrecht* (2005) 243 for discussions of BW 5:50.

<sup>116</sup> BW 5:50.2. These circumstances include cases where the neighbouring property is public waters or a public road; where there is a public road or public waters between the properties; or where the view that can be observed from the openings or structures does not reach further than two meters (because it looks onto or is obstructed by a neighbour's wall that is fitted with opaque windows). BW 5:50.2 also provides that if an opening or a structure is lawful in terms of the provisions of this section, it will stay lawful even if the neighbouring property loses its public function or if the wall (that is less than two meters away) that obstructs the view from such an opening or structure is demolished. See FHJ Mijnsen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 5 Zakenrecht: eigendom en beperkte rechten* (15<sup>th</sup> ed 2008) 192. Furthermore, BW 5:50.4 determines that a property owner whose right to claim the removal of an overlooking opening or structure on a neighbouring property prescribed may not erect a structure within two meters from such a “point” of overlooking so as to cause the neighbour nuisance by disrupting her view. This prohibition does not apply when there is already a building within two meters from the overlooking opening or structure when the prescription period ends. See also KFM Berger *Burenrecht, mandeligheid en erfdienstbaarheden* (4<sup>th</sup> ed 2001) 70; WHM Reehuis & AHT Heisterkamp with GE van Maanen & GT de Jong *Pitlo Het Nederlands burgerlijk recht* Vol 3 *Goederenrecht* (12<sup>th</sup> ed 2006) 445–446 and AC Wibbens-de Jong *Burenrecht: Monografieën BW B26* (4<sup>th</sup> ed 2009) 52 regarding the circumstances under which the restrictions on the placing of windows and other openings are not applicable.

and consequently protects the neighbour's privacy. However, it may have the concomitant effect of preventing the erection of structures that may obstruct the view from a property. For example: A wants to build a wall closer than two meters from B's property. The erection of this wall will obstruct the view enjoyed from B's property. However, A decides not to erect the wall because she is not allowed to place any clear windows in it. This illustrates how the statutory restriction on A's right to build on her property, which is aimed at protecting B's privacy, may also have the effect of protecting the view from B's property. Although the restriction does not give B an actionable right to prohibit the erection of structures that will obstruct her view, it may have the effect of preventing her from losing this attribute.

The existing view from a property is further protected by provisions in the Dutch civil code insofar as the relevant statutory provisions regulate the planting of trees and hedges on neighbouring properties that "contribute" to such a view.<sup>117</sup> These regulations are aimed at preventing the obstruction of the view from a property and the flow of air and light to neighbouring properties.<sup>118</sup> If trees or hedges were planted within the prohibited distance, a property owner may demand the removal of these plants.<sup>119</sup> A property owner therefore has a substantive right to prevent the planting of trees in contravention of these regulations and, if the existing view from her property will be obstructed by such planting, the obstruction of the existing view from her property will also be prevented.

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<sup>117</sup> BW 5:42.1-4 regulates the planting of trees, shrubs and hedges. See the discussion of this provision in n 101.

<sup>118</sup> See n 101 regarding the justifications for regulating the planting of trees, shrubs and hedges.

<sup>119</sup> A property owner's claim for the removal of trees or hedges on a neighbouring property will be unsuccessful if her right to claim such removal has prescribed. See AC Wibbens-de Jong *Burenrecht: Monografieën BW B26* (4<sup>th</sup> ed 2009) 44.

## 4 3 2 3 Nuisance (Hinder)

The obstruction of the pleasant view from a property may constitute an unlawful nuisance in Dutch law and therefore nuisance law can in some instances provide a way to protect the existing view from a property.<sup>120</sup> However, nuisance will only be actionable if it is unlawful in terms of the Dutch civil code.<sup>121</sup> Van Acht reasons that, in the absence of a single standard of acceptable conduct, the lawfulness of an act of nuisance will depend on the specific circumstances surrounding each case.<sup>122</sup> Most importantly, to be considered actionable, nuisance must cause a notable disturbance in the enjoyment of one's property.<sup>123</sup> In establishing whether such a

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<sup>120</sup> RJJ van Acht *Burenrecht* (1990) 207. Dutch law does not have a *numerus clausus* of actionable nuisances. The circumstances of a specific case are considered to establish whether or not the nuisance is unlawful. Therefore, the obstruction of the existing view from a property may indeed be considered an actionable nuisance in certain circumstances.

<sup>121</sup> RJJ van Acht *Burenrecht* (1990) 192-193 and 207 argues that in terms of BW 5:37, an act of nuisance will only be actionable in Dutch law if it is unlawful according to BW 6:162. BW 6:162 distinguishes between three categories of unlawfulness, namely acting in a way that violates a right, acting or failing to act in contravention of a legal duty and acting in a manner that is improper according to the unwritten rules of social norms. The first category is not applicable in cases of nuisance, since determining whether a nuisance is unlawful involves the question of whether or not a right has been violated. Therefore, a nuisance will be considered unlawful in a situation where a property owner acted in contravention of an applicable legal provision or - in instances where no legal rule applies - where the nuisance was caused in a way or to an extent that is unacceptable in terms of social norms. It is in cases that fall into this last category (therefore, cases where no legal rule is applicable) that courts consider factors such as the nature, seriousness, duration of, as well as the damage caused by a nuisance to determine whether such an act constituted an unlawful nuisance. Van Acht criticises BW 5:37 for not providing a standard of lawfulness. He argues that, in the absence of any substantive indication of how to determine whether or not a nuisance is lawful or not, this provision appears to be an "empty shell" (*een lege huls*). However, he concludes that BW 5:37 does have meaning in the sense of referring to BW 6:162, a provision that ensures that an owner is not held liable for causing her neighbour nuisance if she had no part in it. Furthermore, by generally referring to BW 6:162, BW 5:37 leaves scope to consider the specific circumstances of a particular case. See also FHJ Mijnsen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 5 Zakenrecht: eigendom en beperkte rechten* (15<sup>th</sup> ed 2008) 55; KFM Berger *Burenrecht, mandeligheid en erfdienstbaarheden* (4<sup>th</sup> ed 2001) 30 and HJ Sniijders & EB Rank-Berenschot *Goederenrecht* (4<sup>th</sup> ed 2007) 145.

<sup>122</sup> RJJ van Acht *Burenrecht* (1990) 202.

<sup>123</sup> FHJ Mijnsen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 5 Zakenrecht: eigendom en beperkte rechten* (15<sup>th</sup> ed 2008) define nuisance as an instance where a person who is entitled to enjoy a property is disturbed in her enjoyment of it. According to KFM Berger *Burenrecht, mandeligheid en erfdienstbaarheden* (4<sup>th</sup> ed 2001) 32, a mere burden (*last*) on a property is not enough to constitute an unlawful nuisance – only an "overly heavy burden" (*overlast*) will amount to actionable nuisance. The Afrikaans word for "burden" is "*las*", while the Afrikaans word for "nuisance" is "*oorlas*", which corresponds with the Dutch terminology. Not every act where one owner causes a nuisance to another owner is actionable. Actions will only be considered unlawful and actionable if they go too far or if they contravene civil standards or legal provisions. FHJ Mijnsen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot*

disturbance occurred, a specific act of nuisance will be analysed with reference to the standard of acceptable emissions, the nature of the nuisance and its environment. Furthermore, the time at which a nuisance occurs, as well as its frequency, may affect its lawfulness.<sup>124</sup> If an act that causes one property owner nuisance serves an important public interest, the property owner to whom damage is caused will be expected to endure the nuisance.<sup>125</sup> However, a property owner who has to endure nuisance for the sake of protecting a public interest is entitled to claim damages from the person causing such a disturbance.<sup>126</sup>

If the obstruction of the existing view from a property is considered unlawful in a specific case, it may be actionable in nuisance and consequently such a view will be afforded protection in terms of nuisance law.<sup>127</sup> Generally, a property owner will not

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*de beoefening van het Nederlands burgerlijk recht 5 Zakenrecht: eigendom en beperkte rechten* (15<sup>th</sup> ed 2008) 55–58 argue that, according to BW 5:37, one has to consider the criterion laid down in BW 6:162 when determining whether or not a specific act of nuisance is unlawful. Referring to HR 21 Oktober 2005, NJ 2006, 418, with reference to CJH Brunner, they mention that the Hoge Raad considers the public opinion (*maatschappelijke opvattingen*) to be the decisive factor when determining whether the disturbance of a property owner's enjoyment of her property constituted an unlawful nuisance in a specific context. Furthermore, according to the Hoge Raad, the nature, seriousness and duration of a nuisance, the scope of the damage suffered due to a nuisance and other circumstances of a specific case, including the local circumstances, are important factors to determine whether or not a specific action constitutes an actionable nuisance. KFM Berger *Burenrecht, mandeligheid en erfdienstbaarheden* (4<sup>th</sup> ed 2001) 31 argues that the extent to and the manner in which an act of one property owner caused nuisance for a neighbouring property owner will play a role in determining whether a nuisance is unlawful. The nature, seriousness, duration and scope of an act of nuisance and the damage caused by it are again mentioned as factors that the Hoge Raad deems important considerations when deciding whether a specific nuisance is actionable or not. PC van Es *De actio negatoria: Een studie naar de rechtsvorderlijke zijde van het eigendomsrecht* (2005) 224 also refers to the fact that an act has to be measured in terms of social norms (*maatschappelijke betamelijkheidsnorm*) to determine whether the owner's exercise of her ownership entitlements was lawful.

<sup>124</sup> RJJ van Acht *Burenrecht* (1990) 202.

<sup>125</sup> BW 6:168. See FHJ Mijnsen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 5 Zakenrecht: eigendom en beperkte rechten* (15<sup>th</sup> ed 2008) 60 and KFM Berger *Burenrecht, mandeligheid en erfdienstbaarheden* (4<sup>th</sup> ed 2001) 31.

<sup>126</sup> FHJ Mijnsen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 5 Zakenrecht: eigendom en beperkte rechten* (15<sup>th</sup> ed 2008) 60.

<sup>127</sup> In his discussion of the factors that affect the lawfulness of an act of nuisance, RJJ van Acht *Burenrecht* (1990) 207-208 mentions that the obstruction of a property owner's view may sometimes be considered to constitute an unlawful nuisance and that such a view will then be afforded protection in terms of nuisance law. Van Acht reasons that the nature of a nuisance may determine whether it should be tolerated by a neighbour. Certain disturbances, such as the deposition of smoke or dust, or the spreading of noise, will relatively easily be regarded as unlawful interferences with the enjoyment of a property. Conversely, it will be more difficult to prove that the nuisance caused by interference

lose her right to build on her property as she pleases merely because her building works will obstruct the view from a neighbouring property.<sup>128</sup> However, there may be a specific instance where a property owner is prohibited from building, or where her right to build is restricted, because her building works will obstruct the view from her neighbour's property in a way that will cause a serious, unlawful and therefore actionable interference with the neighbour's enjoyment of her property.<sup>129</sup>

#### 4 3 2 4 Abuse of rights (Misbruik van recht)

In Dutch law, the existing view from a property can also be protected in terms of the doctrine of abuse of rights (*misbruik van recht*). This doctrine is primarily concerned with the objectively unlawful exercise of one's ownership entitlements.<sup>130</sup> Reehuis

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with telecommunication reception or a diminution of the amount of light that enters a property is unlawful. Similarly, the obstruction of a pleasurable view from a property is considered a "lesser" nuisance than the loss of the enjoyment of one's garden because of a neighbour's beekeeping. However, the nature of a nuisance alone does not determine its lawfulness. Even though the loss of a pleasant view will, in terms of its nature, not be rendered an unlawful nuisance, the obstruction of a view may still constitute an actionable nuisance. This is possible because BW 5:37 does not provide a limited list of nuisances and because the circumstances of a specific case may indicate that the obstruction of the relevant view causes a serious interference with the enjoyment of a property and is therefore unlawful. When considering the nature of a nuisance in order to determine whether it is lawful, one should keep in mind that the nature (seriousness) of a specific nuisance changes over time. An attribute of property that is considered a necessity in our modern world may not have been of any value to a property owner a few centuries ago.

<sup>128</sup> RJJ van Acht *Burenrecht* (1990) 207.

<sup>129</sup> FHJ Mijnsen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 5 Zakenrecht: eigendom en beperkte rechten* (15<sup>th</sup> ed 2008) 54 refer to the spreading noise, vibrations, bad smells, smoke or gas, obstructing the flow of light or air and taking away support that was previously provided to a neighbouring property as examples of unlawful nuisances. They explain that these are only examples of possible nuisances, since there is an open-ended list of possible nuisances. They also distinguish between two categories of nuisance. The first category is referred to as traditional nuisances (*traditionele hinder*) and includes the "distribution" of noise, vibrations, smells, gasses and water pollution. The second category includes instances where a property owner interferes with the support of her neighbour's building when she erects or demolishes a structure on her own property. Cases that were previously regarded as abuse of rights fall into the second category. PC van Es *De actio negatoria: Een studie naar de rechtsvorderlijke zijde van het eigendomsrecht* (2005) 223 categorises nuisance in the same way. He includes the interception of light and air in the second category (with the interference with support to a neighbouring property), and also mentions that this category consists of acts that were previously considered and treated as abuse-of-right cases.

<sup>130</sup> HJ Snijders & EB Rank-Berenschot *Goederenrecht* (4<sup>th</sup> ed 2007) 144–145 specifically discuss the abuse of a property right, using the term "abuse of a (property) entitlement" (*misbruik van*

and Heisterkamp define this doctrine as a prohibition of use of property in a way that would be lawful in the ordinary course of events but is unlawful under specific circumstances.<sup>131</sup> As far as property is involved, the doctrine means that a property owner may not use her ownership entitlements in an objectively unlawful manner.<sup>132</sup> For example, although a property owner is entitled to erect buildings and structures on her property, the erection of a water tower that is built purely to affect the use and enjoyment of a neighbouring property may be opposed in terms of the doctrine of abuse of rights.<sup>133</sup> During the nineteenth century, the doctrine of abuse of rights was often explained with the example of a property owner who erects a chimney with the sole purpose of obstructing the view from a neighbouring property.<sup>134</sup> In effect, a property owner (A) may rely on this doctrine to prevent the erection of a building on a neighbouring property that will obstruct the view from her (A's) property if she can

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[*eigendoms*]bevoegdheid), which they understand to include “abuse of a [property] right” (*misbruik van [eigendoms]recht*).

<sup>131</sup> WHM Reehuis & AHT Heisterkamp with GE van Maanen & GT de Jong *Pitlo Het Nederlands burgerlijk recht Vol 3 Goederenrecht* (12<sup>th</sup> ed 2006) 399. In the context of property rights, an abuse of right occurs when a property owner uses her property in a manner that causes unlawful harm to another person. An abuse of right does not necessarily involve exercising a property right and is often used in the context of unlawful acts or delicts (*de onrechtmatige daad*), where it refers to instances where the specific circumstances of a case renders the (normally) lawful use of property unlawful.

<sup>132</sup> BW 5:1.1 provides that ownership is the most comprehensive right that a person can have in a thing. Furthermore, in terms of BW 5:1.2, an owner may use her property insofar as such use does not violate the rights of others or contravene any legal provisions and acknowledges the limitations contained in unwritten law. In a case where circumstances render the usually lawful use of a property unlawful, a property owner will be prohibited from exercising the freedom granted to her by BW 5:1. See HJ Snijders & EB Rank-Berenschot *Goederenrecht* (4<sup>th</sup> ed 2007) 137 for a discussion of BW 5:1.

<sup>133</sup> WHM Reehuis & AHT Heisterkamp with GE van Maanen & GT de Jong *Pitlo Het Nederlands burgerlijk recht Vol 3 Goederenrecht* (12<sup>th</sup> ed 2006) 399.

<sup>134</sup> WHM Reehuis & AHT Heisterkamp with GE van Maanen & GT de Jong *Pitlo Het Nederlands burgerlijk recht Vol 3 Goederenrecht* (12<sup>th</sup> ed 2006) 400–401. This example was based on a French decision, Hof van Colmar 2 Mei 1855, DP 1856, 2.9. In the Dutch case, HR 13 Maart 1936, NJ 1936, 415; HR 2 April 1937, NJ 1937, 639, a similar set of facts had to be considered by the court. A property owner erected an unsightly water tower (*watertoren*) solely to spoil his neighbour's view, since it was not connected to a watering scheme and therefore without any use to him. In Dutch case law preceding 1970, judgments of the higher courts (*hoogste rechtscollege*) indicated that in terms of the doctrine of abuse of rights an act would be considered unlawful if it was performed with the purpose of causing another person damage or if it did not have a reasonable aim but was detrimental to another. Conversely, lower courts (*lagere rechtspraak*) followed a wider approach to this doctrine. However, these approaches changed with the decision in HR 17 April 1970, NJ 1971, 89. According to this decision, a property owner would be considered to “abuse” a right if she exercises her ownership entitlements in a way that is highly unreasonable towards another. The focus therefore shifted from whether or not a property owner caused another owner damage when she exercised one of her property entitlements, to establishing whether such an owner acted reasonably.

prove that her view will be obstructed by her neighbour's (B's) building works and that B herself will not derive any benefit from the building works.

#### 4 3 2 5 *Public participation and the protection of property interests*

Dutch planning law creates an additional avenue through which the existing view from a property might be protected. A property owner (A) in Dutch law has an opportunity to prevent the erection of buildings on a neighbour's (B's) property that will interfere with the existing view from her (A's) property by participating in the process of approving B's building plans. The regulation and organisation of land use in the Netherlands are effected through a system of zoning plans (*bestemmingsplannen*), which lay down rules that regulate the use and erection of buildings on land. The process of creating or changing a zoning plan provides an opportunity for consultation with interested parties,<sup>135</sup> while public participation is also part of the process regulating an application for a building permit (*bouwvergunning*).<sup>136</sup> Therefore, in terms of the Dutch system for granting building permits, A will be notified of B's application for a building permit, since such an

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<sup>135</sup> Section 3 of the Wet van 20 Oktober 2006, Wet Ruimtelijke Ordening regulates the creation, content, application and effects of zoning plans (*bestemmingsplannen*) and so-called *inpassingsplannen*. In terms of s 3(7)(7), notice of a planning decision (*voorbereidingsbesluit*), which precedes the approval of a zoning plan, has to be published in the government gazette and by way of electronic media. Furthermore, this provision provides that the public will be allowed to inspect such a decree and that s 3:42 of the Wet van 4 Juni 1992, Algemene Wet Bestuursrecht, will apply to regulate such an examination. According to J Robbe *De bestemmingsplanprocedure en de zelfstandige projectprocedure* (2000) 24, public participation in government is promoted by the fact that citizens have an opportunity to inspect and comment on zoning plans while they are still in their draft form.

<sup>136</sup> The Wet van 29 Augustus 1991 tot herziening van de Woningwet ("Act of 29 August 1991") regulates the approval of building plans. In terms of s 40(a)(1) of the Act of 29 August 1991, no building may be erected without complying with a building permit (*bouwvergunning*) that is specifically granted for such a construction. According to s 41 of the Act of 29 August 1991, the approval process for such a permit entails that notice of an application for a building permit must be published in a local paper within two weeks after the application was received by the relevant local authority. Furthermore, s 50 of the Act provides that public input must be considered when a local authority decides whether or not to grant a building permit.

application has to be advertised.<sup>137</sup> A will also have the opportunity to make presentations to ensure that the effect that B's plans may have on her property interests is taken into account when the application is considered by the relevant decision maker. Furthermore, such a decision maker must consider certain aesthetic values when deciding whether or not to grant the requested building permit.<sup>138</sup>

It is therefore possible for A to draw a local authority's attention to the fact that the proposed building works on B's property may obstruct the existing view from her (A's) property, at a very early stage when the building plans are still under consideration. The local authority will have to take A's interests into consideration when assessing the application for B's building permit. However, although affected property owners should be consulted when zoning plans are created or amended and before building permits are granted, they are not entitled to veto the erection of buildings that will interfere with the existing views from their properties. Information regarding zoning plans and other use restrictions on properties is readily available to citizens. A prospective property owner has a duty (and the opportunity) to ascertain the rules regulating and restricting the use of the property that she intends to buy. This duty implies that a local authority will not easily reject a building permit that otherwise complies with the applicable zoning plan and building regulations, despite the fact that affected parties have the opportunity to raise concerns while a local authority considers an application for a building permit.

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<sup>137</sup> See n 136.

<sup>138</sup> Section 12 of the Act of 29 Augustus 1991 provides that the aesthetic appearance of a proposed building should be considered in determining whether an application for a building permit should be granted and that a city council (*gemeenteraad*) is responsible for making policy that suggests criteria that the relevant decision making authority (the decision can be made by a *burgemeester* or *wethouder*) has to consider when it determines whether the outside appearance (*uiterlijk*) or location (*plaatsing*) of a proposed building complies with reasonable aesthetic demands.

The Dutch planning-law system therefore entitles property owners to be informed of and possibly to object against building plans prior to their approval.<sup>139</sup> Therefore, a Dutch property owner (A) has a substantive right to inform the relevant local authority of any negative effects that the approval of her neighbour's (B's) building plans may have on her (A's) property. Nevertheless, a local authority will be reluctant to reject B's building plans that are otherwise lawful merely because they will have a negative effect on A's property, since A had a duty – before she bought her property – to establish how her property could be affected by any lawful acts performed on neighbouring properties.

#### **4 4 Conclusion**

Like South African law, modern English and Dutch law does not acknowledge an inherent right to the existing, unobstructed view from a property. In South African law, a property owner may have a substantive right, based on a servitude, a restrictive condition, the relevant zoning plan, applicable building regulations or any other applicable legislation to prevent the erection of buildings that may have the effect of obstructing the existing view from her property.<sup>140</sup> Furthermore, there are indications that there may be an exception to the rule that the existing view from a property does not naturally flow from the right of ownership. In instances where the existing view from a property forms an inherent part of the use and enjoyment of the properties in a specific vicinity, such a view may possibly be considered to indeed

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<sup>139</sup> In terms of South African law, property owners will only have the right to see, object or sometimes approve a neighbour's building plans if the relevant plans require the removal or amendment of a restrictive condition, the relevant zoning plan, the applicable building regulations or any applicable legislation. See Ch 3 where the right to prevent building works in South African law is considered as an alternative strategy to protect the existing view from a property.

<sup>140</sup> See Ch 2 and Ch 3.

form part of the right of ownership.<sup>141</sup> However, there is no certainty that this exception will be enforced by courts generally. Prospective property owners have the opportunity and the obligation to ascertain whether the view from a property is protected either by way of servitude, or other building restrictions. Should the view not be protected in any of these ways and future protection not be possible, no monetary value should be attached to the view.

In English law, interference with an existing view, which is considered merely a “matter of delight”, does not constitute an actionable nuisance and can probably not be protected by way of an easement. However, a restrictive covenant may be created by agreement to protect the unspoilt view from a property.<sup>142</sup> Therefore, although the protection of view may not interfere with urban development, view may be preserved in instances where property owners or developers consider it to be so significant to the nature of a specific property that they contractually provide for its protection. English case law also indicates that there may be an exception to the principle that the existing view from a property is not inherently part of the right of ownership. It appears that courts may be willing to acknowledge an inherent right to the existing views from a group of properties within a specific development if such views form an integral part of the use and enjoyment of the properties and if the properties were specifically designed to enhance these views.<sup>143</sup>

Similar to the position in South African and English law, Dutch law does not recognise an inherent right to the existing view from a property. In South African law, a property owner may have a substantive right, based on a servitude or a restrictive condition, to prevent building works on a neighbouring property, and in English law, a

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<sup>141</sup> See 2 4 and 6 3.

<sup>142</sup> See *Gilbert v Spoor and Others* (1983) Ch 27 and *Dennis and Others v Davies* [2008] EWHC 2961 (Ch), discussed in 4 2 2 1.

<sup>143</sup> See the discussion of *Dennis and Others v Davies* [2008] EWHC 2961 (Ch) in 4 2 2 1.

restrictive covenant may create the same entitlement. A property owner in Dutch law may similarly have a right to prevent the erection of building works on a neighbouring property, based on a praedial servitude. Furthermore, unlike the situation in South African and in English law, where interference with the existing view from a property cannot constitute an actionable nuisance, it is indeed possible for a property owner in Dutch law to prove that the obstruction of the view from her property was unlawful and therefore resulted in an actionable nuisance.<sup>144</sup> Dutch law also gives a property owner the opportunity to prevent or object against a neighbour's building works that may obstruct the existing view from her property in terms of the doctrine of abuse of rights. In terms of this doctrine, a property owner (A) will be able to indicate that her neighbour's (B's) building works was unlawful if she can, for example, prove that B's building was or will be erected purely with the intention of obstructing the view from her (A's) property.<sup>145</sup>

South African law entitles property owners to be informed of, to comment on and sometimes to prevent the erection of a building on a neighbouring property in very specific, limited circumstances. If such a right exists, it may be employed as an alternative strategy to protect an existing view, since a property owner will have the opportunity to prevent the erection of a building that will interfere with the existing view from her property.<sup>146</sup> Dutch property owners have a substantive right to be informed of and to comment on any application for the approval of neighbours' building plans and therefore have the opportunity to inform the relevant decision maker of the fact that the proposed building plans may have the effect of obstructing the existing views from their properties. However, in Dutch law, like in South African

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<sup>144</sup> See 4 3 2 3.

<sup>145</sup> See 4 3 2 4.

<sup>146</sup> The possibility of using a substantive right to prevent building works on a neighbouring property as a strategy to prevent the obstruction of an existing view is discussed in Ch 3.

law, a prospective property owner has a duty to ascertain to what extent her future neighbours may use their properties and to determine how these possible uses may affect the enjoyment of the property that she wishes to buy. Local authorities in Dutch law will therefore not easily refuse to grant approval for a building plan merely because the erection of the proposed building will obstruct the view from a neighbouring property.

Nevertheless, unlike Dutch law that provides property owners with the opportunity to see and comment on all applications for building permits, a property owner will, in terms of South African law, not be aware of the fact that a neighbouring owner has applied for a building permit, unless such an application involves an application for the removal or amendment of a restrictive condition, re-zoning, a departure from the applicable building regulations, or if it will contravene any applicable legislation. A property owner in South African law will therefore not have an opportunity to make representations regarding the effect that the proposed development on a neighbouring property may have on the use and enjoyment of her property. South African case law illustrates that this lack of opportunity for public participation can sometimes frustrate the effective protection of property interests in an existing view, especially in instances where building plans have been approved in conflict with a restrictive condition or the zoning scheme. It forces property owners to follow the expensive route of litigation in an attempt to have courts declare their rights and to force local authorities to enforce zoning and building regulations. These problems can be avoided if applications for the approval of building plans are, as in the Dutch system, open for inspection and comments by affected parties, without thereby necessarily creating a substantive right to veto approval of the plans.



## Chapter 5:

### Constitutional aspects

#### 5 1 Introduction

A South African property owner does not have an inherent right to the existing view from her property.<sup>1</sup> Case law indicates that the view from a property can nevertheless be protected in a number of ways, some of which are direct, substantive and permanent while others are indirect, procedural and temporary.<sup>2</sup>

Given the basic principle that a right to an existing view is not protected as an inherent property right, any substantive right or alternative strategy that results in protection of one owner's existing view inevitably implies that a neighbouring owner's right to develop her property is limited. For purposes of the constitutional analysis in this chapter it will be argued that such a limitation may (but will not always) constitute a deprivation of property as meant in section 25(1) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The unobstructed, existing view from a property can be protected by servitudes, restrictive conditions, zoning schemes, building regulations and legislation insofar as these devices restrict building works on a neighbouring property that will interfere with such a view. In some cases, for example where a property owner's right to build is restricted in terms

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<sup>1</sup> This position is established in Ch 2.

<sup>2</sup> See the discussion of case law in Ch 2 and Ch 3. These cases include *Erasmus v Blom* 2011 JDR 0321 (ECP); *Myburgh v Jamison* (1861) 4 Searle 8; *Lewkowitz v Billingham & Co* (1895) 2 Off Rep 36; *Kruger v Downer* 1976 (3) SA 172 (W); *Richardson and Others v South Peninsula Municipality and Others* 2001 (3) BCLR 265 (C); *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C); *Transnet Ltd v Proud Heritage Properties* (405/08) [2008] ZAECHC 155 (5 September 2008); *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (4) SA 42 (CC); *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D); *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA); *Clark v Faraday and Another* 2004 (4) SA 564 (C); *De Kock v Saldanhabaai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006) and *Searle v Mossel Bay Municipality and Others* (1237/09) [2009] ZAWCHC 10 (13 February 2009).

of a servitude, a statutory provision or a restrictive condition, the limitation or deprivation may specifically be aimed at the protection of the existing view from a neighbouring property. In other instances, for example where an owner's right to build is regulated by building restrictions or frustrated by procedural attacks, the limitation or deprivation may result in the protection of views from neighbouring properties although its aim is totally unrelated to the protection of an undisturbed view. Therefore, the protection of the existing view from a property may cause a limitation or deprivation of a neighbouring property owner's right to use her property, regardless of the intended aim of the device or alternative strategy that resulted in such protection.

A property owner whose right to use her property is limited by any of these restrictions sometimes (but, as is argued below, not always) suffers a deprivation of her property for purposes of section 25(1) of the Constitution. Such a deprivation can be permanent or temporary and, depending on the extent of the restriction on the affected owner's right to use (build on) her property, it can be either a total (all forms of building on her property is prevented) or a partial (only the location, height, amount of building works is limited) deprivation. For example, if the existing view from a property is protected in terms of a servitude or a restrictive condition, such protection will mostly place an absolute and permanent restriction on a neighbouring owner's right to build in a way that will obstruct such a view. Nevertheless, a servitude and a restrictive condition is created in terms of an agreement between two property owners. Consequently, a property owner whose right to build is restricted by such a device would have consented to the deprivation of this right, which means that the restriction may not necessarily amount to a deprivation of property for

purposes of section 25(1).<sup>3</sup> Should a property owner's existing view be protected insofar as the applicable zoning plan or building regulations limit her neighbour's right to build in a way that would obstruct such a view, the protection of her view will effectively be the result of a restriction of her neighbour's right to build that is more likely to amount to a deprivation of property for purposes of section 25(1). Such a restriction will mostly cause a permanent but partial deprivation of the neighbour's right to build in the sense that she would be entitled to apply for a departure from the zoning scheme or building regulations and that the relevant restriction would not prevent her from erecting any buildings at all, but only place a limitation on the height or location of her building works. Nevertheless, a zoning plan or building regulations may cause an absolute and permanent deprivation of a property owner's right to build if an application for a departure from such a plan or regulations is refused. Legislation that prevents building works that will obstruct the existing view from a particular property or the line of sight to a specific object (such as a lighthouse) may cause a permanent, or temporary, partial or total restriction on neighbouring property owners' right to build. The nature of the deprivation will depend on what the particular statutory provision ordains and on the aim of such a stipulation.

In this chapter, these deprivations are evaluated in terms of the methodology developed by the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*<sup>4</sup> ("FNB") to establish their validity. The chapter considers the constitutional validity of the restriction of one owner's right to use her property that results in the protection of the view from a neighbouring property. It

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<sup>3</sup> See 5 2 3 1.

<sup>4</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

focuses on the circumstances that justify such a limitation of an owner's right to develop her property and on the level of scrutiny that will be applied when determining whether a limitation of this kind is reasonable and justified under the specific circumstances. Section 25(1) of the Constitution and the decision in *FNB* serve as basis for evaluating the constitutionality of regulatory deprivations of property. Case law discussed in previous chapters is referred to as examples in the constitutional analysis and to illustrate the applicable legal principles.

## 5 2 Section 25(1) of the Constitution

### 5 2 1 Interpreting section 25

Section 25(1) of the Constitution provides that:

“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”

This section serves as a mechanism to ensure due process of law. It acknowledges that regulatory state interference with private property is sometimes unavoidable and permissible and it is aimed at ensuring that such interference with private property rights is in line with due process of law.<sup>5</sup> Legitimate state interference with private property is generally referred to as “regulation”. This concept includes town planning, building regulations, physical planning, environmental protection, and health and sanitation measures.<sup>6</sup> Gildenhuys<sup>7</sup> uses the term “measures of control” (*beheermaatreëls* in Afrikaans) when referring to regulations that deprive owners of

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<sup>5</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 218-219. See T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 7-8 for a discussion of the academic debate regarding the scope of the Constitutional property clause.

<sup>6</sup> AJ van der Walt & GJ Pienaar *Introduction to the law of property* (6<sup>th</sup> ed 2009) 310.

<sup>7</sup> A Gildenhuys *Ontheieningsreg* (2<sup>nd</sup> ed 2001) 24-25.

some of their property interests. Individual property owners are expected to endure, generally without compensation, the losses caused by legitimate regulatory measures that promote the public interest at large.<sup>8</sup>

Section 25(1) provides a framework for the deprivation of property. It stipulates that deprivation must be authorised by law of general application and that no law may permit the arbitrary deprivation of property.<sup>9</sup> However, the subsection does not indicate how the concepts “law of general application” and “arbitrary deprivation” should be interpreted and applied. In most cases it is fairly easy to establish whether a deprivation is authorised by legislation or by other sources of law of general application,<sup>10</sup> but it is more problematic to determine when the deprivation may be arbitrary.<sup>11</sup>

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<sup>8</sup> A Gildenhuys *Ontheiëningsreg* (2<sup>nd</sup> ed 2001) 22-25 draws a distinction between the losses that an owner suffers due to regulatory deprivation and those she sustains due to expropriation. The consequence of regulatory deprivation is that an owner’s use of her property is restricted, while the loss suffered due to expropriation entails that property is taken away from the owner with the aim of advancing the public interest or serving public purposes.

<sup>9</sup> A Gildenhuys *Ontheiëningsreg* (2001) 23 gives the following interpretation of the deprivation clause in s 25(1) of the Constitution:

“Beheermaatreëls, mits dit behoorlik by wetgewing gemagtig word, is regmatige owerheidshandelinge...’n [a]rbitrêre ontneming is een wat willekeurig plaasgevind het, en nie gegrond is op rede of beginsel nie.”

*(Regulatory controls are lawful state actions, provided that they are properly authorised by law ... [A]n arbitrary deprivation is a deprivation that occurred at random and that is not based on reason or principle.)*

<sup>10</sup> On the definition of law of general application, see n 67 below. Importantly, this category includes at least both legislation and the common law; see the sources referred to in n 67. T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 21 comments that the s 25(1) requirement that a deprivation must be conducted in terms of law of general application places the emphasis on legislation, rather than on any other type of government action. He illustrates this point by referring to the following scenarios: In a case where an administrative action deprives a person of his property without the authority of law of general application, the action will be reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000. An executive action that leads to the unauthorised deprivation of property will be regarded as an infringement of the principle of legality and will therefore be reviewable from the outset. Emphasis is placed on the fact that deprivation that is conducted in terms of law of general application is constitutionally valid – and not on the deprivation of property due to a different type of government action.

<sup>11</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 334-335 argues that the requirement that no law may permit arbitrary deprivation is merely a repetition of the requirement that deprivations must be conducted in terms of law of general application. Nevertheless, he leaves room for the possibility that the term “arbitrary” is wider than “not general” and that

In *FNB* the Constitutional Court specifically addressed this difficulty and explained the meaning of the prohibition against arbitrary deprivation.<sup>12</sup> The appellant in this case, First National Bank (“FNB”), attacked the constitutionality of section 114 of the Customs and Excise Act 91 of 1964.<sup>13</sup> This section authorised the seizure and forfeiture of a custom debtor’s property and the property of third parties that was in the debtor’s possession or under her control. The court specifically focused on the requirement in section 25(1) of the Constitution that a legal provision of general application may not authorise the arbitrary deprivation of property. Accordingly, it considered whether or not it was justified to infringe upon one

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“arbitrary” must be interpreted against the background of the general limitations clause in s 36 of the Constitution to ensure that it also refers to the accessibility, clarity and certainty of the law.

<sup>12</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 61-109. AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 237-245 discusses the requirement that a deprivation may not be arbitrary with reference to *FNB* and foreign law. AJ van der Walt “Constitutional Property Law” (2011) 3 *Juta’s Quarterly Review* para 2 2 1 reasons that in *Haffejee NO and Others v Ethekwini Municipality and Others* 2011 (6) SA 134 (CC) para 28, the Constitutional Court confirmed that the *FNB* decision is still authority in cases concerning the meaning of s 25 of the Constitution.

<sup>13</sup> The appellant’s attack was based on s 25(1)-(2) of the Constitution. See AJ van der Walt “Striving for the better interpretation – A critical reflection on the Constitutional Court’s *Harksen* and *FNB* decisions on the property clause” (2004) 121 *SALJ* 854-878 at 862 and 867 for a discussion of the decision of Goldstone J in *Harksen v Lane* 1998 (1) SA 300 (CC) (“*Harksen*”). In the *Harksen* case, the constitutionality of s 21(1) of the Insolvency Act 24 of 1936 was queried. The issue to be determined was whether this section had the effect of expropriating property owners, in terms of the definition of “expropriation” in s 28 of the interim Constitution of the Republic of South Africa Act 200 of 1993 (“the interim Constitution”). The Constitutional Court based its decision on three related ideas with regard to the nature and function of s 28 of the interim Constitution. Firstly, deprivation and expropriation were considered to be two distinct entities with distinguishable features. Accordingly, the distinction between them was considered to be categorical or institutional, with the effect that any state interference with private property is to be categorised as either expropriation or deprivation. Secondly, the distinction between these two concepts was based on the finality and duration of the transfer of ownership to the state. Transfer of ownership only constitutes expropriation if the state acquires the property permanently. Finally, the court ruled that a prospective litigant who wants to base her attack of state action on s 28 of the interim Constitution is faced with one of two choices. She must argue that there has been either an unconstitutional expropriation or an unconstitutional deprivation. These ideas illustrate the court’s categorical approach. In the *FNB* decision, the Constitutional Court deviated from this categorical approach in the sense that it did not regard the concepts “deprivation” and “expropriation” as separate entities. Instead, deprivation was considered to be a wider category that includes the narrower category of expropriation. The court in *FNB* also introduced a new methodology. In future, in cases concerning property it first has to be established whether the relevant action constitutes a deprivation in terms of the requirements of s 25(1) of the 1996 Constitution. If the result of this initial investigation is positive, it may further be determined whether the action also complies with the s 25(2) requirements, in other words whether the deprivation of property also expropriates the owner. Van der Walt concludes that the difference between the *Harksen* and *FNB* decisions comes down to this new approach. See also T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 18-19 in this regard.

person's right of ownership with the aim of recovering another person's (customs) debt.<sup>14</sup>

Ackermann J comparatively analysed the position in different jurisdictions to establish their similarities and differences regarding the deprivation of property. He concluded that the formulation of property rights differs from jurisdiction to jurisdiction.<sup>15</sup> His analysis indicates that despite the different formulations of property rights there are two generally applicable principles.<sup>16</sup> Firstly, there are certain circumstances when it is in the public interest for legislation to deprive individuals of their property without paying compensation. Secondly, there is consensus that there must be an appropriate relationship between the means chosen (the "sacrifice" made by the individual) and the aim of the regulatory measure (the public interest to be served) for the deprivation to be valid.<sup>17</sup> Ackermann J focused on the meaning of the word "arbitrary" in the context of section 25 and concluded that the deprivation of property will be arbitrary when the authorising provision does not provide sufficient reason for the deprivation or when the deprivation is procedurally unlawful.<sup>18</sup>

The court introduced a methodology to guide the application of section 25 in issues concerning the constitutional protection of property.<sup>19</sup> This methodology

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<sup>14</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 100 and 108-109.

<sup>15</sup> See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 71-98.

<sup>16</sup> T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 23 criticises the Constitutional Court in *FNB* for conducting a lengthy study of comparative law and then not applying it.

<sup>17</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 97-98.

<sup>18</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

<sup>19</sup> The methodology was set out in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46. I Currie & J de Waal *The Bill of Rights handbook* (5<sup>th</sup> ed 2005) 535 refer to this "structural analysis" of s 25(1)-(2) of the Constitution, as it was expounded by the Constitutional Court in *FNB*.

entails a set of questions that will lead a court in its determination as to whether or not a property owner has been deprived of her property in a manner that is inconsistent with section 25(1). These directive questions are expounded upon briefly below, followed by a more detailed discussion of each.

When faced with an attack on the legitimacy of a property deprivation, a court's consideration of the matter should commence with determining whether or not there is an identifiable property interest at stake. If it decides that it is indeed dealing with a property interest, the next step is to determine whether there has been a deprivation of such property. Should the answer to this question also be positive, the court has to decide whether the deprivation complies with the provisions of section 25(1). If it does, it is considered to be a legitimate limitation of the owner's property rights. However, if the deprivation does not comply with the provisions in section 25(1), the possibility of justifying the deprivation under section 36 of the Constitution should be considered. In instances where a deprivation is valid in terms of section 25 or justified in terms of section 36, the court further has to determine whether the deprivation also amounts to expropriation in terms of section 25(2). If it does constitute expropriation, the court must establish whether the requirements set out in section 25(2)(a) and (b) are complied with. If these conditions are not met, the court finally has to decide whether or not the expropriation is justified in terms of section 36 of the Constitution.<sup>20</sup> Therefore, should the deprivation neither be consistent with the provisions of section 25(1) or 25(2) and (3), nor be justified under section 36, it is unconstitutional and invalid.

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<sup>20</sup> This structural analysis for the application of s 25 of the Constitution was expounded in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46. T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 2-3 argues that the *FNB* methodology for interpreting s 25 of the Constitution will only survive at a formal level, since the question of whether the interference with the relevant property was arbitrary will dominate the enquiry.

In instances concerning a zoning scheme, building regulation, or any other legislation that prevents the obstruction of the existing view from a property because it restricts a neighbouring property owner's right to build, one can consider the legitimacy of the deprivation of such a neighbour's right to build according to the methodology that the Constitutional Court suggested in the *FNB* case, namely with reference to the so-called police-power principle. In terms of this principle, a regulatory measure that limits the use of property and causes a loss for a property owner will be justified, generally without compensation, if it protects public health and safety and benefits all citizens. In terms of the *FNB* decision, one could say that the protection of public health and safety would be the adequate reason that would justify deprivations brought about by regulatory measures of this kind. The rationale for this reasoning is that owners should not be compensated for any loss caused by the lawful regulation of their use of their properties, subject to two provisos: The regulation may not be implemented unlawfully and it may not have an unequal effect in the sense of causing an individual or a small group to carry a too heavy burden for the benefit of the public in general.<sup>21</sup> In this context, the *nexus* requirement, as it was expounded in the *FNB* decision,<sup>22</sup> means that there needs to be a rational (and sometimes even a proportionate) connection between the burden caused by the regulation and the public benefit (protection of public health and safety) derived from it.

Although the state is authorised to regulate the use, enjoyment and exploitation of private property, even if the regulation restricts an owner's property entitlements or

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<sup>21</sup> AJ van der Walt "Regulation of building under the Constitution" (2009) 42 *De Jure* 32-47 at 40 and AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 213-218.

<sup>22</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

causes financial loss,<sup>23</sup> it must ensure that the deprivation is implemented in a reasonable and general manner and for a public purpose. This principle, as laid down by Holmes J in *Pennsylvania Coal Co v Mahon*,<sup>24</sup> (“*Pennsylvania Coal*”) is aimed at promoting effective governance. In this decision it was said that it would be impossible to govern a country if the rights and values that are part of a property may never be limited through uncompensated regulation.<sup>25</sup> There may therefore be circumstances where the regulation of property may be just, equitable and desirable despite causing (even great) loss for the affected landowner.<sup>26</sup>

In the United States, regulatory deprivation of property is premised on the police-power principle.<sup>27</sup> Van der Walt explains the police-power principle of regulated deprivation as a limitation of property that may cause loss or damage for the property owner but is nevertheless lawful, since it protects public health and safety. He argues that this uncompensated injury is lawful, even without compensation, since it affects all citizens equally and that compensation should only be an issue if the burden is unreasonable or not spread out evenly.<sup>28</sup> In terms of the police-power principle, the uncompensated regulation of the use and enjoyment of private property is therefore justified even if it affects the owner’s property quite severely and causes great financial loss. The only provisos are that the regulatory provision must be properly authorised by law of general application; aimed at the

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<sup>23</sup> AJ van der Walt “Regulation of building under the Constitution” (2009) 42 *De Jure* 32-47 at 39-40 and AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 289.

<sup>24</sup> *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) at 413 and 415.

<sup>25</sup> AJ van der Walt “Regulation of building under the Constitution” (2009) 42 *De Jure* 32-47 at 40.

<sup>26</sup> AJ van der Walt “Regulation of building under the Constitution” (2009) 42 *De Jure* 32-47 at 40 and AJ van der Walt *The law of neighbours* (2010) 341-344. In *Van Rensburg and Another NNO v Nelson Mandela Metropolitan Municipality and Others* 2008 (2) SA 8 (SE); *Barnett v Minister of Land Affairs* 2007 (6) SA 313 (SCA); *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape* 2007 (4) SA 26 (C) and *Transnet Ltd v Proud Heritage Properties* (405/08) [2008] ZAECHC 155 (5 September 2008), landowners or builders intentionally defied the law by violating certain regulatory measures. One may conclude that they accepted the inevitable loss they would suffer should the planning and building legislation be enforced properly.

<sup>27</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 213-218.

<sup>28</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 213-214.

protection of a legitimate public purpose (generally the protection of public health and safety); and that it may not have any disproportionate consequences.<sup>29</sup> The police-power requirement for the limitation of ownership corresponds with the section 25(1) constitutional requirement for non-arbitrary deprivation of property. Consequently, the police-power principle is part of South African law to the extent that it allows for regulatory deprivation of property, according to the requirements of section 25(1), under certain circumstances.

The practical effect of this brief overview is that section 25(1) can be interpreted in such a way that regulatory deprivation of property that is brought about by zoning, planning and building laws that serve the general public purpose of protecting public health and safety could be justified, in terms of the *FNB* decision, to the extent that the restrictions that these laws place on one owner's right to build on her land will not be arbitrary, even when they also have the effect of protecting a neighbouring owner's existing view from her property.

In what follows, the different strategies that can or have been used to protect an existing view by restricting building on neighbouring land are analysed according to the *FNB* methodology to establish whether and when each of these strategies will be justified in terms of section 25(1).

## **5 2 2 The *FNB* decision**

### *5 2 2 1 An identifiable property interest*

In terms of the first step of the *FNB* test, one has to establish whether the deprivation complained of affects a property interest. Section 25(1) clearly states that “[n]o one

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<sup>29</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 218.

may be deprived of property ...". Interference with a property interest is therefore a threshold requirement for determining the constitutionality of a deprivation in terms of section 25(1). Van der Walt argues that it is necessary to determine what constitutes property for purposes of section 25 of the Constitution in every case.<sup>30</sup> He defines the constitutional concept of property as a "social construct that is subject to public interest amendment and regulation".<sup>31</sup> Accordingly, constitutional property is not a "pre-social, natural right".<sup>32</sup>

In the *FNB* decision, the Constitutional Court refrained from giving a conclusive definition of property interests.<sup>33</sup> It concluded that constitutional property at least includes corporeal moveable things and ownership of land, that limited real rights in property will probably be regarded as property, and that neither the economic value of the right of ownership, nor an owner's subjective interests will be decisive in the matter.<sup>34</sup> The Constitution itself indicates that land forms part of the constitutional concept of "property". In section 25(4)(b) it provides that "property is not restricted to land", from which one can infer that property, for purposes of section 25 of the

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<sup>30</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 102-112 reasons that despite the argument made by T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 2-5, 9-11 and 23-25 (namely that the methodology introduced by the Constitutional Court in the *FNB* case had the "vortex" effect of completely focusing a constitutional property challenge on the arbitrariness test), the analysis of a specific property challenge starts off with considering whether that which an owner claims to be deprived of constitutes a property interest. Although the arbitrariness question is often decisive in a constitutional property challenge, it would be impossible to even consider arbitrariness if no identifiable property right has been affected.

<sup>31</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 102.

<sup>32</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 101-102 explains the function of the constitutional property clause as a measure that was introduced to enable a balance between private property interests and the public interest. Accordingly, he argues, property as a constitutional right is different from the private law notion of property. Although property is constitutionally protected, private law property entitlements are not necessarily protected against state interference. The constitutional property clause in fact legitimises the regulatory deprivation of property under certain circumstances. Furthermore, the concept of constitutional property law is wider than that of private law property in the sense that constitutional property will protect "new" property interests if the protection of such interests will promote the aim of finding a balance between private property interests and the public interest.

<sup>33</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 112.

<sup>34</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 51-56.

Constitution, at least includes land.<sup>35</sup> Common law principles provide that the owner of land is the owner of everything that is permanently attached to it.<sup>36</sup> Therefore, land and any permanent buildings and improvements on it are included in the constitutional concept of property. Any restriction on the use and enjoyment of land and of permanent improvements (buildings) on land consequently constitutes a deprivation of property in terms of section 25(1) of the Constitution. The protection of the existing, unobstructed view from a property, whether it is based on a substantive right or an alternative strategy to prevent the obstruction of such a view, implies a restriction on neighbouring owners' rights to use (build on) their properties, to the extent that the neighbouring owners are prevented (either temporarily or permanently) from building on or developing their land. The content of property of land includes certain entitlements. Amongst these are the *ius utendi*, which gives a property owner the right (within the limits laid down by law) to use her property as she pleases.<sup>37</sup> Accordingly, a property owner may build freely<sup>38</sup> on her property,

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<sup>35</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 112 argues that it is necessary to determine the content of "property" for purposes of s 25 of the Constitution in every property case and that s 25(4)(b) of the Constitution is the only guidance that the Constitution provides in this regard.

<sup>36</sup> This principle is deduced from the maxim *cuius est solum, eius est usque ad coelum et ad inferos* ("the owner of land is the owner of everything above and below the ground"). In CG van der Merwe & MJ de Waal *The law of things and servitudes* (1993) 104-105, Van der Merwe reasons that in terms of this maxim, a landowner is the owner of the surface of the land, the space above the land and anything attached to or beneath the surface of the land. This principle is extensively discussed in Ch 2 n 32.

<sup>37</sup> CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 173. The *ius utendi* emanates from the Roman law entitlement *usus*, which is, according to Van der Merwe's definition, the use of a thing in such a manner that it is not materially changed. The *ius fruendi*, *ius abutendi*, *ius disponendi*, *ius possidendi*, *ius vindicandi* and *ius negandi* are all considered to be entitlements that flow from ownership. According to VG Hiemstra & HL Gonin *Trilingual legal dictionary* (3<sup>rd</sup> ed 1992) 215-216, *ius utendi* is the right to use property, *ius fruendi* refers to the right of enjoyment and the *ius abutendi* is the right to abuse one's own property at will. CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 173-174 refers to the fact that although the *ius abutendi* entitles an owner to vandalise and destroy her property, the limitations that are placed on property in modern times, restricts the entitlement to positively abuse one's property. The *ius abutendi* is often rather seen as the right to consume consumable things through normal use. The *ius disponendi* is the right of disposal, the *ius possidendi* is the right of possession, the *ius vindicandi* is the right to claim a thing as one's own and the *ius negandi* is an owner's entitlement to protect her property against infringement by another. Van der Merwe rejects the notion of describing property with regard to the entitlements that it entails for the following reasons: (i) The content of ownership is undetermined, which renders a strict categorisation thereof impossible. (ii) None of the entitlements of ownership is essential in the sense that the limitation or deprivation

within the limits of the law. This property entitlement was confirmed in *Van der Heever v Hanover Municipality*,<sup>39</sup> where Jones J ruled that a property owner may build as high as she wants to on her property, within the limits laid down by law. Therefore, the right to erect buildings and structures on one's property is an identifiable property interest for purposes of a deprivation enquiry in terms of section 25(1). This implies that the common law principle that a property owner does not have an inherent right to the existing view from her property recognises and upholds the right to use (build on) one's property. Any temporary or permanent restriction on the right to build, that may result in the protection of the existing view from a property, can therefore potentially establish a deprivation of the affected owner's right to use her property.

By contrast, as is argued in the next section below, the landowner who claims protection of the existing view from her property will only succeed in proving the existence of a protected property right if she has a substantive right to that view. As was pointed out in chapter 2, the right to enjoy the existing view from a property is not recognised by the common law as an inherent part of the right of landownership, but such a right can be created by way of a servitude, a restrictive condition or legislation.

Consequently, according to the first step in the *FNB* analysis a landowner will only succeed in proving the existence of a protected property right to the existing view from her land if such a right was explicitly created by servitude, a restrictive

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thereof will deprive ownership of its character. He mentions, as an example, that a fiduciary is regarded as the owner of fideicommissary property, regardless of the fact that she does not have the right to dispose of such property. (iii) The entitlements that are considered to flow from ownership are not peculiar to property, for example, a usufructuary is also entitled to use property.

<sup>38</sup> Ownership is not an absolute right and therefore this entitlement, just like all other property entitlements, is subject to external limitations. See the discussion of PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 91-95 regarding the content and function of ownership.

<sup>39</sup> *Van der Heever v Hanover Municipality* 1938 CPD 95. See Ch 2 for a discussion of this case.

condition or legislation; while a landowner will always be able to prove the existence of a protected property right to build on her land, unless that right was explicitly restricted by a servitude, a restrictive condition or legislation. Depending on which party initiates the litigation, the existence of a servitude, restrictive condition or legislation that restricts building will determine whether the plaintiff or applicant can prove a property right.

#### 5 2 2 2 *Has there been a deprivation?*

According to *FNB*, section 25(1) of the Constitution does not only require that there must be an identifiable property interest at stake, but also that the limitation or restriction of the relevant property right must amount to a deprivation of that property. The Constitutional Court's decision in *FNB* clarified the meaning of "deprivation". It held that more or less any significant interference with property will be regarded as a deprivation:

"In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned."<sup>40</sup>

The Constitutional Court's wide definition of "deprivation" in *FNB* means that section 25(1) will be the starting point in any constitutional challenge concerning property, since any interference with property is categorised as a deprivation. Consequently, a

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<sup>40</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57. In this case a property owner was deprived of motor vehicles (moveable corporeal things), since they were attached for sale in execution. The Constitutional Court did not have to determine the specific scope of the word "deprivation" in s 25(1) of the Constitution, since it was fairly clear that the seizure of motor vehicles constituted an interference with private property that constituted a deprivation for purposes of s 25(1). See the reasoning of O'Regan J in her concurring judgment in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) paras 86-87.

limitation of property rights that effectively expropriates a property owner will be considered both a deprivation and an expropriation.<sup>41</sup> Van der Walt explains that this interpretation given by the *FNB* court means that “[a]ll expropriations are deprivations, but just some deprivations are expropriations”.<sup>42</sup>

However, in *Mkontwana v Nelson Mandela Metropolitan Municipality and another; Bissett and Others v Buffalo City Municipality and others; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others*,<sup>43</sup> (“*Mkontwana*”) the Constitutional Court went in a completely different direction. It ruled that an interference with property interests only amounts to a deprivation when it is too extensive, in other words, when it is not justifiable:

“Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation ... at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.”<sup>44</sup>

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<sup>41</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 57-60.

<sup>42</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 204. The approach that the Constitutional Court introduced in the *FNB* decision, in terms of which expropriations are treated as a subset of deprivations, is completely different from the approach it followed in *Harksen v Lane* 1998 (1) SA 300 (CC). In the *Harksen* decision, deprivation and expropriation were considered to be two distinct entities with distinguishable features. Therefore, instead of deprivation (s 25(1) of the Constitution) being the starting point for any constitutional challenge regarding property, as the decision in *FNB* suggested it should be, the *Harksen* ruling implied that a litigant who wants to attack the constitutional validity of an interference with her property rights has to focus her argument either on an unconstitutional deprivation or on an unconstitutional expropriation. See AJ van der Walt “Striving for the better interpretation – A critical reflection on the Constitutional Court’s *Harksen* and *FNB* decisions on the property clause” (2004) 121 *SALJ* 854-878 and n 13 in this regard.

<sup>43</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC).

<sup>44</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 32 per Yacoob J. At paras 85-90, O’Regan J, in a concurring judgment, reasoned that the constitutional

Van der Walt criticises the Constitutional Court's definition of deprivation in this judgment on the grounds that it is unclear, that it does not allow for section 25(1) to authorise and control normal regulatory deprivation, and that its application would render section 25(1) superfluous.<sup>45</sup> He argues that section 25(1) provides a mechanism that both authorises the regulation of private property and renders such regulation capable of constitutional and judicial review. It therefore ensures that the state abides by the rules when it regulates the use and enjoyment of private property. If the *Mkontwana* court was correct, deprivation would only refer to regulation that goes beyond the state's normal, legitimate regulatory functions. Should this definition of "deprivation" be applied in a constitutional property challenge, the section 25(1) investigation will be reduced to the question of whether the state, while exercising a regulatory control over private property, "went further" than what is justifiable in an open and democratic society. Instead of serving the aim of authorising and controlling regulatory deprivations, section 25(1) would be considered as a prohibition against "undemocratic", excessive regulation and as a

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purpose of s 25(1) should be considered when determining the meaning of "deprivation" for purposes of this section. She concluded that

"[i]f one of the purposes of section 25(1) is to recognise both the material and non-material value of property owners, it would defeat that purpose were 'deprivation' to be read narrowly".

<sup>45</sup> According to AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 204-206 it is unclear why the Constitutional Court specifically referred to the values of an open and democratic society when it defined "deprivation" in *Mkontwana*. State regulation of property is normal practice in any regulated society and not exclusive to democracies. He also argues that s 25(1) is aimed at reviewing the regulation of property. It therefore legitimises the deprivation of property in the usual course of events. However, if "deprivation" in s 25(1) only referred to excessive state regulation of private property, this provision would no longer serve the purposes of authorising "normal" regulation and making such regulation susceptible to review. Furthermore, s 25(1) would be redundant if the word "deprivation" in this section only referred to regulatory deprivations that exceed the standards that are acceptable in an open and democratic society, because state actions that are in conflict with the values of such a society can be rendered unconstitutional without even considering s 25(1). Van der Walt mentions three alternative constitutional provisions that will render undemocratic, illegitimate state actions (that concerns property) reviewable and unconstitutional. These provisions include the rule of law principle in s 1(c), the equality provision in s 9, and the administrative justice guarantee in s 33.

measure to determine when state actions have this unlawful effect, which is far more restrictive than the *FNB* interpretation.<sup>46</sup>

In a subsequent case, *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another*,<sup>47</sup> (“*Reflect-All*”) the Constitutional Court followed the wider *FNB* definition of deprivation.<sup>48</sup> It held that property rights are not absolute and may be regulated to promote essential public purposes. In terms of the *FNB* classification of deprivation, namely that almost all interferences with property constitute deprivations, the court in *Reflect-All* decided that section 10(1) and 10(3) of the Gauteng Transport

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<sup>46</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 206 reasons that it is not s 25(1), but s 36 of the Constitution that has to be applied when determining what constitutes acceptable interference with private property in an open and democratic state. If a regulatory control complies with s 25(1), it is a constitutionally valid deprivation of property. Only if the regulation does not comply with the requirements of s 25(1), must it be determined in terms of s 36 whether it is justifiable in an open and democratic society. If the definition of “deprivation” is applied as it was stated by the Constitutional Court in *Mkontwana*, it would be impossible to follow this logic for two reasons. Firstly, it would not be possible to determine whether a regulation is justifiable in terms of s 25(1) unless it has an excessive impact on the use, enjoyment and exploitation of property. Secondly, the enquiry as to whether the relevant deprivation is justifiable in an open and democratic society would already be asked when it is considered whether the regulation complies with s 25(1). This enquiry would therefore not be reserved for cases where the regulation is inconsistent with s 25(1). Van der Walt criticises the *Mkontwana* definition of “deprivation” for being unsatisfactory, since it “collapses a constitutional first stage issue (was there a deprivation of property, and was that deprivation in conflict with section 25(1)?) into a second stage inquiry (is the unconstitutional deprivation justifiable in terms of section 36(1)?)”. The logic that, in cases concerning property, s 36 of the Constitution is only considered if a deprivation is not consistent with s 25 originated in the Constitutional Court’s judgment in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

<sup>47</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC).

<sup>48</sup> The Constitutional Court in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) paras 35-36 referred to its previous decisions in *FNB* and in *Mkontwana* when it considered whether s 10(1) and 10(3) of the Gauteng Transport Infrastructure Act 8 of 2001 deprived the applicants of their properties. Its reasoning indicates that it applied the *FNB* definition of “deprivation”, which is generally accepted as the wider (than the *Mkontwana*) definition of “deprivation”. However, O’Regan J in her concurring judgment in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) paras 85-90, argued that the purpose of s 25(1) of the Constitution should be considered when determining the meaning of “deprivation” for purposes of this section. Stating that s 25(1) is aimed at acknowledging both the non-material and the material value of property to owners, she concluded that the definition of “deprivation” should not be too narrow. The court in *Reflect-All* at para 36, referring to O’Regan’s reasoning in *Mkontwana*, followed a wide definition of deprivation, as introduced in the *FNB* judgment and supported by O’Regan J in the *Mkontwana* decision. See AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 206-207.

Infrastructure Act 8 of 2001 (“Gauteng Transport Act”) does have the effect of depriving the applicants of the use, enjoyment and exploitation of their properties.<sup>49</sup>

Van der Walt argues that the wide interpretation of “deprivation”, as introduced by the Constitutional Court in the *FNB* judgment and applied in subsequent case law, should be followed when considering whether a specific action amounts to a deprivation in terms of section 25(1) of the Constitution. The implication is that the impact of a restriction on an owner’s property rights is, for purposes of determining whether or not an interference with property rights amounts to a deprivation, only relevant if it is so insignificant that it cannot be considered to constitute a deprivation.<sup>50</sup> He defines “deprivation” for purposes of section 25(1) as follows:

“[E]very restriction that has a perceptible effect on the property holder’s use and enjoyment of property, no matter how small or insubstantial, constitutes deprivation in terms of section 25(1) and is therefore subject to its requirements.”<sup>51</sup>

Accordingly, although the *de minimis* rule should be applied, any more than minimal interference with property will be regarded as a deprivation.<sup>52</sup>

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<sup>49</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) paras 28-38. In this case, the constitutional validity of s 10(1) and 10(3) of the Gauteng Transport Act was challenged. These provisions authorised a road planning scheme that restricted the applicants, who were owners of land affected by this scheme, in the use of their properties. The Constitutional Court, giving a wide interpretation to the word “deprivation” for purposes of s 25(1) of the Constitution, decided that s 10(1) and (3) of the Gauteng Transport Act does interfere with the applicants’ use of their properties and consequently authorise deprivations.

<sup>50</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 209. Since the *de minimus* rule applies here, insignificant interferences with an owner’s property rights will not be considered a deprivation for purposes of s 25(1) of the Constitution. The Constitutional Court’s definition of “deprivation” in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 32 indicated that the scope (impact) of the interference with property is indeed an important factor when deciding whether a limitation amounts to a deprivation of property in terms of s 25(1) of the Constitution. The court, per Yacoob, reasoned that only “substantial interference” will constitute deprivation.

<sup>51</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 209.

<sup>52</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 209.

In chapter 2 it was established that according to South African common law a property owner does not have an inherent, substantive right to a view. This position protects neighbouring property owners' rights to build. If the situation changes, therefore, if the existing view from a property is indeed protected, whether it be in terms of a servitude, a restrictive condition, legislation or an alternative strategy based on the right to be informed of, to comment on and sometimes to prevent the erection of building works on a neighbouring property, such protection constitutes a deprivation of a neighbouring owner's right to build.<sup>53</sup>

In the absence of a substantive right to an undisturbed view, no issue regarding the constitutional protection of property arises because no property right has been affected. For example, A buys a house with a magnificent view of the ocean. Subsequently, B erects a building that complies with all the relevant building regulations but that obstructs A's view. Is A deprived of a property right because of the obstruction of her existing view, and, if she is, is such a deprivation consistent with section 25(1) of the Constitution? In the absence of a servitude, restrictive condition, legislation or other measure that provides A with a substantive right to prevent building works that will obstruct the existing view from her property, A does not have a right to an unspoilt view.<sup>54</sup> If B erected her house in terms of properly approved building plans that comply with the relevant building regulations, there is no basis for A's claim of suffering a deprivation because that which A claims to have been deprived of (the existing view from her property) does not form part of her property rights and she is consequently not deprived of an identifiable, legally

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<sup>53</sup> Alternative strategies to prevent the obstruction of the existing, unobstructed view from a property are discussed in Ch 3.

<sup>54</sup> In Ch 2 it is established that a property owner is not inherently entitled to the protection of an unobstructed view to or from her property. She will only have such a right if her property benefits from a servitude of view or a servitude not to build higher that is registered over a neighbouring property.

recognised property interest. It is impossible to conduct the test for deprivation in the absence of such an identifiable property right.

The case law discussed in chapter 2 and chapter 3 suggests that the existing view from one's property may be protected with a servitude or a restrictive condition or by legislation, as well as through a number of other measures and strategies. As was pointed out in chapter 3, apart from the enforcement of a servitude, restrictive condition or legislation, the strategies to protect an existing view do not always establish a substantive right to enjoy that view. *Transnet Ltd v Proud Heritage Properties*<sup>55</sup> ("Transnet") showed that the right to uphold an existing view from or to a property may be created by statute. In *Muller NO and Others v City of Cape Town and Another*<sup>56</sup> ("Muller"), the applicant succeeded with his application for the review and setting aside of a neighbour's approved building plans<sup>57</sup> because the plans contravened the applicable zoning scheme.<sup>58</sup> This judgment illustrates that a property owner may have the opportunity indirectly to protect the view from her property (sometimes merely temporarily) when she ensures the proper enforcement of building regulations and zoning plans. There are also a number of cases where property owners have used their rights to object to neighbours' building plans to prevent the construction of buildings on neighbouring properties. Their objections were mostly attacks either on the relevant local authorities' exercise of their discretion<sup>59</sup> or on their non-compliance with formalities in approving the plans.<sup>60</sup>

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<sup>55</sup> *Transnet Ltd v Proud Heritage Properties* (405/08) [2008] ZAECHC 155 (5 September 2008).

<sup>56</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C).

<sup>57</sup> The building plans were drawn up for the alteration and extension of the existing house on the second respondent's property.

<sup>58</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) paras 31 and 36. The applicant also contended that the erection of the proposed building would obstruct the view from his property, which would consequently cause a decrease in the value of his property. See 3 2 2 3 for a discussion of the applicant's arguments.

<sup>59</sup> *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D); *Clark v Faraday and Another* 2004 (4) SA 564 (C); *De Kock v Saldanhabaai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November

These objections are mostly unrelated to the effect that a building would have on the existing view from neighbouring land. Nevertheless, if successful, both of these arguments can have the result of stalling the building process, mostly only temporarily but sometimes even permanently, and consequently indirectly protect the existing view from a neighbouring property.

As was explained above, the protection of an unobstructed view to or from one property means, in most cases, that a neighbouring owner's right to erect a structure(s) on her property is restricted. Despite the fact that the right to develop one's property is always regulated, at least in the sense that no person may erect a building without properly approved building plans,<sup>61</sup> it is an important property interest. Therefore, any constraint on this right resulting from the protection of someone else's rights interferes with an owner's property rights in such a way that it constitutes a deprivation. Servitudes of prospect or servitudes not to build higher; restrictive conditions that prohibit or restrict building; zoning plans; building regulations and statutory provisions that prohibit or restrict building and procedural attacks on the approval of building plans may all restrict a property owner's right to build on her property. When they have this effect, they amount to deprivations of property interests that must comply with the section 25(1) requirements for constitutionally valid deprivations.

Conversely, in the absence of a servitude, restrictive condition or legislation that effectively prevents building that would spoil an existing view, the owner whose

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2006) and *True Motives 84 (Pty) Ltd v Madhi and Another (Ethekwini Municipality as amicus curiae)* 2009 (4) SA 153 (SCA).

<sup>60</sup> *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA); *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C); *PS Booksellers (Pty) Ltd and Another v Harrison and Others* 2008 (3) SA 633 (C) and *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC).

<sup>61</sup> Section 4(1) of the National Building Regulations and Building Standards Act 103 of 1977 prohibits the erection of buildings without prior approval.

view is destroyed by building on neighbouring land would not be able to prove a deprivation because she would not succeed in proving the existence of a property interest of which she could be deprived. The owner who wants to protect an existing view from her property will therefore only succeed in proving a property interest and a deprivation if building on neighbouring land is allowed, despite the existence of a servitude, restrictive condition or legislation that prevents or restricts such a building and if the building will destroy the view.

For purposes of the rest of the analysis below I focus on just one side of the conflict, namely deprivation of property that results from restrictions on building that are either intended to or have the effect of protecting an existing view from neighbouring land.

### 5 2 2 3 *Is the deprivation in line with section 25(1)?*

#### 5 2 2 3 1 Section 25(1) requirements

The protection of the existing, unobstructed view from a property, whether it be based on a servitude, restrictive condition, legislation or any other measure that restricts or even prevents any building works on a neighbouring property inevitably deprives the owner of such a neighbouring property of her right to use (build on and develop) her property. Deprivations of property, including restrictions on the right to use one's property,<sup>62</sup> must comply with section 25(1) of the Constitution. Section 25(1) sets two requirements: A deprivation must be authorised by law of general application and the law may not permit arbitrary deprivation. According to the *FNB*

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<sup>62</sup> The right to use one's property is considered "property" for purposes of s 25 of the Constitution. See 5 2 2 1 in this regard.

decision, the prohibition against arbitrary deprivation includes two aspects: The deprivation may not be procedurally or substantively arbitrary.<sup>63</sup>

Evaluating whether the deprivation is consistent with section 25(1) therefore entails that the following questions must be answered: Is there authority for the deprivation? Does the authorising legislation or the common law permit deprivation that is procedurally or substantively arbitrary?<sup>64</sup> If any of these questions has a negative outcome, in other words if the deprivation is not authorised, or if the authorising law allows deprivations that are either procedurally or substantively arbitrary, the deprivation is in conflict with section 25(1).

#### 5 2 2 3 2 Is the deprivation authorised by law?

The authorisation enquiry requires one to determine, firstly, whether a deprivation is authorised by law; and secondly, whether the authorising law constitutes law of general application in the sense that it is valid, generally applicable on all citizens and does not amount to the arbitrary treatment of certain individuals or specific members of a group.<sup>65</sup> The question of whether an act of deprivation was authorised

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<sup>63</sup> The Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100 determined that a deprivation of property is arbitrary if the law that authorises such deprivation does not provide sufficient reason for the deprivation or if the deprivation is procedurally arbitrary. See AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 245.

<sup>64</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 235 reasons that a deprivation dispute concerns the effect of the authorising legislation and not the act of deprivation itself.

<sup>65</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 232-237 discusses the requirement that deprivations have to be authorised by law of general application with reference to the general rule-of-law and legitimacy principles of the Constitution. He states that, in terms of this requirement, the authorising law must be formally valid, generally applicable, non-arbitrary and qualify as law of general application.

by law is central to a deprivation dispute, because section 25(1) forbids deprivations that are not in terms of *law* of general application.<sup>66</sup>

For purposes of section 25(1), legislation, the common law and customary law constitute “law”.<sup>67</sup> Furthermore, according to the reasoning of Woolman and Botha, subordinate legislation other than regulations, municipal by-laws, rules of the court and international conventions should also be considered as law of general application.<sup>68</sup> Deprivations may therefore, for present purposes, be authorised by either legislation in the widest sense or the common or customary law. A deprivation that occurred without authorisation by any of these sources of law does not comply with the section 25(1) requirement that “[n]o one may be deprived of property except in terms of law” and is consequently unconstitutional and invalid.

The law that authorises an act of deprivation must also be formally valid, since the requirement that a deprivation must be authorised by law of general application represents the constitutional legitimacy and rule of law principles.<sup>69</sup> Furthermore, the

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<sup>66</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 235 (author’s emphasis indicated). In terms of the wording of s 25(1), deprivations that are not authorised by law are invalid. This provision further emphasises the importance of authorising law by stating that “no law may permit arbitrary deprivation”.

<sup>67</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 334 and AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 234 argues that the s 25 reference to *law of general application* instead of *a law*, indicates that deprivations flowing from common law and customary law principles are also subject to the s 25(1) requirement that the law may not permit arbitrary deprivations. T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 7-8 explains Van der Walt’s approach with an example: A person who is deprived of her property by the attachment of her moveable property to the immovable property of another private individual may theoretically attack, in terms of s 25(1), the common law principle that the owner of immovable property becomes the owner of everything that attaches to her property. If a common law or customary law principle permits a deprivation that proves to be arbitrary, it would be unconstitutional. In *S v Thebus and Another* 2003 (10) BCLR 1100 (CC) it was established that the common law is “law of general application”. However, I Currie & J de Waal *The Bill of Rights handbook* (5<sup>th</sup> ed 2005) 412 follow a different approach. They attach a specific meaning to the concepts of “deprivation” and “expropriation” and argue that the requirements laid down in s 25(1)-(3) are limited to the state as sole role player.

<sup>68</sup> S Woolman & H Botha “Limitations” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2<sup>nd</sup> ed OS 2006) ch 34 51-53 conclude that there is no clarity about whether norms, standards and directives that are issued by government agencies or statutory bodies may be categorised as law of general application. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 233-234.

<sup>69</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 232.

authorising law must be generally applicable in the sense that it must “be generally and equally applicable and ensure parity of treatment” and may not be arbitrary.<sup>70</sup>

The investigation to establish whether an act of deprivation is permitted by a generally applicable law is an important step when confronted with a deprivation dispute. Van der Walt<sup>71</sup> suggests that this enquiry should entail strict scrutiny regarding the existence of authorisation, the outcome of the deprivation, and especially the question of whether the deprivation “in its disputed form, scope and context, was foreseen and authorised”.<sup>72</sup> It is therefore not merely required that a deprivation should be vaguely authorised by law of general application, but that the authorising law must specifically provide for (or at least anticipate) a deprivation in the way that it in fact occurred.

### 5 2 2 3 3 Does the legislation permit arbitrary deprivation?

Section 25(1) of the Constitution provides that “[n]o law may permit arbitrary deprivation of property”. In *FNB, Ackermann J* focused on the meaning of the word “arbitrary” in the context of section 25 and concluded that the deprivation of property will be arbitrary when the authorising provision does not provide sufficient reason for the deprivation or when the deprivation is procedurally unfair.<sup>73</sup> According to this distinction that the *FNB* court made between substantive and procedural arbitrariness, the first question is whether a deprivation was procedurally arbitrary.

<sup>70</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 232.

<sup>71</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 236-237.

<sup>72</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 237.

<sup>73</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. Section 25(1) of the Constitution does not explicitly distinguish between substantive and procedural arbitrariness. The division between these two “forms” of arbitrariness originated in the *FNB* decision. I Currie & J de Waal *The Bill of Rights handbook* (5<sup>th</sup> ed 2005) 543-545 discuss the requirement of “procedural fairness” within the context of deprivation.

Despite Ackermann J's comprehensive reasoning about the factors to consider when determining whether there are sufficient reasons to justify a deprivation, he did not clarify what would render a deprivation procedurally unfair for purposes of section 25(1) and the case was decided on the basis of substantive arbitrariness (insufficient reason for the deprivation).<sup>74</sup>

The *Mkontwana* court defined procedural unfairness for purposes of section 25(1) in the same way that it is defined for investigations in contexts other than section 25(1).<sup>75</sup> In terms of this definition, a deprivation would be considered arbitrary for purposes of section 25(1) if it involves unjustified procedural irregularities. This notion of procedural fairness closely resembles the notion of just administrative action that is reviewed in terms of section 33 of the Constitution or PAJA.<sup>76</sup> In terms of the subsidiarity principles, PAJA should be applied in cases where it has to be determined whether administrative action caused a procedurally arbitrary deprivation of property.<sup>77</sup> Conversely, if a regulatory law directly (without involving any administrative action) deprives an owner of property it will be subject to direct

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<sup>74</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100 per Ackermann J ruled that a deprivation of property will be arbitrary if the law that authorises it either does not provide sufficient reason for the deprivation, or if it (the law) is procedurally arbitrary. The judge then provided specific factors to be considered when determining whether there are sufficient reasons for a deprivation to be substantively justified, but he did not give any further guidance regarding how the procedural lawfulness of a deprivation should be determined.

<sup>75</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 65.

<sup>76</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 265.

<sup>77</sup> AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128 at 100-103 and AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 66-69 explains the set of subsidiarity principles that was developed by the Constitutional Court. These principles prescribe which source of law a litigant should select as a cause of action or as a defence. If there is legislation that gives effect to a right that is protected in the Constitution, an action or defence should be based on that legislation, and not on the Constitution itself. However, if the constitutional validity or efficacy of the legislation constitutes the cause of action, the attack may be based on the constitutional provision directly. The same rule applies when there is legislation that gives effect to a common law right. If a litigant wants to protect a constitutionally protected right, her attack must be based on legislation and not on the common law itself.

constitutional scrutiny in terms of section 25(1), because the constitutional validity of the legislation itself is attacked and PAJA does not apply.<sup>78</sup>

Consequently, a deprivation will probably only be considered arbitrary because of procedural unfairness in terms of section 25(1) if the deprivation did not involve administrative action. The scope for finding that a deprivation is arbitrary for lack of procedural reasonableness is therefore probably limited to deprivations that are caused directly by law (either legislation or the common law), without involving administrative action.<sup>79</sup> For instance, if a statute explicitly states that no structure may be erected closer than 20 meters from the ocean, without providing affected parties with an opportunity to make objections or to apply for special authorisation, the provision itself deprives an owner of a property interest. Since it does not provide for any administrative action, the litigant who wants to attack the deprivation caused by this provision cannot rely on PAJA (the application of which is restricted to administrative action), and will therefore have to rely on section 25(1) of the Constitution to protect her property rights against procedurally arbitrary deprivation.

According to the *FNB* court's interpretation of "arbitrariness", the second and probably most important form that arbitrary deprivation could assume is that of substantive arbitrariness.<sup>80</sup> A deprivation is considered to be substantively arbitrary if it occurred without sufficient reason.<sup>81</sup> The court in *FNB* laid down certain criteria as a basis for determining whether or not there are sufficient reasons for a deprivation

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<sup>78</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 66-67 and 269 and AJ van der Walt "Procedurally arbitrary deprivation of property" (2012) 23 *Stell LR* 88-94 at 91-93.

<sup>79</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 269 and AJ van der Walt "Procedurally arbitrary deprivation of property" (2012) 23 *Stell LR* 88-94 at 91-93.

<sup>80</sup> The court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100 made a distinction between procedural and substantive arbitrariness. See n 73.

<sup>81</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 99-100.

to be legitimate.<sup>82</sup> These criteria include that the relationship between the means (deprivation) and the objective (public interest) must be evaluated; that the complexity of the relationships that are at stake must be taken into account; that the relationship between the aim of the deprivation and the person whose property it affects must be considered; and that the relationship between the purpose of the deprivation, the nature of the property and the scope of the deprivation should be assessed. The nature of the relevant property is indicative of the level of scrutiny that a court must apply when determining whether there are sufficient reasons for the deprivation to be justified. For example, if an owner is only deprived of one entitlement, the justification does not have to be as strong as it would have to be if she was deprived of more than one entitlement or all entitlements. The complete deprivation of ownership of a corporeal movable thing will, according to the *FNB* decision, be justified only if the purpose for the deprivation was necessary. An important further consideration is the question of how extensive a deprivation is – to what extent is the owner deprived of her property? Ackermann J ruled that these criteria should be applied to each case individually.<sup>83</sup> Therefore, the question of whether or not there are sufficient reasons for a deprivation not to be arbitrary is answered with reference to contextual criteria that would indicate the level of scrutiny on which the arbitrariness analysis takes place.<sup>84</sup>

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<sup>82</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

<sup>83</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

<sup>84</sup> AJ van der Walt "Striving for the better interpretation – A critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause" (2004) 121 *SALJ* 854-878 at 866, referring to statements made in *FNB* regarding the purpose and scope of s 25 of the Constitution, emphasises that a single, abstract interpretation of this clause is impossible. A wide, contextual approach, in terms of which the characteristics and requirements of each case are considered individually, as followed by the court in *FNB*, would be more effective.

Establishing whether there is a sufficient *nexus* between the property which an owner is deprived of and the purpose of the deprivation is pivotal to this approach.<sup>85</sup> Accordingly, the limitation on the owner's property is examined to establish whether it promotes the purpose of the deprivation. Is there a clear purpose for the deprivation? Does the limitation indeed serve that purpose? Is there a relevant link to ensure that the limitation is legitimate? The absence of such a *nexus* indicates an arbitrary deprivation.

The facts of the *FNB* case illustrate that the lack of sufficient reasons or "relationships" implicates that a deprivation is unreasonable, arbitrary and consequently invalid. In that case, FNB was the owner of cars (the property they claimed to be deprived of) bought in terms of hire-purchase agreements financed by FNB. These cars were seized by the Commissioner of the South African Revenue Service (SARS), in terms of section 114 of the Customs and Excise Act 91 of 1964 ("Customs Act"), to satisfy the customs debt of third parties (the parties to the hire-purchase agreements with FNB). Therefore, the cars were the property of an owner (FNB) that was completely unrelated to the customs debt. Section 114 of the Customs Act therefore authorised the deprivation of property under circumstances where there was an insufficient *nexus* between the objective of the authorising legislation (the enforcement of customs debts); the owner of the relevant property (the bank that is the owner of the motor vehicles and therefore a third party that was not at all related to or responsible for the customs debt); and the property (the motor vehicles that were not related to the customs debt). This provision therefore authorised an arbitrary deprivation of property, since an analysis of the complex set of relationships indicated an insufficient relationship to justify the effect of this

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<sup>85</sup> This approach is aimed at establishing whether there are sufficient reasons for a deprivation to show that the limitation that it places on an owner's property is not arbitrary.

provision (namely that it deprives owners of property without a justified reason). The Constitutional Court declared section 114 of the Customs Act unconstitutional insofar as it authorised the Commissioner of the South African Revenue Service to seize and declare forfeit the property of third parties.<sup>86</sup>

The protection of the existing, unobstructed view from a property usually requires some form of prohibition or regulation of subsequent building works on a neighbouring property or properties. A wide variety of restrictions on building works may preserve a pleasurable or necessary view. Servitudes, restrictive conditions and legislation may specifically prevent or restrict the erection of building works that will obstruct the existing view to a neighbouring property, while legislation may also create a statutory duty in terms of which a specific view must be protected.<sup>87</sup> Zoning plans or building regulations may restrict or prevent building works and have the concomitant effect of preventing the obstruction of the existing view from a property. Furthermore, the right to be informed of, to comment on and sometimes to prevent the approval of a neighbour's building plans when such plans involve the removal or amendment of a restrictive condition, an application for re-zoning or a departure from the applicable building regulations, may temporarily stall or even permanently prevent the erection of a building and consequently prevent the obstruction of the existing view from a neighbouring property. Each one of these measures of

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<sup>86</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 133. The "category" of third parties that is referred to here includes persons who are not liable to the state for payment of debts as explained in s 114 of the Customs Act. The reason for the ruling in the *FNB* case is that s 114 of the Customs Act authorises the arbitrary deprivation of property. In *FNB*, this section authorised the deprivation of property where there was an insufficient *nexus* between the objective of the authorising legislation (the enforcement of customs debts); the owner of the relevant property (the bank that is the owner of a motor vehicle in terms of a hire-purchase agreement – and therefore a third party that was not at all responsible for the debt); and the property (the motor vehicles that were not related to the customs debt). Section 114 of the Customs Act therefore authorised an arbitrary deprivation of property.

<sup>87</sup> An example of such a statutory duty is mentioned in the discussion of *Transnet Ltd v Proud Heritage Properties* (405/08) [2008] ZAECHC 155 (5 September 2008) in 5 2 3 3.

protecting unobstructed views involves the deprivation of a property right, namely the right to use (build on) one's property. Therefore, all the deprivations caused by the variety of "methods of preserving views"<sup>88</sup> have to be scrutinised in terms of the *FNB* test to determine whether they are valid in terms of section 25(1) of the Constitution. The most interesting part of the deprivation enquiry will be the results of the substantive arbitrariness test.<sup>89</sup> The test will involve an evaluation of the relationships between the owner who is deprived of her right to build, the nature and extent of the deprivation, and the method, purpose and actual effect of the deprivation in each case. The aim of evaluating these relationships is to determine whether there is sufficient reason to restrict a property owner's right to build on her property in each case. In terms of the proportionality requirement that the court in *FNB* referred to, there has to be a link between the impact of a deprivation and its aim.<sup>90</sup> An extensive deprivation has to serve an essential purpose, while a less severe deprivation does not have to serve an equally important aim.<sup>91</sup> Moreover, the level of scrutiny may vary in each case, depending on the contextual factors enumerated in *FNB*. Therefore, should a property owner be prohibited from building at all, there would have to be an essential or very good reason for this prohibition. However, if it is only

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<sup>88</sup> See Ch 3 for a discussion of these various "methods" of preserving existing, unobstructed views.

<sup>89</sup> Although the authorisation for and procedural fairness of deprivations are also important requirements for their constitutional validity, these requirements will not be the main focus when the constitutional issues that arise in situations where the views from properties are protected are considered.

<sup>90</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100(g) per Ackermann J distinguished between situations where "a mere rational relationship" between the impact of a deprivation and its purpose will satisfy the requirement for "sufficient" reasons and circumstances when there must be a proportionate link between the effect of a deprivation and the aim that it serves. AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 238-245 explains that the *FNB* decision clarified the uncertainty that existed about whether the s 25(1) prohibition against arbitrary deprivations required a (thin) rational relationship or a (thick) proportionate relationship between means and ends. It suggested that the level of scrutiny should fit the relevant circumstances.

<sup>91</sup> For example, in instances where building regulations regulate property rights, those regulations that serve an essential public purpose such as the regulatory protection of public health and safety will be subjected to a lower level of review than regulation of property rights that promotes a less essential public purpose such as the preservation of aesthetical attributes.

the place or height of building works that is restricted, or if the right to build is merely frustrated or postponed, the reason for the limitation of the right does not necessarily have to serve an essential or very strong purpose. The results of these enquiries will indicate when one owner's right to build may be restricted to specifically or incidentally advance another owner's property entitlements. They will also show what factors may influence the decision to apply either a thin rationality test or a strict proportionality test.

### **5 2 3 Application of the *FNB* methodology: Deprivation of the right to develop one's property**

#### *5 2 3 1 Servitudes*

If the undisturbed view from a property is protected in terms of a servitude,<sup>92</sup> the question arises whether this right to an unobstructed view restricts the neighbour's property rights in a constitutionally legitimate manner. Is the neighbour who may not build as she desires because of the servitude deprived of a property right? If she is deprived, is such a deprivation constitutionally valid?

In terms of the *FNB* threshold requirement, it must be established whether the right to build freely on one's property constitutes property for purposes of section 25(1). Is there a property right at stake if the right to a view is protected and the neighbour's right to build is thereby precluded or restricted? The court in *Van der Heever v Hanover Municipality*<sup>93</sup> held that a property owner may indeed build as high as she wants to on her property. However, it should be kept in mind that the right to

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<sup>92</sup> A property owner can protect the existing view from her property by registering a servitude of prospect or a servitude that restricts a neighbour's right to raise a building or a structure. See 2 3 2.

<sup>93</sup> *Van der Heever v Hanover Municipality* 1938 CPD 95, discussed in 2 2 2 2.

develop one's property is always regulated, at least in the sense that no person may erect a building without properly approved building plans. The right to build on one's property is therefore always subject to restrictions in the form of building regulations.<sup>94</sup> Moreover, it can also be restricted by agreement.

A servitude of prospect and a servitude not to build higher may both have the effect of depriving an owner of her right to erect a building on her property where and to the height that she desires. Accordingly, where A's undisturbed view over B's property is protected with a servitude that burdens B's tenement in favour of that of A, there is a limitation on B's right to build on her property as she pleases. A servitude of prospect and a servitude not to build higher are both praedial servitudes created by way of agreement between the owner of the dominant tenement and the owner of the servient tenement.<sup>95</sup> This means that B (or the previous owner of B's property) agreed to and effectively sold<sup>96</sup> her right to erect a building in the manner

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<sup>94</sup> Section 4(1) of the National Building Regulations and Building Standards Act 103 of 1977.

<sup>95</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 332-334 explain that praedial servitudes can be created by state grant, agreement, statute or prescription. However, it is unlikely that the state will grant a servitude of prospect or a servitude not to build higher over state land or that it will grant land that is either burdened with or favoured by one of these servitudes. A servitude of prospect is arguably purely aimed at preserving a pleasant view from a privately owned property. If one considers the purposes for which land is usually granted by the state, for example for the development of housing or transportation, it is hard to imagine an instance where the state will grant land with a beautiful view that is already protected with a servitude of prospect. It is equally hard to think of a situation where the state will grant land that is burdened with a servitude of prospect in favour of another property and therefore burdened in a way that prevents or at least restricts development (which will be the aim of the grant in most cases). If there is an important reason why the view from land granted by the state should be preserved, it would be possible to protect such a view by way of building restrictions or in terms of zoning requirements. Accordingly, although servitudes may be created by statute, the aim of preserving a pleasant prospect will mostly be achieved through building regulations and zoning plans. There should be no need for the legislator to create a statutory servitude of prospect or a servitude not to build higher. Both a servitude of prospect and a servitude not to build higher are negative servitudes. It is rare and difficult for a negative servitude to be created by way of prescription because it is difficult to comply with the requirements for prescription where there is no specific prohibition. (It is difficult to prove that a servitude has been used continuously for a period of thirty years when such a servitude involves that the owner of the servient tenement refrained from building on her property for this period. There is no duty on a property owner to use her property in a specific manner.) Consequently, a servitude of prospect and a servitude not to build higher will mostly be created by an agreement. See also CG van der Merwe & MJ de Waal *The law of things and servitudes* (1993) 207 and 218-221.

<sup>96</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 332 explain that the creation of a servitude by way of an agreement involves that the owner of

and to the height that she desires.<sup>97</sup> The servitude restricting B's right to build could therefore be said to deprive her of a property right, but in that case the permission that she granted is a sufficient reason for the deprivation to be considered non-arbitrary.<sup>98</sup> Moreover, since the restriction resulted from agreement it was arguably not brought about by state action authorised by law, even though the common law regulates the contract that created the servitude and legislation regulates its registration and subsequent enforcement. In this case one could therefore argue that a servitude originating in contract either does not bring about a deprivation of property for purposes of section 25(1) or, if it does, results in a deprivation that is justified by the existence of the original agreement.

The same argument would be applicable in a case where a restrictive covenant over one owner's property prevents the obstruction of the view from a neighbour's property. Restrictive covenants, which are the predecessors of statutory restrictive conditions, were used as planning tools to preserve the character of neighbourhoods prior to the enactment of provincial ordinances that now regulate township establishment.<sup>99</sup> These covenants originated in contract and were imposed by township developers with the establishment of a new neighbourhood. Buyers of

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the dominant tenement and the owner of the servient tenement come to an agreement about the extent of the servitudinal rights, the amount payable to the owner of the dominant tenement, the duration of the servitude and the registration of the agreement. Therefore, a servitude is effectively "sold" to the owner of the dominant tenement.

<sup>97</sup> B is also not completely deprived of her right to erect structures on her property; her right to build is merely restricted.

<sup>98</sup> It can also be argued that the right to build is lost when the servitude is created. If this argument is followed, there is no property and the *FNB* threshold requirement, namely that the relevant property interest must constitute "property" for purposes of s 25(1) of the Constitution is not satisfied. However, this reasoning is debatable, since it can be argued that the servitude does not destroy the right to build permanently, but merely restricts it and may be removed.

<sup>99</sup> J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 302-305. Restrictive covenants were agreements between a township developer and the purchasers of all the properties in a development and were inserted into the title deeds of these properties. Restrictive covenants were used to restrict undesired land-uses in a new township establishment before provincial ordinances were enacted to regulate township establishment at the beginning of the 20<sup>th</sup> century. Although restrictive covenants are not used in South African law any longer, questions regarding their operation may still arise, since restrictive covenants may still be applicable to erven in townships that were established before the ordinances were enacted.

properties that are subject to restrictive covenants agree to the limitations that these measures place on their ownership entitlements.<sup>100</sup> A restrictive covenant that has the effect of protecting the view from a property is therefore similar to a servitude of view or a servitude not to build higher. The applicability of both a restrictive covenant and a servitude means that the owner whose right (to build) is restricted (or her predecessor in title) bindingly agreed to the limitation. Therefore, a restrictive covenant that protects one owner's view from her property because it restricts another owner's right to build does not arbitrarily deprive a property owner of the right to build either, since it was imposed in terms of an agreement.

However, in cases where a restrictive condition was imposed by the state, the situation is different. Unlike a servitude or a restrictive covenant created in terms of an agreement between property owners, a property owner does not agree to or permit a restrictive condition that is imposed by the state. Such a state-imposed restriction on a property owner's right to build therefore resembles legislation that places a limitation on a property owner's right to use her property. It was argued above that a property owner cannot be deprived of her right to build on her property in terms of a servitude, a restrictive covenant or a restrictive condition that is created in terms of an agreement between property owners, since such an agreement implies that the right to build was effectively contracted away. However, a property owner whose right to build on her property is restricted by a restrictive condition that was imposed by the state is indeed deprived of her right to build on her property, since this right of hers was unwillingly restricted.

The conclusion with regard to both servitudes and restrictive covenants is that the restrictions they may impose on building in order to protect an existing view do

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<sup>100</sup> J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 302.

not constitute deprivation of property for purposes of section 25 and therefore do not have to be analysed further for arbitrariness. In both those instances the *FNB* test terminates at either the first (no property) or the second (no deprivation of property) step. However, restrictions on building imposed by restrictive conditions that are imposed by or in terms of legislation do constitute deprivation of property and must be analysed further. Since these restrictions are similar to those imposed by building regulations, they are considered in the next section below.

### 5 2 3 2 *Building regulations*

A building regulation may protect an owner's view either when it is specifically aimed at preserving a pleasant view, or when it is aimed at promoting some other public purpose and have the concomitant effect of preventing the obstruction of an existing view.<sup>101</sup> For instance, building regulations may protect the unobstructed view from owner A's property incidentally insofar as they prohibit, for public health and safety reasons, owners B, C and D from building to the size, manner or height that they desire and that would obstruct A's view. Do owners B, C and D suffer deprivations because of these restrictions and are these deprivations constitutionally valid? To answer these questions, the limitation that a building regulation places on an owner's

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<sup>101</sup> Section 17(1) of the National Building Regulations and Building Standards Act 103 of 1977 lists aspects relating to the erection of buildings that may be regulated by building regulations. In terms of this section, building regulations may be imposed to provide, for example, requirements that buildings must comply with as precautionary measures against fires and to provide resistance against floods (s 17(1)(e)-(f)). Building regulations "regarding the durability and other desirable properties of buildings" (s 17(1)(g)); "regarding the ventilation and the provision for daylight in respect of buildings, including the provision of open spaces in connection therewith" (s 17(1)(i)); and building regulations "to regulate, restrict or prohibit use to which any building or categories of buildings may be put" (s 17(1)(l)) may be imposed by the Minister of Economic Affairs and Technology. It is possible that a building regulation may restrict the height of a building as a precaution against fires, to provide resistance against floods, to promote the desirable properties of the building (although it is unclear what will constitute a "desirable property" for purposes of this provision), or to enable sufficient ventilation or a flow of daylight to neighbouring properties. Such a height restriction may have the concomitant effect of protecting the unobstructed view from a neighbouring property.

right to use her property must be analysed in terms of the *FNB* test, with specific emphasis on the aims of the applicable regulatory deprivations.

Building regulations generally satisfy the *FNB* threshold requirements because they do affect property rights<sup>102</sup> and they do “interfere” with property interests in a way that deprives owners of property interests.<sup>103</sup> However, from the outset, a property owner’s right to build is subject to permission (approval of building plans) and regulation. Section 25(1) mandates the state to regulate private property for the public benefit. It provides certain procedural as well as substantive requirements<sup>104</sup> for the regulation of the use of property. State action that restricts an owner’s use and enjoyment of her property through building must be authorised by law of general application, it may not be arbitrary and it must serve an essential public purpose.<sup>105</sup> A building regulation, as an example of such a regulation, must therefore serve a legitimate and justified public purpose. It must also be implemented in such a way that it is in line with the authorising provision and non-arbitrary.

Section 17 of the National Building Regulations and Building Standards Act 103 of 1977 (“National Building Act”) authorises the Minister of Economic Affairs and Technology to regulate a property owner’s use of her property. On the individual level, the effect of building regulations on individual landowners’ right to build must

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<sup>102</sup> As discussed in n 101, s 17 of the National Building Regulations and Building Standards Act 103 of 1977 authorises the Minister of Economic Affairs and Technology to regulate (effectively restrict) a property owner’s use of her property. Since a building regulation has a direct effect on an owner’s entitlement to use her property, it affects a property interest of hers.

<sup>103</sup> According to the wide approach followed by Ackermann J in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57, almost any interference with property interests will constitute a deprivation for purposes of s 25(1) of the Constitution. The restriction that a building regulation places on a property owner’s right to use (build on) her property amounts to a deprivation in terms of this definition. See 5 2 2 2.

<sup>104</sup> Section 25(1) does not explicitly state a substantive public purpose requirement. However, AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 227-228, 231-232 and 238 argues that this section implicitly requires that deprivations must serve a public purpose or that it must be in the public interest. His argument is based on foreign jurisdictions’ tendency to strictly enforce the requirement that a deprivation of property must serve a public purpose.

<sup>105</sup> Protecting or promoting public health and safety is an example of such an aim.

be assessed on a case by case basis, with reference to the actual impact that regulatory prohibitions or controls have on an individual landowner. In terms of the *FNB* interpretation of the section 25(1) requirement that a provision may not be arbitrary, deprivations may neither be procedurally or substantively arbitrary.<sup>106</sup> Building regulations are imposed by way of administrative action, as prescribed by section 17 of the National Building Act,<sup>107</sup> in the form of administrative decisions to approve or disapprove building plans or to enforce building regulations. Therefore, if there is any indication of procedural arbitrariness, such arbitrariness will relate to the administrative action and will be adjudicated in terms of PAJA and not under section 25(1) of the Constitution. This situation should be distinguished from instances where a statutory restriction causes a procedurally arbitrary deprivation that does not involve administrative action.<sup>108</sup>

The deprivation caused by a restriction on the right to build may not be substantively arbitrary either. Different measures are used to determine whether a deprivation is substantively reasonable or justified in terms of the aim that it serves. These tests differ according to the nature of the purpose that is served with the regulation and the impact that the regulation has on private property rights. In the case of building and planning regulations that serve the primary aim of promoting

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<sup>106</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. See n 73.

<sup>107</sup> According to s 17 of the National Building Act, the procedural requirements that must be complied with when a building regulation is imposed, entail the following: It must be imposed by the Minister of Economic Affairs and Technology, who must consult with the council (according to the definition of "council" in s 1 of the National Building Act, "council" refers to council as defined in s 1 of the Standards Act), and it must relate to one of the aspects that are listed in s 17(1)(a)-(w) of the National Building Act. Section 17(3)(a) requires that the Minister must also, together with the publication of the building regulation in the Gazette, publish a notice that invites interested persons to object to the building regulation. Furthermore, s 17(3)(b) sets procedural requirements regarding the date that a building regulation will come into operation; s 17(4) provides procedures for exempting an owner from the provisions of a specific building regulation; and s 17(5) imposes a procedure to be followed when removing servitudes or restrictive conditions to promote compliance with or the operation of any national building regulation.

<sup>108</sup> The possibility of a procedurally arbitrary deprivation that does not involve administrative action is mentioned in 5 2 2 3 3.

public health and safety, something closer to a mere rationality test could be applied. However, building regulations that serve less essential social or aesthetic purposes may arguably be subject to stricter controls.<sup>109</sup> Consequently, a building regulation that serves an overridingly important public safety aim will be considered a constitutionally valid deprivation of property if there is proof of a legitimate reason (such as protecting public safety) for the limitation. For example, if a building regulation serves as a precaution against fire, or if it provides resistance against floods, a low level rationality scrutiny will probably be enough to justify it. However, a building regulation that is purely aimed at aesthetical considerations or the protection of existing views will probably not be considered as an essential regulation that directly promotes or protects public health and safety and will therefore possibly be subject to stricter scrutiny. Should a building regulation serve an aesthetic purpose, it becomes more difficult to justify and consequently it is possible that a proportionate balance between the impact of the deprivation on the property owner and the aim that it serves will have to be established. The purpose of a specific building regulation will therefore determine the level of scrutiny that will be applied when deciding whether it constitutes a substantively arbitrary deprivation or not.

A building regulation that restricts B's right to build on her property and has the concomitant effect of preserving the view from A's property may either be aimed at protecting public health and safety or it may be imposed to promote a "fringe public purpose" such as aesthetic preservation, for example to keep the buildings in a

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<sup>109</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 289-290 argues that building and development controls that protect "fringe public purposes such as social and aesthetic building regulation" should be subject to a higher level of scrutiny, while "no more than a low level rationality scrutiny" is required when determining whether a building regulation that serves the function of protecting public health and safety is a justified deprivation of an owner's property.

specific development below a certain height.<sup>110</sup> If it is aimed at protecting public health and safety, it will possibly be subject to a lower-level test that is closer to mere rationality. Therefore, the deprivation of B's right to build will probably be justified reasonably easily and the (indirect) protection that it provides to A's view is possibly going to be relatively strong. If the building regulation that restricts B's building works only serves a social or an aesthetic purpose, the deprivation of B's property will probably require stronger justification in the sense that the effect it has on her rights must be proportionate to this (less important) aim. Consequently, the limitation of B's right may be more difficult to justify and the (indirect) protection that it provides against the obstruction of A's view is possibly not very strong, since the deprivation that it causes for B may more easily be considered arbitrary. In the latter case, the nature and scope of the effect that the restriction has on B's right to build might be more relevant because the purpose of the deprivation is less compelling; in the first case, the public purpose may be so compelling that the impact of the restriction on B's right may be relatively unimportant.

However, in all cases where mere rationality would not be enough and something closer to proportionality is required, the focus of the proportionality enquiry is on the deprivation suffered by B. The protection of A's view is merely a side effect of the regulation. Although the level of scrutiny that will be applied may determine whether A's view will be protected in future or not, she is not substantively entitled to such a view and therefore has no say in the matter. The benefit (view) that she might derive from the restriction on B's right to build will only be a continued advantage if a court finds, considering the importance of the purpose of the regulation and the effect that it has on B, that the building regulation does not

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<sup>110</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 290 refers to social and aesthetic aims as "fringe public purposes".

deprive B of a property entitlement in a way that is inconsistent with s 25(1) of the Constitution.

Restrictive conditions have the same character as building regulations in the sense that they are imposed by provincial ordinances and that they may regulate a property owner's right to build.<sup>111</sup> Building works must comply with the restrictive conditions that are applicable to the relevant property, just like they must comply with the applicable building regulations. Therefore, the question of whether a restrictive condition that restricts an owner's right to build causes an arbitrary deprivation should be treated in the same way as a building regulation that has the same effect. In most cases, restrictive conditions will satisfy the section 25(1) non-arbitrariness test reasonably easily since they are, by definition, legitimate planning tools that place justifiable restrictions on a property owner's use of her property. Even if the restrictions imposed in terms of restrictive conditions have a fairly harsh impact on affected property owners, the deprivation will most likely not be rendered arbitrary, since the purpose of such a deprivation is so strong. Nevertheless, the impact can become so excessive, especially if one property owner is singled out, that it will render the deprivation arbitrary despite the strong public purpose that it serves.

It has been established that a property owner may derive an indirect benefit from the restrictions that building regulations place on neighbouring owners. The protection of the view from a property is an example of such a benefit. It has also been determined that the "strength" of the (indirect) "protection" of an unobstructed

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<sup>111</sup> J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 305-317 reasons that restrictive conditions are planning tools that regulate the planning of a whole neighbourhood. She emphasises that they differ from servitudes because, *inter alia*, unlike servitudes that regulate the relationship between a dominant and a servient tenement, one property serves both as the dominant and as the servient property when a restrictive condition is applicable. Effectively, restrictive conditions have the effect that every owner in a township is simultaneously mutually and reciprocally bound to all other owners of erven in the township.

view depends on the purpose for which the building regulation that provides the protection has been imposed. If the building regulation serves an essential public health or safety purpose, it will be difficult to show that it arbitrarily deprives an owner of the right to use her property freely and therefore the limitation might provide quite strong protection to the view from neighbouring properties.<sup>112</sup> However, if a social or aesthetic aim is served by the regulation, it will be easier to show that it arbitrarily deprives an owner of the right to use her property and the protection of the view from neighbouring properties will be weaker. Although a building regulation may protect the view from a neighbouring property, such protection is not the purpose of the regulation and therefore it is indirect and does not constitute a substantive or directly enforceable right. Nevertheless, property owners and prospective property owners rely on the continued existence of building regulations and zoning schemes. For example, A buys a property with a beautiful view over a vineyard on B's property. A knows that, in terms of the applicable zoning plan, B's use of the part of her property that is planted with vines is restricted to farming activities. Furthermore, building regulations prohibit B from erecting any buildings on the part of her property that lies between A's property and the vineyard. The restriction against the building works is aimed at reducing damage that may be caused by flooding, since that part of B's property is situated on a river bank. When A buys the property, she believes that the building regulations that apply to B's property will prevent B from erecting any building works on her (B's) property that will obstruct her (A's) view of the vineyard. She is also under the impression that the applicable zoning plan will prevent B from removing the vineyard, or at least, from erecting unsightly buildings or structures on

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<sup>112</sup> J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 249 argues that zoning is a legitimate deprivation of property in terms of s 25(1) of the Constitution – provided that it is instituted in terms of law of general application and that it complies with the non-arbitrariness requirement – since it serves the public purpose of protecting health, safety and welfare.

that part of her property. The constitutional validity of the deprivation of B's right to use her property freely will depend on whether or not the building and zoning regulations are substantively justified.

By imposing the building and zoning regulations that apply to B's property, the state plays the role of public protector. The question of whether the reasons that the state provides for these limitations are sufficient, depends on the specific public aim that is protected. The restriction on the use of the vineyard part of B's property to agricultural activities is a result of the specific zoning of B's land. According to J van Wyk, "[zoning] determines the specific uses to which specific land may be put"<sup>113</sup> and serves the purpose of protecting public health, safety and welfare.<sup>114</sup> Limiting the use of the vineyard part of B's property to agricultural activities ensures that farming activities and residential use are separated, which has certain health benefits. Policy considerations, such as the protection of food security and employment opportunities for unskilled labourers, and possibly even the preservation of visually pleasing landscapes, protect agricultural land against development.<sup>115</sup> The restrictions that the zoning requirements place on B's property will therefore possibly be subject to something closer to a rationality test, since they serve a compelling purpose, namely the protection of public health and safety. Accordingly, it has to be determined whether there is sufficient reason for the deprivation suffered by B because she cannot build freely. J van Wyk reasons that zoning is indeed a legitimate deprivation

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<sup>113</sup> J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 252.

<sup>114</sup> J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 249.

<sup>115</sup> Although the Subdivision of Agricultural Land Act 70 of 1970 does not specifically state these policy considerations, s 4(1)(a)(ii) of the Act determines that an application for the Minister of Agriculture's consent regarding the subdivision of agricultural land shall "be accompanied by such plans, documents and information as may be determined by the Minister" and s 4(2)(a) empowers the Minister to set further conditions that are not stated in the Act. These provisions have the effect that, in practice, submissions for the amendment of land zoned for agricultural purposes must include, amongst others, a visual impact and a heritage study. Accordingly, considerations such as the visual impact that a proposed re-zoning may have are taken into account before permission for such an amendment is granted.

of property, since it serves the purpose of protecting public health, safety, welfare and morals.<sup>116</sup> Therefore, the restriction on B's right to use her property probably constitutes a valid deprivation of her property, since the purpose of the restriction is sufficient reason for the deprivation that she suffers. If the restriction on the use of B's property limits the development of her property for a purely social or aesthetic aim, something closer to a proportionality test will be applied to determine whether the deprivation suffered by B is proportionate to the social and aesthetic aims that it serves, but the building regulation that restricts B's right to build on the specific part of her property that is situated on a river bank serves a public health and safety purpose. It protects the health and safety of the public that is exposed to flooding in the river, either because of buildings on the river bank or nearby areas,<sup>117</sup> or through drinking water that comes from the river. These reasons seem to be sufficient justification for the deprivation of B's property.

Although these regulations limit B's use and enjoyment of her property, they are properly authorised by law of general application that is aimed at the protection of legitimate and important public purposes. B may still build on her property, provided that the building works are above the flood mark. She may for instance perhaps also use the property that lies below the flood mark, as long as she doesn't erect a structure or building on that part. Consequently, the deprivation suffered by B serves

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<sup>116</sup> J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 249 refers to J Dukeminier & JE Krier *Property* (3<sup>rd</sup> ed 1993) 1005, who describe zoning as "the power of government to protect health, safety, welfare and morals". Van Wyk qualifies her statement that zoning constitutes a valid deprivation of property, stating that zoning is a valid deprivation provided that it is done in terms of law of general application and complies with the non-arbitrariness requirement.

<sup>117</sup> Structures that are erected under a determined flood mark expose current property owners, as well as future buyers and tenants, to possible flood damage. A future buyer or tenant may be unaware of the fact that their residence exceeds the flood mark and suffer the financial damage that is caused by floods.

an important public purpose, which can be balanced with the relatively light burden (restriction) that it places on B's right to use her property.<sup>118</sup>

Deprivations must serve an essential aim if the affected right is ownership in land.<sup>119</sup> B's right is ownership of land in this example, but the applicable building regulations and zoning restrictions serve the essential aims of protecting public health and safety. Furthermore, the restrictions imposed by building regulations and the zoning plan neither deprive B of ownership, nor does it deprive her of all uses of her property. The building restriction merely prohibits the erection of buildings on a specific part of her property, while the zoning plan limits the use of her property. The building and zoning regulations are therefore not comprehensive deprivations of B's property rights. In terms of the *FNB* criteria, a deprivation will be justified in circumstances where the restriction that it causes is not disproportionate to the aim that it serves and where it does not cause an imbalance in the complex set of relationships that are at play. There is a proportionate relationship between the

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<sup>118</sup> The restriction of B's property rights is justified in terms of the police-power principle because, although it restricts the use of her property and its enforcement may cause financial loss, the regulations do not place an unreasonable burden on B. Her right of ownership is merely balanced with the public's interests. In terms of the US approach, the restriction is not too heavy because it does not deprive the owner of all economic use of the property. AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 215-216 and 355-359 and AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 427-440 explains that according to the US approach, a regulation is considered to go "too far" and becomes a *per se* regulatory taking that requires compensation when it involves a permanent physical invasion or occupation of the property; deprives the owner of all economic use of her property; or destroys a core property right. If a regulation does not have any of these effects it may nevertheless be considered a regulatory taking based on certain case-specific considerations. German law also requires that a regulatory limitation on private property must be validly authorised and must comply with the proportionality principle. According to AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 365-366 n 109, the proportionality principle that applies with regard to regulatory limitations requires a proportionate balance between the interests of the individual and the social interest. Furthermore, this principle

"is applied with attention for the relative proximity between the right and personal liberty: the closer the property right is involved in securing personal liberty of its holder, the fewer opportunities there are for the legislature to interfere with it; the further a specific property right is removed from the personal liberty of its holder, the easier it is to regulate it ...".

Insofar as B's use of the part of her property that is planted with vineyard is involved with agricultural activities, it is not directly involved with B's personal liberty (it does not affect the use of her home) and restrictions on it would, in terms of the German approach, more easily be justified.

<sup>119</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100(e).

objectives of the restrictions on B's right of ownership and the relatively small impact that they have on her property rights. Therefore, the deprivation of B's property rights amounts to a justified exercise of the state's police-power.<sup>120</sup>

The constitutionality of a deprivation suffered by a property owner whose right to build on her property is restricted by building regulations depends on the specific circumstances of a given case. The point of departure is that the right to build is subject to permission and regulation in any event and that regulatory measures are therefore generally easily justified. However, factors such as the purpose of a building regulation and the impact that it has on an individual property owner will be considered to determine, firstly, which test should apply when deciding whether there are sufficient reasons for the deprivation and, secondly, whether the result of the test indicates that the deprivation is in line with section 25(1).

### 5 2 3 3 *Other legislation*

Apart from the National Building Act, other legislation may also restrict a property owner's right to build on her property, thereby directly or indirectly protecting the view from or to a specific property. An example of such legislation is section 74 of the National Ports Act 12 of 2005 ("the National Ports Act") in terms of which the National Ports Authority is, *inter alia*, responsible for maintaining adequate and efficient lighthouses to assist in the navigation of ships. The statute creates a statutory duty that obliges the National Ports Authority to operate and maintain lighthouses. According to the ruling in *Transnet Ltd v Proud Heritage Properties*<sup>121</sup>

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<sup>120</sup> The police-power principle is discussed in 5 2 1.

<sup>121</sup> *Transnet Ltd v Proud Heritage Properties* (405/08) [2008] ZAECHC 155 (5 September 2008).

(“*Transnet*”), this duty includes an obligation to prevent the obstruction of the view from the sea to a lighthouse signal.<sup>122</sup>

Does a statute like the National Ports Act that limits a property owner’s right to develop her property (to protect the existing view to or from a specific property or object) deprive this owner of property in a way that is inconsistent with section 25(1) of the Constitution? If legislation has the effect of prohibiting a property owner from building on her property, such as the relevant provision in *Transnet*, such a property owner’s right to build on her property is affected. This right (to use, build and develop one’s property) constitutes a property interest for purposes of section 25(1) and if such a right is restricted, the property owner suffers a deprivation of property. The *FNB* methodology requires that, in instances where there is a deprivation of property, it must be established whether such a deprivation is in line with section 25(1) of the Constitution.

The requirements for a constitutionally valid deprivation of property is, in terms of section 25(1) of the Constitution, that the deprivation must be authorised by law of general application and that the deprivation may not be procedurally or substantively arbitrary. The first respondent in *Transnet* suffered a deprivation of its property because it was prohibited from developing its property in the way that it wanted to. This deprivation was authorised by section 74(1)(f) of the National Ports Act. This provision authorises the National Ports Authority to maintain lighthouses and navigational aid to ensure safe and effective port traffic control. It constitutes law of general application because it is national legislation that is formally valid, clear and generally applicable.

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<sup>122</sup> *Transnet Ltd v Proud Heritage Properties* (405/08) [2008] ZAECHC 155 (5 September 2008) paras 11 and 13.

The question of whether a statutory provision that deprives an owner of a property right is procedurally arbitrary in terms of section 25(1) of the Constitution depends on its specific wording. In certain instances, a statutory provision may arguably be considered procedurally arbitrary in terms of section 25(1) of the Constitution. This will be the case where such a provision directly, without involving any administrative action, deprives a property owner of a property right.<sup>123</sup> For example, if legislation prohibits the erection of any buildings or of buildings of a certain height in a certain radius from lighthouses, without giving affected owners a right to object or to apply for exceptions, it may be considered to constitute a procedurally arbitrary deprivation of property without involving administrative action. However, if a deprivation is authorised by legislation but executed through administrative action - for example, in *Transnet* the National Ports Authority had a statutory duty to take steps to maintain the views to lighthouses; these steps would constitute administrative action - its constitutional validity will, according to the subsidiarity principle, be determined in terms of PAJA and section 33 of the Constitution and not in terms of section 25.<sup>124</sup> A deprivation of property by a statutory provision will therefore only be considered procedurally arbitrary in terms of section 25(1) of the Constitution if it places a restriction on an owner's property right without providing for any administrative involvement.

When determining whether a statutory provision that deprives a property owner of a right is substantively arbitrary, it has to be established, in terms of the criteria laid down in *FNB*, whether there is sufficient reason for such a deprivation. The court in *FNB* argued that a complex set of relationships has to be considered to establish

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<sup>123</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 269 argues that although it is unclear what will constitute as "procedurally unfair" deprivations in terms of s 25(1), deprivations that are directly caused by legislation will probably fall into this category (and not in the category to be adjudicated in terms of PAJA and s 33 of the Constitution).

<sup>124</sup> See n 77 for a discussion of the subsidiarity principles.

whether there is indeed sufficient reason for a deprivation.<sup>125</sup> If this reasoning is applied to the facts in *Transnet*, the deprivation of the first respondent's right to develop its property probably does not constitute a substantively arbitrary deprivation. In this case, the first respondent was prohibited from erecting an apartment building in front of the Richmond beacon, because such a development would interfere with the navigational aid provided by the beacon and therefore make it unsafe for ships to enter the Port Elizabeth port. In terms of section 74(1)(f) of the National Ports Act, the National Ports Authority is statutorily enjoined to ensure the "safety of navigation and shipping in ports ... and [to] maintain adequate and efficient lighthouses and other navigational aids". The prohibition on the first respondent's proposed development was in terms of this provision and it was specifically aimed at maintaining adequate and efficient navigational aids.

The relationship between the deprivation (building restriction) and its aim (maintaining an unobstructed view to the Richmond beacon to ensure safe port traffic) shows that there is sufficient reason for the deprivation. Furthermore, there is a vertical relationship between the state (National Ports Authority) and the individual property owner,<sup>126</sup> in terms of which the state acts in a regulatory capacity. In this case, the state acts as public protector and therefore the question of whether the reasons for the deprivation are "sufficient" depends on the specific public purpose that is protected. The object of the National Ports Act is to promote "an effective and productive ports industry".<sup>127</sup> The National Ports Authority aims to achieve this purpose by performing its duties in a manner that "does not jeopardise the national

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<sup>125</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

<sup>126</sup> The first respondent, Proud Heritage Properties.

<sup>127</sup> Section 2(a) of the National Ports Act 12 of 2005.

interest”.<sup>128</sup> It also aims “to enable port users to access the port in the most effective way possible”<sup>129</sup> and “to promote and undertake the necessary measures to enhance safety and security of life and property in ports”.<sup>130</sup> The provision that authorises the deprivation of the first respondent’s right to develop its property therefore serves an essential public safety aim. Consequently, there is a sufficient rational link between the purpose of the deprivation (safety of port traffic) and the means chosen to promote it (a restriction on building works in the vicinity of a lighthouse) to justify the deprivation. Given the overriding importance of the public purpose, the deprivation would in this case probably be justified by something approaching mere rationality, since the effect that the deprivation would have on the affected landowner is probably irrelevant in view of the goal of the regulatory scheme.

The *Transnet* decision shows that a deprivation of the right to develop one’s property that is caused by an explicit or an implicit statutory duty requiring an unobstructed view to or from a property or a specific object, may be justified in terms of section 25(1) of the Constitution if the relevant provision satisfies the non-arbitrariness test.

#### 5 2 3 4 *Departures from building regulations or a zoning scheme*

A prospective property owner often relies on the continued existence of the building regulations and zoning scheme that regulate building works on properties in the area where she wants to buy. This may create the expectation that the existing views observed from properties in such an area will continue to exist insofar as they are

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<sup>128</sup> Section 12(a) of the National Ports Act 12 of 2005.

<sup>129</sup> Section 12(c) of the National Ports Act 12 of 2005.

<sup>130</sup> Section 12(h) of the National Ports Act 12 of 2005.

protected in terms of the applicable building regulations and zoning scheme.<sup>131</sup> For instance, when A buys a property, she knows that her neighbour (B) is restricted, in terms of building regulations and the relevant zoning scheme, to erect buildings on her (B's) property that would obstruct the existing view from her (A's) property. A therefore relies on the continued existence of the restrictions that the building regulations and zoning scheme impose on the use of B's property for the protection of the existing view from her own property. Will A suffer a deprivation if there is a change in the relevant building regulations or zoning scheme? In other words, does A have any right to enforce her expectation of the continued existence of the building regulations and zoning scheme?

In terms of section 3(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), procedural fairness is required for any administrative action that "materially and adversely affects the rights or legitimate expectations of any person".<sup>132</sup> Therefore, if A can prove that this previously existing situation (the application of the building regulations and zoning scheme on B's property) gave her a right or a legitimate expectation that the existing building regulations or zoning scheme would remain unchanged, the decision to approve such changes would be scrutinised in terms of PAJA to establish whether it complied with the requirement of procedural fairness. Since it is hard to conceive of a reason why anybody would have the right that an existing zoning scheme or set of building regulations should remain unchanged, the protection that owners enjoy in this regard is restricted to

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<sup>131</sup> In *Erasmus v Blom* 2011 JDR 0321 (ECP) para 37, Revelas J reasoned that although the general position is that a property owner does not have an inherent right to the existing view from her property, such a right may be enforced in circumstances where the views from a properties in a specific development are the primary reasons for buying the properties. However, he qualifies this statement, arguing that in such circumstances, there would be regulations in place that protect the existing views from the properties in the development. This reasoning confirms that a property owner may enforce the right to the existing, unobstructed view from a property insofar as it is protected in terms of building regulations.

<sup>132</sup> Section 3(1) of PAJA. See C Hoexter *Administrative law in South Africa* (2<sup>nd</sup> ed 2012) 390-398.

administrative law and probably to situations where they can prove a legitimate expectation that a certain regulatory or zoning scheme or rule would remain unchanged.

However, the situation is different when it comes to re-zonings and departures from the existing zoning scheme. A, as an affected property owner, indeed has the right to be informed of, to comment on or to object against a neighbour's application for the re-zoning of her property or for a departure from the applicable zoning scheme or building regulations.<sup>133</sup> However, she (A) does not have a right to prevent such changes and will therefore not be deprived of any property rights if B's application for any of these changes is approved. Nevertheless, if B's application is approved without any notice to A or without giving A the opportunity to comment on or to object against such approval, A would have been deprived of her right to be heard. The approval of B's application might consequently be set aside. If A provides sufficient reasons why the property should not be re-zoned or why the applicable zoning scheme should not be departed from, B's application may fail and the obstruction of the existing view from A's property might be prevented permanently. If she does not provide sufficient reasons, B's application for re-zoning or for a departure may be approved, possibly with qualifications or restrictions. In the latter instance, A could at most succeed in temporarily stalling the building works that would obstruct the existing view from her property, but she would not be entitled to the continued existence of such a view.<sup>134</sup>

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<sup>133</sup> *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 130 and 136. See also J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 354, 357 and 395-396 and the discussions in 3 2 2 2 and 3 2 2 3.

<sup>134</sup> See 3 2 3 for a more extensive discussion of how a property owner can protect the existing view from her property by relying on alternative strategies to prevent building works on neighbouring properties.

According to Corbett CJ in *Administrator, Transvaal and Others v Traub and Others*,<sup>135</sup> a

“[l]egitimate, or reasonable, expectation, may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.”

If A can prove that the relevant local authority had expressly promised not to approve any application for a departure from the building regulations or zoning scheme that is applicable to B’s property, or if she can prove that there is an existing regular practice that applications for such departures regarding property in the vicinity of B’s property are not granted approval, she (A) can argue that the approval of B’s application to have her (B’s) property re-zoned or for a departure from the applicable zoning scheme deprived her of the legitimate expectation that the pre-existing situation (the way B’s property was zoned and building regulations applied to her property) would continue. Should A successfully prove that the approval of B’s application “materially and adversely” affected her right to be heard or her legitimate expectation that the building regulations and zoning scheme would not change, the relevant decision maker would have to indicate that the approval complies with the procedural fairness requirement of section 3(1) of PAJA.

A change in building regulations or zoning plans may indeed deprive property owners, to whose properties they apply, of certain property rights. For example: A buys a property on which she wants to erect an eight meter high building. The applicable building regulations stipulate that houses in A’s neighbourhood may not

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<sup>135</sup> *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) 756H-I. C Hoexter *Administrative law in South Africa* (2<sup>nd</sup> ed 2012) 394-396 discusses the development of the legitimate expectation doctrine in the context of procedural fairness of administrative action. See also J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 177.

exceed a height of ten meters. After A bought the property but before she submits buildings plans, the building regulations change. The implication of the amended regulations is that A may now only construct a house of six meters high. Does A suffer a deprivation of a property right that is inconsistent with section 25(1) of the Constitution?

The first question relates to the time when A acquires a right to erect a building of ten meters high. Does she acquire this right in terms of the zoning scheme (when she buys the property) or in terms of her approved building plans (when her building plans are approved)? If the change in the building regulations or zoning scheme occurs after A's building plans have been approved, the change will indeed deprive her of a property right. However, if the change occurs after A has bought the property but before her building plans are approved, the question of whether she suffers a loss of a property right is moot. A zoning scheme arguably only entitles a property owner to apply for approval of building plans that comply with the prescribed limitations. If this is the case, an affected property owner is probably not deprived of a right or a legitimate expectation if the building regulations or zoning scheme changes before she submitted an application for the approval of her building plans. However, it may also be argued that a property owner does already acquire a legitimate expectation to build within the parameters of the existing legal framework when she buys a property.

The amended regulation may therefore affect a property right and deprive a property owner of the right to use her property freely. The determining question in such a deprivation inquiry is whether or not the change in the regulation promotes an important public purpose. If such a change serves an essential public purpose such as public health and safety, something approaching a thin rationality test will apply.

The change, although depriving A of her right to use her property in the way that she expected that she would, will probably be considered justified in terms of section 25(1) of the Constitution as soon as it is proven that it serves an overriding public purpose such as public health and safety. However, if the change in the building regulation or zoning plan serves a less important aim such as aesthetic preservation, something closer to a proportionality test will apply and the effect that the change has on A's rights must be taken into account. It will be more difficult to show that the deprivation that A suffers is proportionate to the (less important) aims that it serves and the reasonableness of the deprivation will be subject to stricter scrutiny.

#### 5 2 3 5 *Procedural difficulties*

Property owners have the right to be protected from unlawful building works on neighbouring properties.<sup>136</sup> However, the phraseology of section 7(1)(b) of the National Building Act creates confusion in this regard.<sup>137</sup> According to this provision, a building control officer must refuse to approve building plans if she is of the opinion that the proposed building will “probably or in fact” disfigure the area,<sup>138</sup> be unsightly or objectionable,<sup>139</sup> or derogate from the value of neighbouring properties.<sup>140</sup> The section creates the impression that property owners have the right to object to building plans of neighbouring owners if the proposed buildings would have any of these effects. This is problematic. Case law indicates that objections based on section 7(1)(b)(ii)(aa)(aaa), 7(1)(b)(ii)(aa)(bbb) or 7(1)(b)(ii)(aa)(ccc) of the National

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<sup>136</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 294 argues that the state's police power includes a duty to protect neighbours' rights against unlawful building.

<sup>137</sup> Section 7(1)(b) of the National Building Act is also considered in 3 3 3, with regard to the fact that it has been used as an alternative strategy to prevent building works on neighbouring properties in attempts to protect the existing view from a property.

<sup>138</sup> Section 7(1)(b)(ii)(aa)(aaa) of the National Building Act.

<sup>139</sup> Section 7(1)(b)(ii)(aa)(bbb) of the National Building Act.

<sup>140</sup> Section 7(1)(b)(ii)(aa)(ccc) of the National Building Act.

Building Act are often used in an attempt to frustrate neighbouring property owners' rights to build on their properties, sometimes with the incidental effect of protecting an existing view from the objector's property.<sup>141</sup> These sections seem to give a wide and undefined discretion to a building control officer. Consequently, it is seemingly possible for a property owner who wants to prevent the erection of a building on a neighbouring property, in an effort to protect her existing view, to object against the discretion exercised by the building control officer in terms of section 7(1)(b)(ii)(aa).

Conflicting judgments about the proper interpretation of the grounds for refusing a building plan in terms of section 7(1)(b)(ii)(aa) complicate the matter. In *Walele v The City of Cape Town and Others*<sup>142</sup> ("Walele"), the Constitutional Court interpreted section 7 to mean that a decision-maker may only approve building plans when it is satisfied that the relevant legal requirements have been adhered to, and that none of the disqualifying factors in section 7(1)(b)(ii) will ensue once the proposed building has been erected.<sup>143</sup> The court further stated that approval of any plans that facilitate the erection of a building that will cause one of the unwanted outcomes may be set aside on review. Accordingly, in order to have the approval of building plans set aside, an applicant would, for example, only have to prove that the erection of the proposed building might possibly diminish the value of her property. Therefore, this approach protects the interests of neighbouring property owners very strongly in that they only have to raise the possibility that the negative effects enumerated in the Act may result from the building being completed.<sup>144</sup>

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<sup>141</sup> See 3 3.

<sup>142</sup> *Walele v The City of Cape Town and Others* 2008 (6) SA 129 (CC).

<sup>143</sup> *Walele v The City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 54-55.

<sup>144</sup> The Constitutional Court's interpretation of s 7 of the National Building Act in *Walele v The City of Cape Town and Others* 2008 (6) SA 129 (CC) is also discussed in 3 2 1.

The Constitutional Court's interpretation of section 7 in *Walele*<sup>145</sup> created the impression that a landowner has the right to have the approval of building plans reviewed if she merely raises a reasonable prospect that the erection of the proposed building will affect the market value of her property detrimentally.<sup>146</sup> The Supreme Court of Appeal rejected this interpretation in *True Motives 84 (Pty) Ltd v Madhi and Another*<sup>147</sup> ("*True Motives 84*"). Deciding that the Constitutional Court's interpretation of section 7 was *obiter*,<sup>148</sup> the court in *True Motives 84* determined that a local authority may only reject building plans on the basis of section 7 if it is satisfied that, once the proposed building is erected, it will definitely or probably have one of the undesirable effects. The implication of this approach is that a neighbouring owner will not be able to attack a local authority's approval of building plans by merely proving that there exists a possibility that one of the undesirable effects would eventuate. The Constitutional Court in *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another*<sup>149</sup> ("*Camps Bay Ratepayers*") acknowledged that the interpretation of section 7(1) of the National Building Act is an important constitutional matter, since it concerns the exercise of a vital public power, namely the approval of building plans.<sup>150</sup> Although it was faced with the conflicting decisions in *Walele* and *True Motives*, the court refused to clarify

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<sup>145</sup> According to the majority judgment of the Constitutional Court in *Walele*, the correct interpretation of s 7(1)(b) of the National Building Act prohibits a local authority from approving building plans if there is a possibility that the proposed building would, for example, affect the market value of neighbouring properties. Therefore, even if a local authority is merely concerned that the building might have one of the negative outcomes that is provided for in s 7(1)(b)(ii), the plans have to be rejected.

<sup>146</sup> AJ van der Walt *The law of neighbours* (2010) 352-353.

<sup>147</sup> *True Motives 84 (Pty) Ltd v Madhi and Another (Ethekwini Municipality as amicus curiae)* 2009 (4) SA 153 (SCA) paras 21-23, 33 and 35-39.

<sup>148</sup> The Supreme Court of Appeal in *True Motives 84 (Pty) Ltd v Madhi and Another (Ethekwini Municipality as Amicus Curiae)* 2009 (4) SA 153 (SCA) paras 35-39 specifically mentioned that paras 32, 63 and 55 of the *Walele* judgment contain wrong statements in law and are *obiter*.

<sup>149</sup> *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC).

<sup>150</sup> *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) para 27.

what the interpretation of section 7(1)(b) should be, since it had to decide upon objections based on a different provision.<sup>151</sup>

These cases illustrate that there is uncertainty about the correct interpretation and application of section 7(1). They also show that section 7(1)(b)(ii) creates the opportunity for a property owner to prevent or delay building works on a neighbouring property. In terms of the decision in *Walele*, an owner who does not have a substantial ground to prevent her neighbour from erecting a building on her property may permanently or temporarily prevent the construction with an attack on the discretion exercised in terms of section 7(1)(b)(ii).<sup>152</sup> This decision has the effect that property owner A can successfully object to the approval of neighbour B's building plans if she can prove that the erection of the proposed building will possibly diminish the value of her property. Such an objection would halt B's building project and consequently hinder her right to build on her property. This interpretation of section 7(1)(b)(ii) creates room for a property owner (A), who does not have any right to prevent the erection of a building on a neighbour's (B's) property, to nevertheless delay and consequently frustrate B's right to build. Van der Walt reasons that

“Protecting the rights of neighbours against unlawful building is an important part of the state's police power in the sphere of regulatory control over development and building. At the same time it is important not to allow lawful building work to

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<sup>151</sup> The applicants in *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) based their attack on s 7(1)(a) of the National Building Act. See AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 295 fn 346.

<sup>152</sup> The *Walele* court's interpretation of s 7 of the National Building Act may have the effect that a property owner may temporarily or permanently prevent the approval of a neighbour's building plans that proposes building works that would obstruct the existing view from her own property. Nevertheless, it is argued in 3 3 3 2 that, as was indicated in subsequent decisions, s 7 of this Act does not provide a remedy for a property owner who attempts to prevent the erection of buildings on a neighbouring property with an attack on the relevant local authority's decision to approve building plans. Accordingly, this provision in the National Building Act does not create a substantive right to prevent building works purely on the basis of the fact that such buildings would interfere with the existing, unobstructed view from a neighbouring property.

be held up, perhaps indefinitely, by spurious and litigious objections of neighbours.”<sup>153</sup>

It has to be established whether the (temporary or indefinite) restriction of B’s right to use (to build on) her property that is caused by A’s objection to B’s building plans amounts to a deprivation of B’s property rights. If it does, is it a justified deprivation in terms of section 25(1) of the Constitution?

The *FNB* test requires that a deprivation enquiry must start with the questions of whether a property right has been affected, and whether this interference amounts to a deprivation. B’s right to use (build on) her property will be affected if a court upholds A’s objection against the approval of the relevant building plans.<sup>154</sup> The effect of the court upholding A’s conduct (objection to the approval of her building plans) certainly interferes with B’s property interests to such a degree that, in terms of the wide approach introduced in *FNB*, it amounts to a deprivation (of her right to build on her property).<sup>155</sup>

To determine whether such a deprivation is in line with section 25(1) of the Constitution, it must be established whether it is procedurally or substantively arbitrary. The first question is whether a specific deprivation is procedurally arbitrary in terms of section 25(1). A statutory provision that authorises a deprivation will only be considered procedurally arbitrary in terms of section 25(1) of the Constitution if it directly deprives an owner of a property right, without involving any administrative

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<sup>153</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 294.

<sup>154</sup> The right to build on one’s property is considered “property” for purposes of s 25(1) of the Constitution. See 5 2 2 1.

<sup>155</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57 per Ackermann J, suggested that a wide approach should be followed when deciding whether a specific interference with a property interest amounts to a deprivation. According to his reasoning, almost any interference with property interests will constitute a deprivation for purposes of s 25(1) of the Constitution. See 5 2 2 2.

action.<sup>156</sup> If such an authorising provision does involve administrative action, the deprivation cannot be rendered procedurally arbitrary in terms of section 25(1), but it may be considered procedurally arbitrary in terms of PAJA.<sup>157</sup> In the case where a property owner suffers a deprivation of her right to build because a neighbour attacked the approval of her building plans, administrative action is involved in the form of the exercise of the administrative discretion to either approve or reject the plans. Consequently, the deprivation of a property owner's right to build because of a neighbour's objections to the approval of her building plans would not be procedurally arbitrary in terms of section 25(1) of the Constitution, although it may in a given case be procedurally arbitrary in terms of PAJA.

The second question is whether a specific deprivation is substantively arbitrary. In terms of *FNB*, a deprivation of a property owner's right to build will be substantively arbitrary if the authorising provision does not provide sufficient reason for it.<sup>158</sup> The *FNB* decision also indicates that a complex set of relationships has to be evaluated in every individual case to establish whether there is sufficient reason for a deprivation not to be considered substantively arbitrary. This evaluation involves that the purpose of every deprivation has to be considered. If the purpose of the deprivation of an owner's right to build is very important, something approaching a mere rationality test can be applied to determine whether there is sufficient reason for a deprivation not to be considered arbitrary.<sup>159</sup> Such a rationality test will only

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<sup>156</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 269. See 5 2 2 3 3.

<sup>157</sup> C Hoexter *Administrative law in South Africa* (2<sup>nd</sup> ed 2012) 390-406 discusses the requirement, set out in s 3(1) of PAJA, that administrative action must be procedurally fair.

<sup>158</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. See 5 2 2 3 3.

<sup>159</sup> In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100(g), Ackermann J distinguished between situations where "a mere rational relationship" between the impact of a deprivation and its purpose will satisfy the requirement for "sufficient" reasons and

require a rational link between the purpose of the deprivation and the means chosen to promote it. The effect that the deprivation has on the owner is not taken into account and a balance between the purpose and impact is not sought. However, if a deprivation does not serve an all-important aim, for example if a property owner's right to build on her property is restricted to create a visually pleasing neighbourhood, something approaching a stricter proportionality test will be applied to determine whether there are sufficient reasons for the deprivation not to be considered substantively arbitrary. A proportionality test requires a proportionate balance between the impact of a deprivation and its purpose. Accordingly, an extensive deprivation must serve an important purpose, whereas a less severe deprivation does not have to serve an equally essential aim.<sup>160</sup>

The deprivation suffered by a property owner whose building works are stalled because a neighbouring owner attacked the approval of her building plans on the basis of section 7 serves the purpose of re-evaluating the relevant local authority's decision to approve such plans. Effectively, such an attack is primarily aimed at promoting the attacker's personal interest in having the exercise of a local authority's discretion set aside in order to ensure that the effect that the approval of the relevant building plans may have on the enjoyment and value of her (the attacker's) property is taken into account.<sup>161</sup> Such a deprivation therefore does not serve an essential purpose, for example the protection of public health and safety, but is aimed at preserving the alleged aesthetic enjoyment or market value of one or a few

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circumstances where there must be a proportionate link between the effect of a deprivation and the aim that it serves. See AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 238-245.

<sup>160</sup> The difference between a rationality test and a proportionality test for determining whether there is sufficient reason for a deprivation not to be rendered arbitrary is discussed in 5 2 2 3 3.

<sup>161</sup> Such attacks are based on the reasoning that in exercising its discretion to approve building plans, a local authority should, in terms of s 7(1)(b)(ii)(aa)(aaa), (bbb) and (ccc) of the National Building Act, consider the effect that the approval of the plans will have on the aesthetic enjoyment and value of neighbouring properties.

neighbouring properties. Because of the relatively unimportant aim that the deprivation serves, something closer to a proportionality test has to be applied in these cases to determine whether there is sufficient reason for the deprivation to be justified in terms of section 25(1) of the Constitution. Accordingly, the impact of the deprivation has to be considered to establish whether there is a proportionate balance between the aim of the deprivation and the effect that it has on an affected property owner.

If the effect of the attack on the approval of building plans is that a property owner's (A's) right to build is merely temporarily frustrated (because she is prevented from commencing with building works), A does not necessarily suffer a severe deprivation of her property rights. Therefore, there may well be a proportionate balance between the rather unimportant aim of the deprivation (the personal interest in preserving the aesthetic enjoyment and value of a property) and the relatively slight impact that the deprivation has on A's property rights (her right to build is frustrated temporarily).

Perhaps more important in this regard is the fact, established in several recent decisions,<sup>162</sup> that the interpretation of section 7 on which this whole argument is based may be faulty because the market value of property is not affected by the loss of an unprotected, existing view from that property. If the logic of these decisions is followed, the argument considered above might possibly collapse altogether and a section 25(1) analysis would be unnecessary.

Property owners have also attacked the approval of neighbours' building plans on the ground that there was a procedural irregularity in the approval of such plans. If evaluated in terms of the *FNB* methodology, the deprivations caused by these

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<sup>162</sup> See 3 3 3.

attacks will have the same results as those focused on a decision maker's discretion with regard to the questions of whether an identifiable property interest is involved, whether there has been a deprivation and whether the deprivation is procedurally arbitrary. However, the primary aim of an attack based on a procedural irregularity is to ensure proper administrative procedure, which will benefit the public at large. An attack on the approval of building plans on the ground of a procedural irregularity therefore serves a more important aim than an attack based on the exercise of a local authority's discretion. However, although a deprivation (restriction of the right to build) that is aimed at ensuring proper administrative procedure may benefit the public at large it does not override the primary aim of protecting public health and safety (which building regulations and legislation promote). Therefore, the deprivation of a property owner's right to build due to an attack on the approval of her building plans based on a procedural irregularity will probably be scrutinised in terms of something closer to a proportionality test, taking full account of the effect that the deprivation has on the affected owner. The proportionality test applied in such an instance will at least be less strict than that which will be applied when an attack on the approval of a neighbour's building plans based on the exercise of a discretion deprives such a neighbour of her right to build. Accordingly, the deprivation of a property owner's right to build (the fact that her building works is stalled pending the evaluation of such an attack) that is caused by an attack, based on a procedural irregularity, on the approval of her building plans will only be legitimate in terms of section 25(1) if there is a proportionate balance between the impact that it has on the individual owner (the temporary restriction of her right to build and the loss caused by it) and the purpose that it serves (ensuring proper administrative procedure). Nevertheless, because the purpose of ensuring proper

administrative procedure is more important than the purpose of preserving aesthetic considerations through an attack on the exercise of a local authority's discretion, a deprivation caused by an attack based on a procedural irregularity will be more easily justified than an attack based on the exercise of a discretion.

In *Camps Bay Ratepayers' and Residents' Association v Harrison*,<sup>163</sup> the first respondent, Ms Harrison, bought a property with the idea to demolish the existing single storey cottage and erect a three storey house. She submitted building plans, which were approved by the Municipality of the City of Cape Town. After she had commenced with building works in accordance with the approved building plans, the applicants<sup>164</sup> objected to the Municipality's decision to approve the plans. They were successful with proceedings to stop the building works and Ms Harrison submitted revised building plans that were again approved by the local authority. The applicants turned to the courts to have approval of the revised plans set aside but they were unsuccessful. The Supreme Court of Appeal dismissed their application to have the approval of the final set of revised plans set aside and the Constitutional Court refused to grant them leave to appeal.<sup>165</sup>

The Supreme Court of Appeal<sup>166</sup> considered a complex set of relationships that were relevant to the circumstances under which Ms Harrison constructed the building works. It considered the fact that Ms Harrison acted in reliance upon the approval of building plans, that she had already built a substantial structure, and the fact that the litigation costs she incurred because of the applicants' attack "was quite

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<sup>163</sup> *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA).

<sup>164</sup> The first applicant, the Camps Bay Ratepayers' and Residents' Association, is an association that safeguards the interests of residents in certain neighbourhoods of Cape Town. The second applicant, PS Booksellers (Pty) Ltd, is the owner of a neighbouring property, diagonally behind Ms Harrison's property.

<sup>165</sup> AJ van der Walt "Constitutional property law" (2010) 4 *Juta's Quarterly Review* para 2 3 1.

<sup>166</sup> *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA).

unrelated to the encroachment over the building line”.<sup>167</sup> It decided that there was not a proportionate relationship between the impact that the deprivation brought about by strict enforcement of the regulations would have on the first respondent (the frustration of her right to build and an order to demolish completed building works) and the aim of the deprivation (to enforce building regulations and title deed conditions). It held that “there is not the slightest prospect that the infraction [completed building works that encroached upon the building line] will impact in any meaningful way on the aesthetics or the future development of Camps Bay”.<sup>168</sup> Therefore, the deprivation (forcing her to demolish completed building works that constitute an “infraction”) was not considered proportionate to the aim (the protection of aesthetics through the enforcement of building regulations and title deed conditions) that it would serve. In terms of *FNB*, a deprivation is substantively arbitrary if there is not a sufficient reason for it. In *Camps Bay Ratepayers’ and Residents’ Association v Harrison*<sup>169</sup> the court applied a proportionality test to establish whether there was sufficient reason for the relevant deprivation, because the deprivation did not serve an all-important objective. This decision confirms that a deprivation aimed at aesthetic preservation does not serve an essential purpose and would therefore only be considered to satisfy the section 25(1) non-arbitrariness requirement if it satisfies a fairly strict proportionality test, rather than a thin rationality test.

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<sup>167</sup> *Camps Bay Ratepayers’ and Residents’ Association v Harrison* [2010] 2 All SA 519 (SCA) para 62.

<sup>168</sup> *Camps Bay Ratepayers’ and Residents’ Association v Harrison* [2010] 2 All SA 519 (SCA) para 62.

<sup>169</sup> *Camps Bay Ratepayers’ and Residents’ Association v Harrison* [2010] 2 All SA 519 (SCA).

### 5 3 Concluding the *FNB* test

The *FNB* methodology requires that, if a deprivation does not comply with the requirements of section 25(1), one has to determine whether it may nevertheless be a justifiable limitation of a property right in terms of section 36(1). In theory, a deprivation that does not comply with section 25(1) may still be considered a valid deprivation of property if it complies with section 36(1) of the Constitution.<sup>170</sup> However, it is unlikely that a deprivation that is considered arbitrary for purposes of section 25(1) will be a justified limitation of an owner's constitutional property rights in terms of section 36.<sup>171</sup> If the deprivation is arbitrary because it does not comply with the section 25(1) requirement that deprivations must be imposed by law of general application, it will also fail to satisfy the section 36 provision that "[t]he rights in the Bill of Rights may be limited only in terms of law of general application". A deprivation that fails the section 25(1) non-arbitrariness test for lack of sufficient reason will probably not satisfy the section 36(1) requirement that a limitation of a right in the Bill of Rights must be "reasonable and justifiable in an open and democratic society" either.<sup>172</sup> Therefore, a restriction of a property owner's right to build that constitutes an arbitrary deprivation in terms of section 25(1) will probably not be justified in terms of section 36(1). For example, building regulations and other

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<sup>170</sup> According to the decision in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46(g), if it has been established that if a deprivation does not comply with s 25(1), it must be considered whether it is justifiable in terms of s 36(1) of the Constitution.

<sup>171</sup> T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 26-28 and AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2012) reason that although a deprivation that does not comply with s 25(1) may theoretically be justified under s 36(1), it is unlikely that such a deprivation will comply with the requirements for a justified limitation in terms of s 36(1).

<sup>172</sup> T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 27 argues that the test determining whether a limitation of property rights is justified in terms of s 36(1) will address the same questions as (would have been already addressed) in the s 25(1) arbitrariness test. AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 287 considers the possibility of justifying an arbitrary deprivation under s 36 as an effective methodological device to ensure "substantive and critical debate that could give meaning to the Constitution (and the property clause)".

legislation that restrict a property owner's right to build but that serve an essential public purpose, such as promoting public health and safety, will be considered a valid deprivation of her property in terms of section 25(1) and will in principle also be justified in terms of section 36(1). However, if a deprivation of a property owner's right to build is not justified in terms of the section 25(1) requirements, it will not be justified in terms of the section 36(1) requirements either. The implication is that a measure that deprives an owner of her right to build and that does not comply with section 25(1) is invalid.

If a deprivation satisfies the section 25(1) non-arbitrariness test or is justifiable in terms of section 36(1), it must be established whether the (lawful or justified) deprivation also amounts to an expropriation for purposes of section 25(2). The methodology introduced in *FNB* has the effect that all interferences with property will first be considered as deprivations. Only if such interference is a valid deprivation in terms of section 25(1) will it be determined whether it also amounts to an expropriation.<sup>173</sup> Deprivation is based on the state's police power to regulate the exercise of an individual owner's property rights, while expropriation occurs when the state exercises its authority to expropriate in terms of its statutory power of eminent domain.<sup>174</sup> A deprivation may occur in terms of servitudes, building regulations, restrictive covenants, legislation, conditions of establishment or procedural attacks. However, authority for a deprivation does not imply that an expropriation is also authorised. Authorisation for expropriation has to be established separately and explicitly. Unlike authority for a deprivation that can flow from the common law, for

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<sup>173</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 204.

<sup>174</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 344 reasons that expropriation only comes into question when the state was authorised to expropriate.

instance where a servitude authorises a deprivation of a property owner's right to build, expropriation must be authorised by legislation.

A property owner may suffer a deprivation of her right to build in terms of a non-arbitrary regulation of this right<sup>175</sup> or because of a building restriction that results from an agreement between two private parties. Neither of these devices that limit the right to build involves the state's power of eminent domain or authorises the expropriation of a private property owner. Therefore, it is irrelevant to consider whether a deprivation of a property owner's right to build constitutes an expropriation. Simply put, the kinds of restrictions on building that may protect an existing right of view do not usually have anything to do with expropriation and therefore the final stages of the *FNB* test are irrelevant for present purposes.

A deprivation that does not comply with section 25(1) of the Constitution because it is substantively arbitrary may, at least in some instances, theoretically still be considered a valid regulation of private property rights, even when it does not constitute a formal expropriation, in terms of the notion of constructive expropriation. This is especially relevant when the deprivation is substantively arbitrary because its impact on the affected landowner is excessively restrictive in the absence of compensation. Constructive expropriation refers to regulatory deprivation that has such a severe impact on a private property owner that it cannot be justified in terms of the purpose that it serves and therefore requires compensation.<sup>176</sup> It will occur when the state exercises its power to regulate the use of private property in such a

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<sup>175</sup> The application of the non-arbitrariness test indicated that the restriction of an owner's right to build that is caused by building regulations, restrictive conditions, legislation or procedural difficulties constitute non-arbitrary regulatory deprivation of an owner's property rights.

<sup>176</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 347-353.

way that the impact of the regulation has the effect of an expropriation.<sup>177</sup> For example, if legislation such as the National Ports Act would prohibit an owner who bought property for development purposes from erecting any buildings on her property, she may be deprived of all economic use of her property. The impact of such a regulation might be so severe that it is considered to have the effect of an expropriation.<sup>178</sup> In cases of that kind the notion of constructive expropriation might be considered as a strategy to avoid the deprivation being declared arbitrary and invalid. However, according to the Constitutional Court in *Reflect-All*<sup>179</sup> constructive expropriation would probably not “be appropriate in our constitutional order”,<sup>180</sup> since it would “cripple” regulatory deprivation in its aim of promoting effective governance.<sup>181</sup> This possibility is therefore not considered for present purposes. As a result, a deprivation of property that is substantively arbitrary according to the *FNB* test will probably simply be invalid.

#### 5 4 Conclusion

A right to the existing, unobstructed view from a property does not naturally flow from the right of ownership because, amongst other reasons, a property owner may build

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<sup>177</sup> Constructive expropriation is not relevant in instances where the state exercises its authority to expropriate because in those cases there is real expropriation and not merely regulation that has the effect of expropriation.

<sup>178</sup> However, because the use of her right is regulated by the state’s exercise of its authority to regulate private property (and not in the exercise of its authority to expropriate), it is not an expropriation.

<sup>179</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) paras 64-65.

<sup>180</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 65.

<sup>181</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2012) 287-288 and 383-384 argues that constructive expropriation should not form part of South African law because the effect that it has, namely to transform a regulatory action into expropriation, is not compatible with the way that expropriation is treated as a subset of deprivation.

on her property as she pleases.<sup>182</sup> By implication, any substantive right or alternative strategy that protects the existing view from a property must specifically be proven. If such a substantive right does exist, it restricts the erection of buildings on neighbouring properties.<sup>183</sup> According to the *FNB* decision, the right to build on one's property is considered "property"<sup>184</sup> and any restriction on this right is a deprivation of property for purposes of section 25(1) of the Constitution.<sup>185</sup> Therefore, any form of protection of the existing view from a property, whether it be by way of a substantive right or an alternative strategy, involves a deprivation of a neighbouring owner's right to build and has to be justified in terms of the requirements for a valid deprivation of property in terms of section 25(1).

This chapter assessed the constitutional validity of servitudes, restrictive covenants, building regulations, restrictive conditions, other legislation, departures from building regulations and zoning schemes and attacks on the approval of building plans that are either aimed at or that results in the protection of the existing view from a property because all these constructs limit a neighbouring owner's right to build and therefore deprive her of property for purposes of section 25(1). The application of the *FNB* methodology for determining whether a deprivation is justified in terms of section 25(1) of the Constitution indicates that in instances where a property owner's right to build is restricted by a servitude or a restrictive covenant created by contract, the arbitrariness question arguably does not arise, since the deprived property owner (or her predecessor in title) permitted the limitation of her right to build.<sup>186</sup> Despite the fact that there is a restriction on such an owner's right to build, there are no circumstances in which such a limitation will be considered an

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<sup>182</sup> See Ch 2 and Ch 6.

<sup>183</sup> See Ch 3.

<sup>184</sup> See 5 2 2 1.

<sup>185</sup> See 5 2 2 2.

<sup>186</sup> See 5 2 3 1.

unjustified deprivation, since the owner who “suffers” the deprivation voluntarily agreed to have her right restricted.

In cases where a property owner’s right to build is either permanently or temporarily limited in terms of building regulations or other legislation, or because of procedural attacks on the approval of building plans, the validity of the deprivation of such an owner’s right to build is determined with reference to the question of whether it satisfies the section 25(1) non-arbitrariness requirement. According to the decision in *FNB*, a deprivation will only satisfy this requirement if it is neither procedurally nor substantively arbitrary.<sup>187</sup>

The question of procedural arbitrariness is fairly easily answered, since building regulations, other legislation or statutory provisions that provide for attacks on the approval of building plans will only be considered procedurally arbitrary for purposes of section 25(1) if they directly deprive property owners of their rights to build without involving any administrative action. Given the nature of regulation of planning, development and building on land, this prospect seems unlikely. On the other hand, if a deprivation that is suffered in terms of any of these devices does involve administrative action, it may still constitute a procedurally arbitrary deprivation in terms of section 3(1) of PAJA.<sup>188</sup> Building regulations are usually implemented in terms of administrative action and therefore can probably not constitute procedurally arbitrary deprivation in terms of section 25(1).<sup>189</sup> Legislation that limits a property owner’s right to build may cause a procedurally arbitrary deprivation in terms of section 25(1), but only if it restricts building works directly and without making provision for any administrative action. The example mentioned in this chapter,

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<sup>187</sup> See 5 2 2 3 3 and n 73.

<sup>188</sup> See 5 2 2 3 3.

<sup>189</sup> See 5 2 3 2.

namely the National Ports Act, which is, *inter alia*, aimed at protecting the existing view to a lighthouse and consequently restricts building works on surrounding properties, does not cause a procedurally arbitrary deprivation of the surrounding property owners' rights to build in terms of section 25(1), since it involves administrative action.<sup>190</sup> A statutory provision that provides an opportunity for property owners to delay and frustrate a neighbour's right to build, for example section 7(1)(b)(ii) of the National Building Act, always involves administrative action in the sense that a local authority or court may refuse to halt the neighbour's building works while considering the objections against the approval of her building plans. Such a statutory provision will only cause a procedurally arbitrary deprivation for purposes of section 25(1) if it provides for the suspension or termination of building works on a relevant property in terms of a procedure that fails to comply with the procedural fairness requirements in PAJA. This possibility is not explored here.

The question regarding whether or not a deprivation was substantively arbitrary has to be answered with reference to the specific circumstances of a given case. The *FNB* decision suggests that a deprivation will satisfy the requirement for substantive reasonableness if there is sufficient reason for it.<sup>191</sup> It proposes a complex set of relationships that has to be considered in order to determine whether sufficient reasons exist in a particular case. If a deprivation serves an essential purpose, something closer to a mere rationality test is required to indicate whether there is sufficient reason for a deprivation. Accordingly, it has to be indicated that there is a rational link between the purpose of the deprivation and the means employed to promote it (the restriction that causes the deprivation). However, if a

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<sup>190</sup> See 5 2 3 3.

<sup>191</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. See 5 2 2 3 3.

deprivation serves a less compelling aim, something closer to a proportionality test has to be applied, in terms of which it must be indicated that there is a proportionate balance between the purpose of the deprivation and the impact that it has on an individual owner.

Building regulations and legislation, such as the National Ports Act, that serve important and overriding public health and safety purposes will therefore justify deprivations more easily, in terms of something closer to a mere rationality test. If it can be proven that there is a rational link between the deprivation that they cause (restrictions on building works) and the aims that they serve (protecting public health and safety), these “devices” that have the effect of protecting the existing view from a property may satisfy the section 25(1) requirement of substantive reasonableness more or less regardless of the effect on the affected landowner and therefore the deprivation of property owners’ right to build that they bring about will be valid more often than not. However, building regulations and legislation that restrict property owners’ rights to build but serve less compelling objectives, such as preservation of aesthetic values, will have to satisfy a stricter proportionality-type test. In terms of such a test it would have to be indicated that there is a proportionate balance between the impact that the deprivation has on an individual property owner (restriction on her right to build) and its purpose (the preservation of aesthetic values). Only if such a balance is proven will the deprivation of the limitation on the property owner’s right to build be considered a valid deprivation in terms of section 25(1).

Many property owners have attempted to prevent building works on neighbouring properties, and consequently to protect the existing views from their own properties, by attacking the approval of their neighbours’ building plans. These

attacks are either focused on procedural irregularities in the process of approving such building plans or on a local authority's exercise of its discretion to approve the plans. In most cases the attacks have at best resulted in the temporary protection of the existing views from properties by a temporary suspension of the building process. A property owner whose building works are stalled because the approval of her building plans is being revised suffers a deprivation of her right to build. If a request for such a revision is purely aimed at an attack on a local authority's discretion to approve the plans, probably to ensure that the attacker's personal interests are taken into account, the deprivation (limitation on a property owner's right to build) does not serve a compelling reason and will consequently have to satisfy a stricter proportionality test. However, if the object of such an attack is to rectify a procedural irregularity in the original approval process, the deprivation serves a slightly more important aim in the sense that it benefits the public (ensuring proper administrative procedures) and the test to determine whether the deprivation is substantively reasonable should at least be less strict than the one that is applied for a deprivation that is purely aimed at attacking a discretion. Therefore, in both the instance where the approval of a neighbour's building plans is attacked on the basis of the discretion exercised by the relevant decision maker and on the ground of a procedural irregularity, a proportionality-type test will apply. Accordingly, the impact of the deprivation (a temporary restriction on the right to build and possibly costs incurred because building works are stalled) will be taken into account to consider whether there is a proportionate balance between this impact and the aim that the deprivation serves (purely attacking a discretion to promote self-interests or ensuring proper administrative procedures for the public benefit). In instances where the purpose is purely to promote self-interests in protecting an existing view, the

deprivation will only be justified if it does not have a very severe impact on the individual owner whose right to build is restricted. However, if the aim involves the public interest in proper administrative procedures, the deprivation will be justified even if it has a more severe effect on the individual property owner, but case law<sup>192</sup> suggests that even then the procedures and formalities will not be enforced strictly if the public benefit is slight while causing a severe negative impact on a landowner who has acted in good faith.

Strategies to protect the existing view from a property are sometimes based on various methods to prevent the erection of buildings on a neighbouring property. When successful, these methods deprive such a neighbour of her right to build on her property. Evaluation of the deprivations caused by these methods indicate that the protection of the existing view from a property will indeed be legitimate – even if it deprives a neighbour of her right to build – if the device in terms of which building works on a neighbouring property is restricted serves an important or overriding public purpose. The protection of the existing view from a property will therefore be justified in such a case, despite the deprivation caused to a neighbour, insofar as it is the result of legislation or building regulations that serve essential and overriding public objectives. However, the deprivation (restriction on a property owner's right to build) caused by building regulations that do not serve an important public health and safety aim and attacks on the approval of a neighbour's building plans will only be justified if there is a proportionate balance between the purpose of the deprivation (for example, preservation of aesthetics either through building regulations or a local authority's discretion; or ensuring proper administrative procedures) and the impact

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<sup>192</sup> *Richardson and Others v South Peninsula Municipality and Others* 2001 (3) BCLR 265 (C). See also AJ van der Walt *The law of neighbours* (2010) 350; 3 2 2 2; 3 2 3 and specifically Ch 3 n 65.

that it has on the neighbour (the restriction of her right to build). This indicates that, although the existing view from a property can be protected through alternative strategies to prevent building works on neighbouring properties, such protection – and the concomitant restriction on a neighbour’s right to build – will only be justified in terms of section 25(1) of the Constitution if it serves an essential, overriding or primary public protection aim. If the method that protects one’s view does not serve such an important purpose, it will only be valid if there is a proportionate balance between its aim and the impact that it has on the neighbour who is deprived of her right to build.

## Chapter 6:

# Conclusions

### 6 1 Introduction

It has been established that a South African property owner does not have an inherent right to the existing view from her property.<sup>1</sup> Analysis of the English and Dutch legal systems indicates that a right to view is not acknowledged in these jurisdictions either.<sup>2</sup> This chapter shows that most of the justifications for this position are rooted in rational and legitimate policy considerations. Policy dictates that the recognition of a generally applicable, natural right to a view is undesirable, since it will imply that a property owner has an inherent entitlement in the property of another, namely to restrict that owner's right to build. Furthermore, such a right will inhibit development and will be inconsistent with the rule that a development on your own land that is prior in time does not give a property owner a stronger right over another person's adjoining land. Law and Economics theory also provides a justification for the rule against recognising the right to a view. In terms of the logic of this theory, imposing a general right to a view will constitute an inefficient exchange of entitlements.

Nevertheless, the existing, unobstructed view from a property can be protected with a servitude, a restrictive covenant, a restrictive condition or in terms of legislation. Furthermore, the existing view from a property is protected insofar as building regulations restrict building works on neighbouring properties that will

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<sup>1</sup> In terms of the South African common law, which is discussed in Ch 2, the right to a view is not considered as an entitlement that naturally flows from the ownership of property. This position is confirmed by the discussion of recent case law in Ch 3.

<sup>2</sup> See Ch 4.

obstruct such a view, and an attack on the approval of a neighbour's building plans may have the effect of stalling her building works and consequently result in the temporary protection of the existing view from one's property.<sup>3</sup> If the existing view from a property is protected in one of these ways, it necessarily implies that a neighbouring owner suffers a deprivation of her right to develop (build on) her property. Constitutional analysis indicates that such a deprivation is justified in terms of section 25(1) of the Constitution of the Republic of South Africa, 1996 ("Constitution") if it serves an important purpose and if there is at least a rational link between the deprivation and the purpose. However, if the deprivation does not serve an essential aim it will only be justified in terms of section 25(1) of the Constitution if there is a proportionate relationship between the aim promoted by the deprivation and the impact that it has on an individual property owner.<sup>4</sup>

This chapter examines the principle against acknowledging a right to a view with reference to policy considerations, including Law and Economics arguments, that traditionally consider the preservation of the existing view to or from a property as less important than the entitlement to develop (erect buildings or structures on) a property. It also explores the possibility of recognising a right to a view in situations where the existing view contributes to the utility of a property. This possibility is considered from policy and Law and Economics perspectives to determine why such (specific) circumstances may require that one owner's entitlement to build should be made subject to another's right to a view. Moreover, instances where the principle against the recognition of a right to a view is amended to acknowledge exceptions are examined to establish whether such amendments are justified in terms of section

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<sup>3</sup> See 2 3 2 with regard to the protection of the existing view from a property in terms of a servitude and Ch 3 regarding the other ways of protecting such a view.

<sup>4</sup> The constitutional aspects regarding the protection of the existing view from a property are considered in Ch 5.

25(1) of the Constitution. Apart from general policy considerations, Calabresi and Melamed's paradigm<sup>5</sup> for the protection of property rights is applied to illustrate how entitlements are allocated in the common law position regarding the right to a view, and how they could be either assigned differently or transferred when a specific situation requires that an existing, unobstructed view should be protected.

## 6 2 Rationales for not recognising a right to a view

### 6 2 1 The perception of "view"

Traditionally, the enjoyment of an unobstructed view to or from a specific property is generally perceived as a "matter only of delight, and not of necessity"<sup>6</sup> that one owner enjoys because of a specific state of affairs on a neighbouring property. The advantage of enjoying a beautiful view from one's property is considered an "incidental" benefit, which courts are reluctant to treat as an inherent property right.<sup>7</sup> The distinction between the loss of a merely incidental advantage that a property owner enjoys and real damage that an owner suffers originated in Roman law and was received and applied in Roman-Dutch law.<sup>8</sup> However, despite the fact that the

<sup>5</sup> G Calabresi & AD Melamed "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv LR* 1089-1128 developed a theory to explain the protection of property rights that is generally applied in Law and Economics literature.

<sup>6</sup> The principle that the view (prospect) from one property over another is only a matter of delight and that its obstruction therefore does not constitute an actionable nuisance was laid down in *Bland v Moseley* (1587) 9 Co Rep 58a and later confirmed in *William Aldred's Case* (1610) 9 Co Rep 57b at 59a, 77 ER 816 at 821 and in *Dalton v Angus & Co* (1881) All ER 1 (HL) 24. J Church & J Church "Nuisance" in WA Joubert, JA Faris & LTC Harms (eds) *The law of South Africa* Vol 19 (2<sup>nd</sup> ed 2006) para 193 categorise the pleasant view from a property as a "source of delight" and suggest that aesthetics are irrelevant in the context of the law relating to neighbours and nuisance. See also W Freedman "Paradise lost? The obstruction of a pleasant view and the law of nuisance" in SV Hoctor & PJ Schwikkard (eds) *The exemplary scholar: Essays in honour of John Milton* (2007) 162-184 at 163-164.

<sup>7</sup> In *Dorland and Another v Smits* 2002 (5) SA 374 (C) 383 Comrie J warned that, as a matter of policy, courts should not venture into the area of aesthetics.

<sup>8</sup> In *D 39 2 26*, interference with the flow of water or light to a property was not considered to cause an actionable harm for the affected property owner, because the flow of water and light to a property was regarded as mere incidental benefits of a property. The Roman legal system did not specifically mention the existing view from a property as an incidental benefit of property. See 2 2 1 2 and 2 2 1 3.

existing, unobstructed view from a property was not expressly categorised as an incidental benefit in Roman or Roman-Dutch law, there are indications that the enjoyment of such a view was indeed considered to be an incidental advantage in Roman-Dutch law.<sup>9</sup> Today, this distinction forms part of South African law and, as was confirmed in *Dorland and Another v Smits*<sup>10</sup> (“*Dorland*”), the view from a property is an example of a purely (incidental) aesthetical attribute, which means that it is not regarded as an inherent aspect of a landowner’s entitlements.<sup>11</sup> According to Crombie J in *Dorland and Another v Smits*,<sup>12</sup>

“The trouble with aesthetics, visual or other, is that they are notoriously subjective and personal ... I consider this to be an area into which as a matter of judicial policy the courts should not venture. As it was put by the California Court of Appeal, third district, in *Oliver et al v AT&T Wireless Services et al* (1999) 76 Cal App 4th 521 (90 Cal Rptr 2d 491):

‘Otherwise, one person's tastes could form the basis for depriving another person of the right to use his or her property, and nuisance law would be transformed into a license to the courts to set neighbo[u]rhood aesthetic standards.’<sup>13</sup>

In the US case of *Oliver et al v AT&T Wireless Services et al*,<sup>14</sup> to which Crombie J referred, the California Court of Appeal referred to its earlier decision in *Haehlen v*

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<sup>9</sup> The existing, unobstructed view from a property is not mentioned when Voet 39 1 1 refers to examples of incidental advantages of properties, such as the flow of light and water to a property, but Voet 8 2 12 encourages one to apply the same principles to a servitude of view as those that are applicable to a servitude for the free flow of light and air. Furthermore, in the discussion of the *servitus altius tollendi* in Voet 8 2 6, the blocking of openings for light and air (interferences with incidental benefits of property) is categorised together with view. See also W Freedman “Paradise lost? The obstruction of a pleasant view and the law of nuisance” in SV Hoctor & PJ Schwikkard (eds) *The exemplary scholar: Essays in honour of John Milton* (2007) 162-184 at 165-166. See 2 2 1 3.

<sup>10</sup> *Dorland and Another v Smits* 2002 (5) SA 374 (C).

<sup>11</sup> See 2 2 1 1.

<sup>12</sup> *Dorland and Another v Smits* 2002 (5) SA 374 (C) 383.

<sup>13</sup> *Dorland and Another v Smits* 2002 (5) SA 374 (C) 383.

<sup>14</sup> *Oliver et al v AT&T Wireless Services et al* (1999) 76 Cal App 4th 521 at 535 (90 Cal Rptr 2d 491 at 501).

*Wilson*,<sup>15</sup> where it rejected a claim that the unsightly appearance of a wooden fence constituted a nuisance for the plaintiff. The court's reasoning illustrates that the view from a property (whether it be across or onto a neighbouring property) is categorised as part of the aesthetic attributes of a property, and that things that contribute to a property's aesthetic attributes are considered luxurious attributes that are unnecessary for the use of a property.<sup>16</sup>

The California Court of Appeal also ruled, in *Oliver et al v AT&T Wireless Services et al*,<sup>17</sup> that the obstruction of a pleasant view does not affect the use and enjoyment of a property to such a degree that it constitutes an actionable nuisance:

“In short, the displeasing appearance of an otherwise lawful structure on one side of a boundary cannot be deemed to substantially interfere with the enjoyment of that which is on the other side of the boundary without significantly diminishing the rights associated with both sides of the boundary.”<sup>18</sup>

This reasoning emphasises two reasons why courts consider it undesirable to acknowledge the right to a view as an inherent right to property ownership. Firstly, a pleasant view onto or across a neighbouring property does not serve an important purpose, but merely contributes to the enjoyment of one's property.<sup>19</sup> Secondly, the

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<sup>15</sup> *Haehlen v Wilson* (1936) 11 Cal App 2d 437 at 441.

<sup>16</sup> In *Haehlen v Wilson* (1936) 11 Cal App 2d 437 at 441, the California Court of Appeal, quoting *Varney & Green v Williams* (1909) 155 Cal 318 at 320 reasoned that

“[i]n the absence of some legislative action the courts cannot set up [a]esthetic standards to which builders must conform ... ‘No case has been cited, nor are we aware of any case, which holds that a man may be deprived of his property because his tastes are not those of his neighbo[u]rs. [A]esthetic considerations are a matter of luxury and indulgence rather than a necessity, and it is necessity alone which justifies the exercise of police power to take private property without compensation.”

<sup>17</sup> *Oliver et al v AT&T Wireless Services et al* (1999) 76 Cal App 4th 521 at 535 (90 Cal Rptr 2d 491 at 501).

<sup>18</sup> *Oliver et al v AT&T Wireless Services et al* (1999) 76 Cal App 4th 521 at 535 (90 Cal Rptr 2d 491 at 501).

<sup>19</sup> In *William Aldred's Case* (1610) 9 Co Rep 57b at 58a and 59a, 77 ER 816 at 817 and 821 the court reasoned that there are four things that are desired in a house, namely *habitatio hominis* (the residence of men), *delectatio inhabitantis* (the delight of inhabiting a property), *necessitas luminis* (necessary light), and *salubritas aëris* (salubrity of air). It emphasised that interference with a person's

acknowledgment of a right to have an unobstructed view from one's property would inevitably limit development on neighbouring property and therefore extend an owner's entitlements beyond the borders of her own property. Consequently, a right to a view would entitle a property owner to command her neighbour to perform certain actions on her property, or enjoin her from performing such actions.

## 6 2 2 The right to develop one's property

A property owner has an inherent right to develop (build on) her property.<sup>20</sup> In chapter 5 it is argued that any form of protection of or the recognition of a right to the existing view from a property results in the deprivation of a neighbouring owner's right to build for purposes of section 25(1) of the Constitution.<sup>21</sup> The recognition of a right to the existing, unobstructed view from a property would imply that a property owner (A) is given rights over someone else's (B's) land in the sense that A's right to the view from her property would inevitably restrict B in the use of her land. This situation would be in conflict with the principle that rights over the land of another may only be acquired by way of legislation or by way of a real right based on an agreement, like a servitude.<sup>22</sup> Rights over the land of another cannot be acquired by first use of one's own land. Should a right to the existing, unobstructed view from a property be acknowledged, A would have a right over B's land, purely based on the fact that she developed her own property first. The recognition of the right to a view

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"habitation" is an actionable nuisance, since that is "the principle end of a house" and that the hindrance of the supply of light and air to a property is also actionable in nuisance, because of the historic significance of the action against the interference with the light and air supply to a neighbouring property. Recent case law, such as *Dorland and Another v Smits* 2002 (5) SA 374 (C) and *Oliver et al v AT&T Wireless Services et al* (1999) 76 Cal App 4th 521 (90 Cal Rptr 2d 491), illustrates that view is still considered to form part of the aesthetics of a property, which is considered a luxurious attribute and not a necessity for the use of property.

<sup>20</sup> See 2 2 2.

<sup>21</sup> See 5 2 2 2.

<sup>22</sup> CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 175-185 and CG van der Merwe & MJ de Waal *The law of things and servitudes* (1993) 98-101. See also 2 2 2.

would consequently prevent the later development of neighbouring properties and be in conflict with the basic principles of property law.

From as early as 1752, English courts have reasoned that it is undesirable to acknowledge a right to the existing view from a property, since it would inhibit urban development.<sup>23</sup> Epstein argues that if all views were to be protected equally, it would be impossible to use (develop) the land over which such views are to be enjoyed.<sup>24</sup>

“That right [against the blocking of light] is not recognized, for, as in the view case, its uniform protection would either prevent the development of all land or hopelessly cloud the conditions under which it might take place.”<sup>25</sup>

An unobstructed view normally requires a relatively large area of vacant land.<sup>26</sup> Therefore, if a general right to a view is recognised, it would inevitably restrict the erection of buildings on a large and undefined area. Furthermore, a right to an unobstructed view to or from a property inevitably depends on the time when such property is developed and the place where it is situated. Consequently, the

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<sup>23</sup> The principle that prospect is a matter of delight and not a necessity was established in *William Aldred’s Case* (1610) 9 Co Rep 57b, 77 ER 816 and has been confirmed in *Bland v Moseley* (1587) 9 Co Rep 58a. However, it was only in *Attorney-General v Doughty* (1752) 2 Ves Sen 453 that a court provided a policy reason for not giving property owners an actionable right to a view. In this judgment, Lord Hardwicke LC ruled that the obstruction of the prospect from another owner’s property is not a nuisance, since the recognition of a right to have an undisturbed view from one’s property would inhibit urban development. This principle was again applied by Lord Hardwicke LC in *Fishmongers’ Co v East India Co* (1752) 1 Dick 163, where he ruled that the possibility of obstructing the view from a neighbouring property does not prevent a landowner from erecting buildings on her own property. In *Dalton v Angus & Co* (1881) All ER 1 (HL) 24 the principle was confirmed by Lord Blackburn. Lord Blackburn held that the rule against the protection of view is justified because view is purely a matter of delight and since a right to a view would impose burdens on a “large and indefinite area”. In *Hunter v Canary Wharf Ltd* (1997) AC 655 at 666E–F, Pill LJ applied the old principles that relate to the right to a view in a modern context to illustrate that these rules have sound policy grounds that are still applicable today. The Court of Appeal confirmed that the obstruction of the view from a property is still not actionable. In the South African case *Myburgh v Jamison* (1861-1863) 4 Searle 8, it was submitted for the defendant that a servitude of prospect is odious because it hinders development and is therefore in conflict with public policy.

<sup>24</sup> RA Epstein “Nuisance law: Corrective justice and its utilitarian constraints” (1979) 8 *The Journal of Legal Studies* 49-102 at 60-61.

<sup>25</sup> RA Epstein “Nuisance law: Corrective justice and its utilitarian constraints” (1979) 8 *The Journal of Legal Studies* 49-102 at 62.

<sup>26</sup> *Dalton v Angus & Co* (1881) All ER 1 (HL) 24 and RA Posner *Economic analysis of law* (8<sup>th</sup> ed 2011) 67.

recognition of a general right to a view would inhibit development, since it would imply that developers later in time would be forced to take the views from prior developed properties into account. This situation would be inconsistent with the rule that an earlier development does not give a property owner a stronger right purely by virtue of her building works preceding the development of neighbouring properties. This rule entails that different owners' property rights should comprise the same entitlements regardless of when the owners acquired or developed them.<sup>27</sup>

The German principle of the social context or situation of land (*Situationsgebundenheit*)<sup>28</sup> correlates with the principle that a property owner does not have stronger property rights than her neighbours merely because she developed (built on) her property before they developed their properties. Van der Walt defines *Situationsgebundenheit* as the way in which the context and situation of property interests determine its nature, content and limits.<sup>29</sup> He concludes that, according to German case law,<sup>30</sup> some of the effects of this principle regarding the social context or situation of land are the following:

“Beneficial characteristics of the situation, such as the presence or absence of developments or development plans, can generally not be relied upon as of right ... Such beneficial characteristics clearly do not form part of the property if the

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<sup>27</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 289-290 argues, in his discussion of *Nyangane v Stadsraad van Potchefstroom* 1998 (2) BCLR 148 (T) at 160E-G, that general rules regulating planning law allow for restrictions that only apply to certain erven within a development, as long as they promote the conservation of the character of the area by reciprocally obliging owners to adhere thereto. This case concerned limitations on property rights within the context of a specific neighbourhood or development. Rules regarding the size and character of homes were found to serve a legitimate town planning purpose, because although these restrictions only applied to certain erven within a development, it promoted the conservation of the character of the area.

<sup>28</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 154.

<sup>29</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 154-155.

<sup>30</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 154-155 specifically mentions the decisions in *BVerwGE* 38, 209 [1971] and *BGHZ* 23, 235 [1957].

reasonable user would have refrained from exercising them or from relying upon their permanence.”<sup>31</sup>

In terms of this principle, the view from a building that was erected before the area was fully developed cannot be regarded as a right if the reasonable prospective property owner would have realised that subsequent development of the area might lead to the loss thereof.<sup>32</sup>

The application of this rationale for not recognising a right to the existing view from a property is evident in chapter 3, where cases concerning attacks on the approval of neighbours’ building plans are discussed to illustrate how these attacks are used as an alternative strategy to prevent building works that may obstruct the existing views from properties. In some cases, these attacks focus on purely procedural irregularities in the approval of such plans, while the exercise of a local authority’s discretion to approve the relevant building plans are attacked in other

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<sup>31</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 155. A similar principle applies in Swiss law. AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 374-375 explains that practice and theory show that factual interests (*faktische Interessen*) is not protected by the Swiss property guarantee that was inserted in article 22<sup>ter</sup> of the *Constitution of the Swiss Confederation 1874* in 1969. (A new version of this Constitution was adopted in 1999. See AJ van der Walt “The property clause in the New Federal Constitution of the Swiss Confederation 1999” (2004) 15 *Stell LR* 326-332 for a discussion of the development of the Swiss property clause and the protection of property rights under the Swiss Constitution.) This was illustrated in the *Blaser Case*, *BGE 105 Ia 219* (1979), where the court ruled that a proposed development that would interfere with the property owners’ (complainants’) “rights of” access to the water of a nearby lake was not unlawful, since the complainants were not entitled to have direct access to the lake. The Swiss principle that the factual interests of a specific property are not protected as guaranteed rights correlates with the German principle that the benefits of a property that flows from its social context or situation of land (*Situationgebundenheit*) do not form part of the entitlements of that property. The beneficial characteristics that a property derives from its locality and surrounding circumstances, such as the applicable zoning scheme, are subject to change. Property owners (and prospective owners) should realise that these advantages are not part of the property’s entitlements and that they cannot rely on the continuation of these favourable characteristics.

<sup>32</sup> M Kidd “The view I behold on a sunshiny day’: *Paola v Jeeva NO*” (2005) 122 *SALJ* 556-562 at 561-562 refers to the argument, based on this rule, that was raised by the third respondent (municipality) in the *Paola* case in order to take the Supreme Court of Appeal’s judgment on appeal to the Constitutional Court. The municipality argued that the Supreme Court of Appeal’s finding would infringe upon a person’s right to property because the effect of recognizing the right to a view would be that neighbouring property owners would have to yield to the right of the person who developed first. The right to a view would therefore lead to the unequal and arbitrary treatment of property owners.

instances.<sup>33</sup> In *Muller NO and Others v City of Cape Town and Another*<sup>34</sup> (“*Muller*”) and the Supreme Court of Appeal’s ruling in *Paola v Jeeva NO and Others*<sup>35</sup> (“*Paola*”), purely procedural irregularities rendered the approval of building plans unlawful. However, the irregular approval of building plans does not entitle neighbouring property owners to object against such approval in a way that would result in an absolute prohibition against the proposed building works. It may merely have the effect of stalling irregularly approved building works and therefore temporarily prevent the erection of buildings that would obstruct the existing views from neighbouring properties.<sup>36</sup>

Attacks on the discretion exercised when a local authority approved building plans are based on the reasoning that section 7(1)(b)(ii)(aa)(ccc) of the National Building Regulation and Building Standards Act 103 of 1977 (“National Building Act”) compels a local authority to refuse to approve an application for building plans if it is satisfied that the erection of the proposed building “will probably or in fact derogate from the value of adjoining or neighbouring properties”. These attacks focus on the discretionary power that this provision gives a local authority and are aimed at preventing the approval of building plans that would allow the erection of buildings that are otherwise completely lawful but will interfere with the existing views from neighbouring properties. However, these attacks have been unsuccessful in most

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<sup>33</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C).

<sup>33</sup> In *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C) and *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA), discussed in 3 3 2 1, property owners attacked the approval of their neighbours’ building plans on the ground of alleged procedural irregularities in the approval of such plans. Attempts to have the approval of neighbours’ building plans set aside on the basis of the exercise of a local authority’s discretion to approve such plans were rejected in *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D); *Clark v Faraday and Another* 2004 (4) SA 564 (C) and *De Kock v Saldanhaabaai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006), discussed in 3 3 3 1.

<sup>34</sup> *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C).

<sup>35</sup> *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA).

<sup>36</sup> See 3 3 2 2.

cases, indicating that courts are not willing to acknowledge the loss of an existing view from a property as a factor that may cause such a property to depreciate.<sup>37</sup>

According to the courts' reactions on attacks based on the discretion exercised in the approval of building plans, section 7 of the National Building Act does not create a substantive right to prevent the erection of buildings purely on the basis of the fact that such buildings would interfere with the existing, unobstructed view from a neighbouring property. This provision therefore does not create an exception to the principle that the existing view from a property is merely an incidental benefit and that otherwise lawful interference with it is not actionable. The fact that neither attacks of building plans based on purely procedural irregularities nor attacks focused on the discretion exercised when such plans were approved would result in an absolute prohibition on the right to build (and the consequent protection of the view from a neighbouring property), confirms the principle that a property owner does not have an inherent right to the existing view from her property. Moreover, courts' reluctance to set the approval of building plans aside on the basis that the approval of such plans would lead to the obstruction of the view from neighbouring properties and cause them to depreciate, can be explained in terms of the rationale for not recognising an inherent right to the existing view from a property. Building plans should not be set aside merely because it may result in the obstruction of the existing view from a property, since view is an incidental advantage of property and its protection (which may be the result of the rejection of building plans) would inhibit development.

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<sup>37</sup> *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D); *Clark v Faraday and Another* 2004 (4) SA 564 (C) and *De Kock v Saldanhaabaai Munisipaliteit en Andere* (7488/04) [2006] ZAWCHC 56 (28 November 2006), discussed in 3 3 3 1.

### 6 2 3 An economic justification

The economic approach to property law focuses on the role of the law in promoting an efficient allocation of resources.<sup>38</sup> This allocation takes place within a legal framework where legal rules define and protect property rights. According to Law and Economics thinking, efficient allocation of resources will only be achieved through the creation and protection of property rights that encourage exchange and investment.<sup>39</sup>

Calabresi and Melamed<sup>40</sup> argue that a legal system is primarily concerned with balancing out different entitlements. In terms of this balancing act one has to determine which of the parties will succeed in enforcing their entitlements. State intervention plays a determining role in selecting the prevailing entitlement. Because of this intervention it is not simply a task of deciding which entitlement enjoys the strongest protection.<sup>41</sup> To address this difficulty, Calabresi and Melamed developed an economic theory of rules that regulate voluntary transfers and provide remedies for infringements (involuntary transfers).<sup>42</sup> In terms of these rules, the question of which of the parties' entitlement will prevail requires an analysis of the effects that

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<sup>38</sup> TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to Law and Economics* (2005) 246-260 at 246 defines the role of property rules with reference to the assignment of property rights, the transfer and violation of these rights, and the optimal scale of ownership.

<sup>39</sup> TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to Law and Economics* (2005) 246-260 at 246.

<sup>40</sup> G Calabresi & AD Melamed "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv LR* 1089-1128 at 1090. R Coote & T Ulen *Law and Economics* (4<sup>th</sup> ed 2004) 76-77 argue that economic analysis can be used to explain some fundamental questions in property law.

<sup>41</sup> G Calabresi & AD Melamed "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv LR* 1089-1128 at 1090-1092.

<sup>42</sup> TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to Law and Economics* (2005) 246-260 at 249.

will be brought about by any given exchange (transfer) of existing property entitlements.<sup>43</sup>

The framework developed by Calabresi and Melamed suggests two alternatives for protecting property rights.<sup>44</sup> They distinguish entitlements protected by property rules from entitlements protected by liability rules.<sup>45</sup> Entitlements protected by property rules are the least affected by state intervention. These entitlements may only be transferred in terms of a “voluntary transaction” where the right-holder determines the terms of the transfer and the value of the relevant entitlement.<sup>46</sup> Conversely, the transfer of entitlements that are protected by liability rules is only subject to the requirement that the party who acquires or destroys them must be willing to pay the monetary compensation as determined by an organ of state. The right-holder’s consent is not required for the transfer of such an entitlement, nor does

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<sup>43</sup> G Calabresi & AD Melamed “Property rules, liability rules and inalienability: One view of the cathedral” (1972) 85 *Harv LR* 1089-1128 at 1092.

<sup>44</sup> L Fennell *The unbounded home: Property values beyond property lines* (2009) 17-18 argues that, according to Calabresi & Melamed’s theory, once a court has decided which party holds the relevant entitlement and how the law protects that entitlement, it has to determine how the entitlement will be protected. G Calabresi & AD Melamed “Property rules, liability rules and inalienability: One view of the cathedral” (1972) 85 *Harv LR* 1089-1128 at 1092-1093 provide a third alternative as well, namely inalienable entitlements. These entitlements are the most affected by state intervention. The state may determine the first holder of the relevant entitlement, the compensation to be paid if the entitlement is taken away or destroyed, and it may prohibit its sale.

<sup>45</sup> G Calabresi & AD Melamed “Property rules, liability rules and inalienability: One view of the cathedral” (1972) 85 *Harv LR* 1089-1128 at 1092. L Fennell *The unbounded home: Property values beyond property lines* (2009) 17 explains that Calabresi & Melamed’s economic theory provides a “systematic look at the alternatives available to a court adjudicating a conflict between two neighbouring parties”.

<sup>46</sup> G Calabresi & AD Melamed “Property rules, liability rules and inalienability: One view of the cathedral” (1972) 85 *Harv LR* 1089-1128 at 1092 reason that the transaction that takes place when entitlements protected by property rules are transferred is voluntary in the sense that the state allows right-holders to decide upon the value of the relevant entitlements themselves. TJ Miceli “Property” in JG Backhaus (ed) *The Elgar companion to Law and Economics* (2005) 246-260 at 249 refers to the distinction that Calabresi and Melamed make between property rules and liability rules for protecting legal entitlements. He argues that a property rule allows a right-holder to prohibit other parties from acquiring the property right without her consent, while a liability rule would only allow her to claim monetary compensation (as determined by a court) for the transfer of her entitlement. L Fennell *The unbounded home: Property values beyond property lines* (2009) 18 explains that in terms of Calabresi and Melamed’s “protection regimes”, a right-holder who is protected by a property rule will be entitled to injunctive relief and punitive damages if her right is seized. Conversely, a right-holder who is protected by a liability rule will only be entitled to compensatory damages.

the right-holder have a say in the determination of the value.<sup>47</sup> Therefore, the exchange of an entitlement protected by a property rule requires the right-holder's consent, while the transfer of an entitlement protected by a liability rule does not require such consent.<sup>48</sup> Although a right-holder's consent guarantees mutually beneficial transfers,<sup>49</sup> the process of obtaining such consent may be so costly that it prevents an efficient transfer. According to Miceli,<sup>50</sup> this trade-off suggests that if transaction costs are low, property rules are preferred because they ensure mutually beneficial bargaining between private parties. However, if transaction costs are high, property rules are not able to facilitate efficient bargaining and liability rules, which allow court intervention to coerce transfers, are preferable.<sup>51</sup>

Calabresi and Melamed<sup>52</sup> apply the distinction between property and liability rules to demonstrate how their theory can help resolve legal disputes in the context of nuisance. Their illustration concerns a situation where emissions from one owner's (A's) property cause nuisance to another owner (B). Property rules and liability rules are respectively considered to determine which should be applied to achieve the most efficient outcome. In terms of rule one, B is entitled to be free of pollution and A may only pollute with B's permission. Rule two assumes that A may pollute, but is responsible to pay B for any damages that she may suffer as a result of the pollution.

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<sup>47</sup> G Calabresi & AD Melamed "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv LR* 1089-1128 at 1092 and TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to Law and Economics* (2005) 246-260 at 249.

<sup>48</sup> G Calabresi & AD Melamed "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv LR* 1089-1128 at 1092; TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to Law and Economics* (2005) 246-260 at 249.

<sup>49</sup> Consent will guarantee a mutually beneficial transfer, since the party requesting the transfer will obviously derive some benefit from it while the initial right-holder will not give her consent if the exchange will not benefit her.

<sup>50</sup> TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to Law and Economics* (2005) 246-260 at 249.

<sup>51</sup> TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to Law and Economics* (2005) 246-260 at 249.

<sup>52</sup> G Calabresi & AD Melamed "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv LR* 1089-1128 at 1092; TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to Law and Economics* (2005) 246-260 at 1115-1116.

According to the third rule, A is entitled to pollute. She may only be stopped if B buys her out. The fourth rule holds that A may pollute and may only be stopped by B if B compensates her for not polluting. Although both rule one and rule two consider B to be the holder of the entitlement to be free of pollution, they are protected differently. Rule one protects B's entitlement to be free of pollution with a (strong) property rule, while rule two protects it with a (weaker) liability rule. In terms of rules three and four, A has the entitlement to pollute. Rule three protects this entitlement with a property rule, since B may prevent the pollution only if she buys A out on terms that A finds acceptable. A liability rule protects A's entitlement in terms of rule four, because A's right to pollute may only be taken away from her if B compensates her for the loss that she may suffer from not being able to perform the act that causes the pollution.

The property rule and liability rule paradigm may be applied to explain the position of the right to a view in South African law from a Law and Economics perspective. A dispute concerning the protection of the existing, unobstructed view to or from a property involves the balancing out of two opposing entitlements, namely the right to develop one's property and the right to have an undisturbed view to or from one's property. South African law does not recognise an inherent right to a view. Therefore, this "entitlement" does not enjoy any protection as a property right in terms of Calabresi and Melamed's theory; the initial entitlement is therefore assigned to the owner who wants to build on her land. South African case law indicates that courts use a property rule to protect an owner's right to develop her property when neighbours attack the proposed construction of buildings in attempts to protect the unobstructed views to or from their own properties.<sup>53</sup> Protecting the right to develop

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<sup>53</sup> In *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D) the applicant urged the court to set the approval of his neighbours' building plans aside, arguing that the proposed building would obstruct the existing view from his property. The court dismissed the application on the basis that upholding a right

with a property rule entails that a property owner (A) may build on her property as she pleases (within the limits laid down by zoning schemes, building regulations and other legislation) and that a neighbouring owner (B) would only be able to prevent A from building (and prevent the obstruction of her existing view) if she (B) negotiates with A and obtains A's consent, at a price that she is willing to accept. The "transfer" of A's entitlement will therefore only take place if A consents and on the terms that she deems acceptable. Such a transfer, which resulted from negotiation and agreement between A and B, may be cast in the form of a servitude or a restrictive covenant "bought" by neighbour B who wants to protect her existing view.

Alexander and Peñalver<sup>54</sup> argue that in terms of utilitarian property theory, "entitlements"<sup>55</sup> should be assigned to the person who values them most and should only be transferred with the consent of this (initial) rights-holder.<sup>56</sup> These rules for allocating and exchanging entitlements are aimed at achieving the most efficient outcome. Therefore, property rights are kept in the hands of those who value them most. In terms of the South African common law rule against recognising a right to the existing view from a property, the entitlement (property right) is initially assigned to the owner who has a right to build on her property. This allocation is efficient in terms of the efficiency model, since it keeps transaction costs low. A property owner who wants to prevent the obstruction of the existing view from her property knows with which neighbour (the rights-holder) to negotiate to have the entitlement

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to a view would have unwanted effects. The court therefore used a property rule to protect the respondents' right to build. The court in *Clark v Faraday and Another* 2004 (4) SA 564 (C) also protected the right to build with a property rule, since it refused to prohibit the respondent from continuing with the building works on her property. The fact that such building works would obstruct the view from the applicant's property did not motivate the court to provide less extensive protection to the respondent's right to build. *Paola v Jeeva NO and Others* 2002 (2) SA 391 (D) and *Clark v Faraday and Another* 2004 (4) SA 564 (C) are discussed in 3 3 3 1.

<sup>54</sup> GS Alexander & EM Peñalver *An introduction to property theory* (2012) 30.

<sup>55</sup> GS Alexander & EM Peñalver *An introduction to property theory* (2012) 30 use the term "particular legal rights" for that which G Calabresi & AD Melamed "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv LR* 1089-1128 at 1089 refer to as "entitlements".

<sup>56</sup> GS Alexander & EM Peñalver *An introduction to property theory* (2012) 30.

transferred. If the entitlement was allocated differently, in other words if property owners were inherently entitled to the preservation of the existing views from their properties, the transaction costs would be higher. A property owner who wanted to erect a building on her property that would interfere with the existing view from her neighbour's property would first have to establish which of her neighbours' rights to the existing views from their properties would be affected by her building works. This would be nearly impossible, since her building works might have obstructed or at least interfered with a large and undefined area of land. Consequently, the South African common law principle that a property owner does not have an inherent right to the existing view from her property ensures that transaction costs in matters concerning a conflict between the views from a property and building works on neighbouring properties are kept to a minimum and therefore promotes an efficient outcome.

South African courts rely on assumptions that are similar to the efficiency model to justify the rules that govern conflicts between a property owner's right to build and her neighbouring owner's (right) to have an unobstructed view. They consider the utility of being able to develop one's property as a more efficient outcome than the enjoyment of a pleasant view from one's balcony (and over another's property). Accordingly, in such a dispute, the right to develop one's property prevails and a property rule is assigned to the owner who wants to build (A). In terms of this protection, A's right to build on her property is protected in the most extensive way. This right will only be transferred to the owner (B) who wants to prevent the obstruction of her existing view if B is willing to buy it from A on A's terms. Therefore, there will only be an exchange of entitlements if B values the protection of her unobstructed view more highly than A values her right to build and if the parties can

agree on a transfer. The establishment of a servitude or a restrictive condition that either protects the existing, unobstructed view from B's property or restricts building works on A's land is usually the result of such a voluntary exchange of entitlements between A and B.

The South African common law position regarding the right to a view shows that policy considerations dictate that the right to develop (build on) one's property is more important than the right to have an unobstructed view. Consequently, in a situation where a property owner's (A's) right to develop her property interferes with the existing view from her neighbour's (B's) property, A's right to develop is afforded stronger protection and will mostly be protected with a property rule. B would only have the right to prevent A from building in a manner that will obstruct the view from her (B's) property if A has granted her permission (sells her the right) to do so. This permission will be cast in the form of a servitude or a restrictive covenant that either protects the view from B's property, or that restricts building works on A's property. The constitutional analysis in chapter 5 indicates that there is no deprivation of A's right to build for purposes of section 25(1) of the Constitution in such circumstances, because A agreed to the limitation of her right.

## 6 3 Rationales for recognising exceptions to the rule against the protection of view

### 6 3 1 Public health and safety

The protection of public health and safety forms an important part of state governance and enjoys priority over the protection of private property.<sup>57</sup> This was illustrated in *Transnet Ltd v Proud Heritage Properties*<sup>58</sup> (“*Transnet*”), where the public interest in the safety and navigation of ships justified the substantive protection of the existing view towards lighthouses.<sup>59</sup> The decision in *Transnet* is an example of a situation where the state decided, for an overridingly important public purpose, to assign the initial entitlement to an owner who had a duty to prevent building, rather than the owner who wants to build. In terms of the National Ports Act 12 of 2005 (“National Ports Act”), the National Ports Authority is responsible for maintaining adequate and efficient lighthouses to assist in the navigation of ships. According to the judgment in *Transnet*, this statutory duty entitled the National Ports Authority to prevent the erection of buildings that would obstruct the views towards a lighthouse. The National Ports Act therefore effectively embodies a policy decision, in order to promote a public purpose, namely the safety and navigation of ships, to assign the initial entitlement to the protector of the existing view and not to the builder. The fact that the legislation denied the property owner’s (Proud Heritage Properties’) entitlement to build in this case implies that this reverse assignation of the initial entitlement serves an important and overriding public purpose. The

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<sup>57</sup> Section 25(1) of the Constitution provides that the use and enjoyment of private property may be regulated by the state, provided that such a regulation is in terms of law of general application and that it is not arbitrary. The constitutional validity of a situation where private property (the right to build on and develop one’s property) is regulated to promote a public purpose is considered in Ch 5.

<sup>58</sup> *Transnet Ltd v Proud Heritage Properties* (405/08) [2008] ZAECHC 155 (5 September 2008). This decision is also discussed in 3 2 2 4.

<sup>59</sup> This protection was granted in terms of the National Ports Act 12 of 2005.

decision in *Transnet* indicates that a property owner's (A's) normal right to build may not be recognised in a particular instance if the state decides to do so (for example, through legislation) to promote a public purpose. Since the initial entitlement in this case was vested in B, A will have to buy a right to build from the owner or authority (B) that is now entitled to prevent building works, but will only be allowed to do so if she carries the cost of ensuring that the public purpose is still served in another way, for instance by paying for the lighthouse to be moved. Depending on the circumstances, the initial assignment of the entitlement may implicate that it is protected by an inalienability rule<sup>60</sup> in this case.

Building regulations that are specifically aimed at preventing the erection of unsafe building works, for example building regulations that restrict the height of buildings or limit buildings' proximity to boundaries, might indirectly prevent the obstruction of the existing view from a neighbouring property. Such regulations that primarily serve the purpose of maintaining safe building standards might effectively protect an existing, unobstructed view. Therefore, according to public policy considerations, public health and safety purposes may justify the substantive protection of the view to or from certain properties or may have the unintended result of protecting the existing, unobstructed view from a property.<sup>61</sup> In other words, there may be instances where a property owner's right to develop her property may be restricted either by another owner's right or duty to protect a view or by the public interest in regulating building works.

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<sup>60</sup> See n 44.

<sup>61</sup> In *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) para 48, Rampai J, referring to the decision of Hoexter JA in *Malherbe v Ceres Municipality* 1951 (4) SA 510 (AD) at 517–518, reasoned that public policy ordains that a property owner whose private individual comfort and convenience is disturbed by a neighbouring owner's activities must endure such interference if the neighbour's activities are aimed at promoting public welfare.

Section 25(1) of the Constitution provides that the use and enjoyment of private property may be regulated by the state provided that such regulation is in terms of law of general application and that the deprivation of property it brings about is not arbitrary. In chapter 5, the constitutional validity of a situation where private property (the right to build) is regulated (right to build is restricted) to promote a public purpose (for example to prevent the obstruction of the view towards a lighthouse), was considered. It was established that the regulation (deprivation) of a private owner's property would only comply with the non-arbitrariness requirement if it was justified by its purpose.

The existing view from a property can be protected with a servitude, a restrictive condition or legislation that either expressly protects the view or prevents building works on a neighbouring property that would interfere with the view. Furthermore, restrictive conditions, zoning schemes, building regulations and legislation that are primarily aimed either at preventing unsafe building works (protecting public health and safety) or preserving the aesthetic attributes of a neighbourhood may have the concomitant effect of preventing the erection of buildings that would obstruct the existing views from neighbouring properties. However, the existing, unobstructed view from a property will only be protected (indirectly) through legislation, zoning schemes and building regulations insofar as these measures cause a valid deprivation of property (limitation on the right to build) in terms of section 25(1).

In chapter 5 it was concluded that servitudes and restrictive covenants that restrict property owners' right to build do not cause an arbitrary deprivation (or in fact any deprivation) of their rights to build in terms of section 25(1) of the Constitution, since a property owner whose right to build is restricted by a servitude or a restrictive

covenant voluntarily permitted the creation of this limitation.<sup>62</sup> By contrast, the constitutional validity of legislation, zoning schemes and building regulations that result in the protection of an existing view has to be evaluated with specific reference to the aims that these restrictions on building serve. Legislation, building regulations and zoning schemes that restrict building works on a property for an important purpose such as public health and safety will be considered to cause a justified deprivation of the owner's right to build if something like a rational link between the deprivation of the right to build and the (important) purpose of such a deprivation can be proven. However, legislation and building regulations that restrict a property owner's right to build and that are primarily aimed at an arguably less essential purpose, such as the preservation of the aesthetic attributes of a neighbourhood, will only be considered to cause a justified limitation of the right to build if it can be indicated that there is a proportionate balance between the deprivation (restriction on the right to build) and the impact that it has on the individual property. A limitation that serves a relatively unimportant or irrelevant purpose will therefore only be considered a justified limitation in terms of section 25(1) of the Constitution if such a proportionate balance can be proven.

### **6 3 2 A significant "advantage" in a special development context**

It has been established above that the existing, unobstructed view from a property is generally perceived to be purely a matter of delight and an incidental advantage of property.<sup>63</sup> Roman texts considered in chapter 2 indicating that certain attributes of property are mere incidental advantages and that interferences with them are not

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<sup>62</sup> See 5 2 3 1.

<sup>63</sup> See 6 2 1 above and 2 4 1.

actionable were not applied rigidly in Roman law.<sup>64</sup> This shows that the South African common law principle that a property owner does not have an inherent right to the existing view from her property might arguably be applied as a guideline and not as an absolute principle. In cases where the existing, unobstructed view from a property forms part of the property's use and enjoyment and is considered more than a merely incidental advantage of the property, the principle that interferences with such a view is not actionable could possibly not apply or may be applied flexibly.<sup>65</sup> Both South African and English case law have examples of cases where prospective property owners have, seemingly reasonably, relied on the continued existence of the views from their properties in exceptional cases. Therefore, similar to the position in Roman law where an interference with an advantageous attribute of property was indeed actionable in certain circumstances, a property owner in South African law might arguably, for policy reasons, have an inherent right to the existing, unobstructed view from her property in situations where such a view is a significant advantage of her property.

The ruling in *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others*<sup>66</sup> ("*Waterhouse*") suggests that, in instances where the interference with the view from a (neighbouring) property "has a material and negative influence on the intended use, enjoyment and purpose for which the neighbouring property was purchased, developed and improved",<sup>67</sup> such interference

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<sup>64</sup> These Roman texts specifically referred to the flow of water and light to a property as an incidental advantage of a property. In this regard, see 2 4 1 for a discussion of commentary on these Roman texts as per A Rodger *Owners and neighbours in Roman law* (1972) 38-89 and D van der Merwe "n Lastigheid in die oorlasreg: Optrede wat uiteraard regmatig is, ongeag die negatiewe gevolge daarvan" (1983) 16 *De Jure* 218-233.

<sup>65</sup> This was concluded in 2 4 1.

<sup>66</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004).

<sup>67</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) para 33.

may be unlawful. Rampai J reasoned that, because of the specific nature and location of the applicant and respondent's river fronting properties, the view from these houses was an "essential part" of the purpose for owning them.<sup>68</sup> He held that the applicant's<sup>69</sup> use and enjoyment of the view from its property over the river formed part of its right of ownership and that the first respondent interfered with this right when it erected a thatched structure that obstructed the applicant's view.<sup>70</sup>

This decision implies that in certain instances the view from a property may be considered an attribute that forms part of the ordinary use and enjoyment of a property. Accordingly, if the surroundings of a specific property is of such a nature that the view to or from it is considered more than a mere incidental benefit, one property owner's right to erect a building or structure on her property may be limited to accommodate another owner's right to have an unobstructed view. Considered purely in terms of the South African position with regard to the right to a view, the court's reasoning in the *Waterhouse* case appears to be flawed. The applicants should not have succeeded with their action if the court followed the default logic that a property owner does not have an inherent right to the existing view from her property, and that a property owner has the responsibility to ensure that the view from her property is adequately protected by a servitude or similar right if it forms an important part of the use, enjoyment and convenience of her property.<sup>71</sup>

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<sup>68</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) para 29.

<sup>69</sup> The first applicant is a close corporation that owned a river front property on the Free State side of the Vaal River. The second and third applicants are the only two members of the closed corporation. See *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) paras 2 and 3 for factual information regarding the respective parties.

<sup>70</sup> *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) paras 34 and 57.

<sup>71</sup> In *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) para 9 the court mentioned that the applicants did not propose that every landowner has an inherent right to a view. Instead, they argued that the respondents used

There therefore seems to be some basis for the development of such a flexible principle in South African law. Despite the Roman law principle that certain attributes of property are merely incidental advantages, this legal system did prevent interference with an incidental advantage of a property in certain circumstances.<sup>72</sup> The *Waterhouse* decision shows that, in South African law, courts may depart from the main rule that a property owner does not have an inherent right to the existing view from her property, when the reason for the rule, namely that the view from a property is merely an incidental benefit, does not apply. For example, the view from a property will not merely be an incidental advantage if it is an essential part of the property and its use and protecting it would enhance instead of prevent development of the surrounding area. If the location and surroundings of a property form such an important part of its utility that the protection of the enjoyment of these attributes from one's property (by way of protecting the unobstructed view) is more valuable than the protection of a neighbour's right to develop her land, the obstruction of the views of these surroundings might be prevented. Therefore, as indicated by the ruling in *Waterhouse*, there is a possibility of an exception to the rule against the recognition of an inherent right to the existing view from a property. It may be that this flexible approach should only apply in the context of a specific development, where all the properties were planned and built around specific views.

In the English case of *Gilbert v Spoor and Others*,<sup>73</sup> ("*Gilbert*") the Court of Appeal also acknowledged the possibility that an undisturbed view over a landscape may be valuable and advantageous to a landowner. Importantly, this conclusion was

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their property "in a manner which unreasonably interferes with their ordinary use, comfort, convenience and enjoyment of their [applicants'] own property." By implication, the applicants reasoned that their unobstructed view over the river formed part of the normal use and enjoyment of their property and that they were therefore (inherently) entitled to its continued (undisturbed) existence.

<sup>72</sup> See 2 4 1.

<sup>73</sup> *Gilbert v Spoor and Others* (1983) Ch 27.

reached in the context of a property development where a restrictive covenant benefitted owners of adjacent properties. The applicant was the owner of a piece of property in a building scheme. Properties in this scheme were subject to a covenant restricting the erection of buildings to one dwelling house per property. In 1976 he was granted permission to erect two more houses on the property. He subsequently applied to the Lands Tribunal to have the covenant amended or discharged.<sup>74</sup> A restriction imposed by a covenant could only be modified or discharged if it did not “secure to persons entitled to the benefit of it any practical benefit of substantial value or advantage...”.<sup>75</sup> The tribunal held that the effect of the modification or discharge of the covenant and the subsequent erection of two additional buildings by the applicant would obstruct the view from other properties in the scheme. Such an obstruction would deprive the persons entitled to benefit from the covenants of a “practical benefit of substantial value or advantage”.<sup>76</sup>

On appeal, the applicant contended that the view was not a “practical benefit”, since it was not visible from the objectors’ properties.<sup>77</sup> The Court of Appeal rejected this argument, stating that the “practical benefit” requirement was not limited to restrictive covenants that applied to specific pieces of land. Therefore, the pleasant view did not have to be enjoyed from the objectors’ properties to be considered a “practical advantage” to those objectors for purposes of this provision. According to the court’s reasoning, the obstruction of the view would indeed have a negative effect on the objectors’ properties, since it would be injurious to the estate as a

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<sup>74</sup> Section 84 (1)(aa)(1A) authorises the Lands Tribunal to, on application, modify or discharge a restriction “arising under covenant or otherwise”. Their power in this regard is subject to certain conditions, one of which is that the restriction to be modified or discharged may not have the effect of securing to the persons entitled to it “any practical benefits of substantial value or advantage to...”

<sup>75</sup> Section 84(1)(aa)(1A) of the Law of Property Act 1925.

<sup>76</sup> *Gilbert v Spoor and Others* (1983) Ch 27 at 33 and 36.

<sup>77</sup> Successors in title to the purchasers of other properties within the building scheme made objections to the applicant’s application for the amendment or discharge of the covenant.

whole.<sup>78</sup> *Gilbert v Spoor and Others*<sup>79</sup> is therefore an example of an instance where a court was willing to acknowledge that an undisturbed view over the property of another may be valuable and to the benefit of a property owner. The court's decision also illustrates that an unobstructed view of a scenic landscape does not have to be enjoyed directly from a property to be considered valuable to the owner. A property can also benefit from a pleasant view even if such a view can only be observed from a nearby spot. However, this judgment has to be examined with reference to the particular circumstances that were present in *Gilbert v Spoor and Others*.<sup>80</sup> The court recognised the respondents' right to a view because it was indirectly provided for in a restrictive covenant. Importantly, the court ruled that the restrictive covenant was used as a device to preserve the specific character of the relevant building scheme and that the unimpeded views, whether observed from houses or elsewhere in the development, formed part of this character. Therefore, the court was willing to protect the views that the respondents enjoyed when they were in the development, because it regarded the value that they derived from the enjoyment of these views to be higher than the value and gain that the applicant would obtain if he developed his property.

Generally, the right to the existing, unobstructed view from one's property is not recognised as an inherent property right. This principle is based on the reasoning that the recognition of a right to the unobstructed view from a property would not promote an essential factor in the use and enjoyment of a property, but would restrict an important part of the use (right to develop) of neighbouring properties. As a matter of policy, the right to develop one's property is considered to override the possibility

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<sup>78</sup> *Gilbert v Spoor and Others* (1983) Ch 27.

<sup>79</sup> *Gilbert v Spoor and Others* (1983) Ch 27 at 33 and 35.

<sup>80</sup> *Gilbert v Spoor and Others* (1983) Ch 27 at 33 and 35.

of acknowledging a right to the existing view from a property. However, as was indicated by the *Waterhouse* ruling and the English *Gilbert* decision, the existing, unobstructed view from a property may indeed form an essential part in the use and enjoyment of a property under certain circumstances. The fact that the Roman rule against protecting merely incidental attributes of property was context sensitive, in the sense that interferences with such attributes were indeed actionable in some circumstances, might suggest that the view from a property may sometimes form a significant part of the use of a property. Therefore, there may be room for an exception to the general rule against the recognition of the right to a view if the development of properties in a specific area is enhanced and not restricted by the protection of the views of the surroundings. This might be the case where land in a specific location is very expensive because of the surrounding views, or where the whole development was planned and built around certain views. Prospective property owners will only be willing to pay the high prices if they have the insurance that building works on neighbouring properties will be regulated so as to prevent significant interferences with those views from their properties. The development of such an area will therefore be enhanced if view is protected (because it is recognised as an important part of the use of the properties).

This kind of special exception may also be justified in terms of Law and Economics analysis. In Law and Economics theory, the assignment of property rights is aimed at maximising utility.<sup>81</sup> Traditionally, in a dispute between the protection of a property owner's view and her neighbour's right to develop her property, the neighbour's right to develop will prevail. The protection of the right to develop one's property is justified in terms of an efficiency argument, which holds that the

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<sup>81</sup> TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to Law and Economics* (2005) 246-260 at 246 and GS Alexander & EM Peñalver *An introduction to property theory* (2012) 30.

development of property is generally considered to maximise economic and social utility while view is perceived not to have any use other than mere “enjoyment”. The facts in the *Waterhouse* and *Gilbert* cases show that under certain circumstances, the view to or from a property may indeed contribute to the “use” of a property in a way that it becomes an essential aspect of that property. Although an unobstructed view cannot necessarily be utilised in economic or social terms, the planned exposition of houses and the role of the view in creating the overall character of a specific development may create the impression - which may be confirmed if the erection of buildings is restricted by a restrictive covenant or other regulations - that the existing views from properties should be protected. A prospective property owner may therefore be motivated to pay a higher price for a property in such a development because she considers the unobstructed views as part of the lifestyle (use) that a property in such a development offers.

Law and Economics theory also suggests that, in any given dispute, the property right of the person who places the highest value on her entitlement should prevail.<sup>82</sup> In terms of this logic, property rights are assigned to the “highest valuer”. In cases such as *Waterhouse* and *Gilbert*, the value of an unimpeded view may indeed be higher than the value that would be “earned” from erecting more buildings on one’s property. Consider the example where a river fronting area of land is developed so as to ensure that the owner of each respective plot has a view of the river from her house and that views of the river may also be enjoyed from elsewhere in the development. A prospective property owner wanting to buy a property in such a development will most probably attach a higher value to the beautiful views than merely regarding it as an “incidental advantage”. Her assumption (or, if restrictive

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<sup>82</sup> GS Alexander & EM Peñalver *An introduction to property theory* (2012) 30.

conditions, servitudes or other rules or regulations restrict building works in the development, her informed belief) that the views are more than “incidental” would be correct to the extent that the development of the properties was planned in a specific way to optimise the views. Therefore, and in contradistinction to the normal case where a buyer would take into account the possibility of building that might destroy an existing view, it would not be unreasonable for a buyer to assume that the views will be preserved and to include the value of the unimpeded views in the price that she is willing to pay for the property.

The right to develop one’s property is traditionally protected by a property rule, which may, in terms of Calabresi and Melamed’s paradigm, be transferred to a person who attaches a higher value to it and is therefore willing to “pay” for the transfer.<sup>83</sup> However, in a case where a buyer “reasonably” includes the value of the unimpeded views from her property in a specific development, all the buyers in the development arguably effectively already paid for a transfer of development rights in order to have their reciprocal interests in the views from their respective properties protected. Despite the fact that the right to develop is usually protected with a property right, circumstances where view forms an integral part of the character of a development may indicate that everyone who buys property in the development voluntarily consents to the transfer of their rights to develop their properties and at the same time acquires the right to an unobstructed view. Every owner therefore derives reciprocal obligations and benefits, since each owner’s right to build is collectively restricted (because the other owners acquired the right to a view) and each is collectively entitled to the right to an unobstructed view (because the others consented to the limitation of their right to build). In other words, this example shows

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<sup>83</sup> See 6 2 3 above.

that the existing views from properties in such a development may be protected as a property right (with a property rule), because it was included in the properties by consent, arguably even in cases where the arrangement is not formalised by the registration of servitudes or restrictive conditions. The protection of an existing view (by consent) in these cases would nevertheless be similar to the protection of a right to a view in terms of a servitude or a restrictive covenant, which also arises from an agreement in terms of which one property owner consents to the restriction of her right to build in favour of the protection of the unobstructed view from her neighbour's property.

The facts of the *Gilbert* case illustrate that there may be instances where the development of properties in a specific area is aimed at enhancing the enjoyment of the surroundings that is observed from each individual property. Such an area will be developed with the idea that the individual properties will be valuable because of their beautiful surroundings and not so much for their potential to be developed. It may be argued that a buyer of property in such an area reasonably considers the optimal enjoyment of the view from her property as part of the entitlements flowing from ownership of the property. She therefore already "pays" for this attribute when she buys the property. Despite the fact that a neighbouring owner's right to build would normally be considered to prevail in a dispute regarding the protection of view, the fact that an area was specifically developed to maximise the enjoyment of the view from each individual property may indicate that all the buyers of properties in the development place such high values on the protection of the beautiful views that they are willing to exchange their right to develop for the protection of the views. In such a building scheme, property owners therefore have reciprocal rights for the protection of unimpeded views.

Law and Economics arguments are useful both when a court has to decide whether or not the circumstances of a case necessitates the recognition of a right to a view, and when it has to determine how this right should be protected. It has already been established that Calabresi and Melamed's property rights paradigm may assist a court in the latter decision, since it limits a court's decision to two alternatives. In terms of this paradigm, a court will have to decide whether it should protect a right to a view with a property rule that will "allow rightholders to enjoin all attempts to acquire the right on terms that they deem unacceptable",<sup>84</sup> or whether protection with a liability rule that "only allow rightholders to seek monetary compensation (as set by a court) for seizures of the right"<sup>85</sup> will be more effective.<sup>86</sup>

A property rule will provide the strongest protection to the existing view from a property. If a court orders that a specific view is protected with a property rule, any person wishing to act in violation of the right would be required to negotiate with the right-holder and would only be allowed to "perform" the infringement if the right-holder gave her consent, probably against payment of an agreed sum of money. No interference (obstruction) of the view will be tolerated in the absence of such consent. A court would most likely protect the existing view to or from a property with a property rule (an order for demolition) in cases where the protection of such a view would serve an important public purpose. This form of protection will ensure that no violation (obstruction) of the view is tolerated. For example, if the existing, unobstructed view to a lighthouse is necessary for the navigation of ships, as was the situation in the *Transnet* case, and a court recognises a right to an unobstructed

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<sup>84</sup> TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to Law and Economics* (2005) 246-260 at 249.

<sup>85</sup> TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to Law and Economics* (2005) 246-260 at 249.

<sup>86</sup> TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to Law and Economics* (2005) 246-260 at 249.

view of the lighthouse, no development on surrounding properties that will interfere with the view towards the lighthouse will be allowed, except if the right-holder gave her permission. Therefore, a property owner who attempts to exercise the right to develop her property will be prohibited from erecting any buildings or structures that will interfere with the unobstructed view towards the lighthouse. If she has already commenced with building works, she will be ordered to demolish that which violates the right-holder's entitlement.

The *Waterhouse* decision creates the impression that South African law may possibly allow for an exception to the common law principle that a property owner does not have an inherent right to the existing, unobstructed view from her property. This ruling implies that, in circumstances where the views of the surroundings of a property forms an integral part of the property's use and enjoyment, such views should be protected as an inherent property right.<sup>87</sup> An exception of this kind is possible in the sense that historically, in Roman law, although an interference with an attribute of property that was usually considered to be a mere incidental advantage was not actionable, interference with such an advantage was actionable in certain circumstances.<sup>88</sup> English law also indicates that the existing view from a property may possibly be protected in cases where it is a significant advantage of a property.<sup>89</sup>

However, the possibility for an exception of this kind is probably much smaller than it appears on the surface. Insofar as *Waterhouse* suggests that the existing view from a property could be protected as an inherent property right in certain

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<sup>87</sup> See the discussion of *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) in 2 4 2.

<sup>88</sup> See 2 4 1.

<sup>89</sup> See the discussions of *Gilbert v Spoor and Others* (1983) Ch 27 and *Dennis and Others v Davies* [2008] EWHC 2961 (Ch) in 4 2 2 1.

circumstances, this protection (and consequent exception to the common law principle) must be based on implied consent between neighbouring property owners. A property owner (A) would only be entitled to the existing views from her property in terms of implied consent by neighbouring property owners (B and C) to refrain from obstructing such views if either planning or development of the specific area occurs simultaneously. If such a form of explicit or implied consent could be construed, an argument that resembles the situation where view is protected by reciprocal servitudes or restrictive covenants becomes possible. However, in the absence of registration of implied or express consent, it would not be binding on B and C's successors in title and they would consequently not be prohibited from interfering with the views from A's property. Without an actual real right, such as a servitude or restrictive covenant, that is based on the original consent, this construction therefore seems unlikely to succeed in South African law. Moreover, English law suggests that the possibility of an "exception" to the rule against recognition of an inherent right to the existing view from a property only features in cases where the protection of the views from properties in a specific development is regulated by rules or other devices such as restrictive conditions. An exception to the common law principle that the existing view from a property does not form part of an owner's property rights is therefore not possible without a registered real right that is based on implied or express consent in terms of restrictive covenants, rules that regulate building works in a specific development, or servitudes.

Consequently, although the recognition of an inherent right to the existing view from a property appears to be possible and useful in some cases, it is not workable in the absence of registration of some form of real right based on consent, either between neighbours among themselves or between a property owner and a

developer. Prospective property owners and developers who want to protect the existing views from properties therefore have to ensure that these views are properly protected through registration of servitudes or restrictive conditions. In the absence of a workable exception to the common law principle that a property owner does not have an inherent right to the existing view in situations where view is a significant advantage in a specific development, the position regarding the constitutional aspects also remains unchanged. In a special property development where the developer registers restrictive conditions or a prospective property owner registers a servitude to ensure the preservation of specific existing views, owners who are consequently deprived of their rights to build (in a manner that would obstruct such views) do not suffer an unjustified restriction of their property rights in terms of section 25(1) of the Constitution.<sup>90</sup>

#### **6 4 Conclusion**

It is traditionally believed that the recognition of a right to a view will constitute an imperfect balance of property rights. This reasoning flows from the perception that an unobstructed, beautiful view across an undeveloped neighbouring property is an incidental benefit that contributes to the value of only one property, while the development of property promotes the public interest at large. The limited enjoyment that an individual property owner will derive from the protection of the view across a neighbouring property will therefore not justify the negative effect that it will have on property owners' rights to develop their properties and the public's interest in the economic stimulation brought about by property development. Accordingly, the law

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<sup>90</sup> A servitude or a restrictive condition that restricts a property owner's right to build does not cause a deprivation of property for purposes of s 25(1) of the Constitution. See 5 2 3 1.

attaches more value to the right to build and develop on one's land than to the incidental enjoyment of a view across neighbouring land.

This perception does not acknowledge the possibility that protection of the view to or from a specific property may serve an important public purpose. It has been demonstrated above that there are strategies by which an existing view can be secured so that it may not be obstructed by building works on neighbouring land. When the right to a view has been secured through a servitude, restrictive conditions, zoning or building regulations, the concomitant restriction on the neighbouring owners' right to build either does not constitute a deprivation of their property or is justifiable as a non-arbitrary deprivation in terms of section 25(1) of the Constitution. Other, procedural strategies that focus on the procedure by which building plans had been approved or on the discretion that is exercised to approve building plans can never really restrict the right to build permanently and therefore do not really constitute a deprivation of property.

Strictly protecting the right to build rather than the enjoyment of incidental views does not allow for the possibility that a particular property development may be designed to enhance the unimpeded views that can be observed from there and that the protection of these views may enhance instead of restrict development of the surrounding area. Case law indicates that there may indeed be instances where the recognition of an inherent right to the existing, unobstructed view would promote an essential public purpose<sup>91</sup> or would enhance instead of restrict development.<sup>92</sup> In these exceptional circumstances, a transfer of entitlements may arguably take place

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<sup>91</sup> See the discussion of *Transnet Ltd v Proud Heritage Properties* (405/08) [2008] ZAECHC 155 (5 September 2008) in 6 3 1. This decision is also discussed in 3 2 2 4.

<sup>92</sup> See the discussions of *Waterhouse Properties CC and Others v Hyperception Properties 572 CC and Others* (2198/04) [2004] ZAFSHC 97 (28 October 2004) and *Gilbert v Spoor and Others* (1983) Ch 27 in 6 3 2.

to ensure that the entitlement of the highest valuer, namely the owner wanting to prevent building works to protect views, is protected. The exceptional cases where a right to a view is acknowledged because it would enhance development would only apply in specific developments planned around certain views and would involve reciprocal duties and entitlements similar to those that are usually protected by servitudes or restrictive conditions. The protection of view in these instances would not cause arbitrary deprivation in terms of section 25(1), since the right to continue enjoying the existing view will have to be registered, either as servitudes or as restrictive covenants, for the sake of legal certainty and enforceability against successors in title.

## List of abbreviations

<i>BW</i>	Burgerlijk Wetboek
<i>Cambridge LJ</i>	Cambridge Law Journal
<i>CCR</i>	Constitutional Court Review
<i>Harv LR</i>	Harvard Law Review
<i>JQR</i>	Juta's Quarterly Review
<i>LAWSA</i>	The Law of South Africa
<i>SALJ</i>	South African Law Journal
<i>Stell LR</i>	Stellenbosch Law Review
<i>THRHR</i>	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg

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