

The right to a view reconsidered

AJ VAN DER WALT*

CA KRIEK**

1 Introduction

Traditionally, an existing, unimpeded view over or across neighbouring properties is considered a mere incidental advantage, interference with which is generally not actionable. Contrary to popular belief, the advantage of enjoying a beautiful view from one's property is generally considered an "incidental" benefit and not as an incident of landownership. In that sense, there is no inherent right to a view. In one sense, this should not be surprising, since the view from one's property is not so much an incident or quality of that property as it is an advantage of a certain state of affairs, namely the absence of obstructive buildings or plants, on the adjoining property or properties over which the view is enjoyed. Insofar as it is legally interesting, a view from one property is always a view over other properties. In that sense, the view from one property is not an incident or quality of that property but rather an incidental benefit resulting from the quality of the adjoining properties. From first principles, this suggests that the notion of a right to a view is self-defeating, since ownership of one property does not automatically bring with it any entitlements with regard to the state or the qualities of adjoining land.

The notion of a right to a view could have either of two meanings. In the first place, it refers to the notion that one landowner has the right, purely as an incident of ownership of her piece of land, to demand that the owner of neighbouring land should refrain from doing anything (such as building) on the neighbouring land that would disturb or terminate the existing view *over the neighbouring land* that the former owner currently enjoys from her land. Secondly, it could refer to the idea that one landowner has the right, purely as an incident of ownership of her piece of land, to demand that the owner of neighbouring land should refrain from doing anything (such as building) on the neighbouring land that would disturb or terminate the existing view *onto the neighbouring land* that the former owner currently enjoys from her land. Whereas the former concerns a current view over neighbouring land to some pleasant distant vista, such as a sea or mountain view, the latter concerns a current view onto the neighbouring land as such.

In principle, South African law does not recognise an inherent right to the existing view from a property in either sense, 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 or otherwise

* Distinguished Professor of Law and South African Research Chair in Property Law (SARCPL) hosted by Stellenbosch University, funded by the Department of Science and Technology and administered by the National Research Foundation. The views expressed in this article are those of the authors and should not be ascribed to any of these institutions.

** Post-doctoral fellow, SARCPL.

use their properties.¹ Purely as a matter of formal authority, South African law reflects the position in Roman-Dutch law that there is no natural or inherent right to enforce the continued existence of an existing view from any given property.

However, despite the absence of a natural right to the existing view from one's property, such a view may be protected by way of a negative servitude or a similar device.² In *Erasmus v Blom*,³ the court confirmed the rule against recognition of the right to a view and held that an unobstructed view can be protected against lawfully built obstructions only 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. The existence and application of servitudes that are specifically aimed at preserving the existing view from or to the dominant tenement indirectly confirm that there is no natural entitlement, based purely on the ownership of property, to have an unrestricted view to or from one's property. However, despite the seemingly clear authority on this point, some recent South African decisions indicate that courts sometimes 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 even in the absence

¹ This point was most recently confirmed in *Trustees for the Time Being of the Dewel Trust v Schlosz* (11050/14) 2014 ZAWCHC 128 (18 Aug 2014) par 25. See further Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* (2006) 127; Van der Walt *The Law of Neighbours* (2010) 357-358. In a series of cases, including *Myburgh v Jamison* (1861) 4 Searle 8; *Van der Heever v Hanover Municipality* 1938 CPD 95; *Dorland v Smits* 2002 5 SA 374 (C); *Clark v Faraday* 2004 4 SA 564 (C) 575-577; *Muller NO v City of Cape Town* 2006 5 SA 415 (C) par 72-74; *De Kock v Saldanhabaai Munisipaliteit* (7488/04) 2006 ZAWCHC 56 (28 Nov 2006) par 36-39; *Erasmus NO v Blom* (3311/09) 2011 ZAECPEHC 11 (31 March 2011) par 36, the courts have indicated that in terms of the common law, a property owner does not have an inherent right to the existing, unobstructed view from her property. See also Freedman "Paradise lost? The obstruction of a pleasant view and the law of nuisance" in Hoctor and Schwikkard (eds) *The Exemplary Scholar Essays in Honour of John Milton* (2007) 162; Koch *The Right to a View Common Law, Legislation and the Constitution* (2012 dissertation University of Stellenbosch) 20-57; Van der Walt and Koch 2013 *THRHR* 696.

² Van der Merwe *Sakereg* (1989) 470 479-480; Badenhorst, Pienaar and Mostert (n 1) 127 327. Van der Merwe and De Waal "Servitudes" XXIV *LAWSA* re (updated by Van der Merwe) par 572 explain that a *servitus prospectus* 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. In the *Myburgh* case (n 1) 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 and Co* (1895) 2 Off Rep 36. The principle that a negative servitude (either a *servitus prospectus* or a *servitus altius non tollendi*) may be registered in South African law to protect the existing view from a property against lawfully built obstructions was confirmed in the *Erasmus* decision (n 1) par 36. Van der Linde and Basson "Environment" in Woolman, Bishop and Brickhill (eds) III *Constitutional Law of South Africa* (2002) ch 50 16-17 are more sympathetic towards the existence of a right to a view, relying on *Paola v Jeeva* 2004 1 SA 396 (SCA), where the court protected the appellant's view of the Durban coast. However, as we argue below, this decision does not support that view; see n 4 below.

³ (n 1) par 36.

of an acquired right (such as a servitude) to prevent the obstruction of the owner's view.⁴

Apart from the well-established principles regarding the protection of an existing view by way of a servitude or similar instrument, case law indicates that there are 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 based on pre-existing property rights that may entitle the rights holders to prevent the erection of buildings on neighbouring properties, or they are cast in the form of disputes based on procedural irregularities that may have the same effect, albeit temporarily.⁵

2 *The right to a view under the common law*

2.1 No inherent right to a view

2.1.1 View as an incidental advantage

2.1.1.1 South African law

In South African law, the view from a property is categorised as a “source of delight” and not as an inherent entitlement that results from ownership of the land.⁶ Church and Church⁷ state that interferences with certain sources of delight, for example interference with an aesthetically pleasing attribute of property, are not recognised as nuisance, although they may amount to interference with the comfort of human

⁴ The court in *Waterhouse Properties CC v Hyperception Properties 572 CC* (2198/04) ZAFSHC 97 (28 Oct 2004) 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. The same inherent protection was given to the existing view from a property in *Ndlambe Municipality v Lester* (92/2011) 2012 ZAECHC 33 (3 May 2012) when the high court accepted, without analysing the authority on this issue, that a property owner is entitled to contest the approval of a neighbour's building plans when the erection of a building in terms of such plans will interfere with the views from its property. See Van der Walt and Koch (n 1) 696. In the *Paola* decision (n 2), the court 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 the plans unfit for approval in terms of s 7(1)(b)(ii)(aa)(ccc) of the National Building Regulations and Building Standards Act 103 of 1977. In par 23 of its judgment, the court concluded that 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 s 7(1)(b)(ii)(aa)(ccc) of the act, not be approved. Although this interpretation of s 7 of the act is *obiter*, it may have created the impression that a property owner has an indirect right to the existing view from her property. See Van der Walt (n 1) 364; Koch (n 1) 100-103.

⁵ The decisions in the *Erasmus* case (n 1); the *Myburgh* case (n 1); the *Lewkowitz* case (n 2); *Kruger v Downer* 1976 3 SA 172 (W); *Richardson v South Peninsula Municipality* 2001 3 BCLR 265 (C); the *Muller* case (n 1); *Transnet Ltd v Proud Heritage Properties* (405/08) 2008 ZAECHC 155 (5 Sept 2008); *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 4 SA 42 (CC); *Paola v Jeeva NO* 2002 2 SA 391 (D); the *Paola* case (n 2); the *Clark* case (n 1); the *De Kock* case (n 1); *Searle v Mossel Bay Municipality* (1237/09) 2009 ZAWCHC 10 (13 Feb 2009); *Capendale v Municipality of Saldanha Bay, Capendale v 12 Main St, Langebaan (Pty) Ltd* 2014 1 All SA 33 (WCC); *Ramdass NO v Ethekwini Municipality* (11971/14) 2014 ZAKZDHC 27 (17 June 2014) indicate that litigants sometimes attempt and that courts are sometimes willing to protect the existing views from properties in a number of ways, some of which are direct, substantive and permanent while others are indirect, procedural and temporary. See Koch (n 1) 58-119. These “alternative strategies” to protect the existing view from a property are discussed in a separate article (forthcoming).

⁶ Church and Church “Nuisance” XIX *LAWSA* re par 193.

⁷ Church and Church (n 6) par 193.

existence. Consequently, the loss of a pleasant view from a property because of the erection of an unsightly or visually displeasing structure on adjoining or nearby land 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.⁸

The decision in the *Dorland* case⁹ 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 aesthetic considerations are irrelevant in common law relating to neighbours and nuisance.¹⁰ 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.¹¹ 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.¹²

The court *a quo* granted an order in favour of the respondent (then applicant), obliging the appellants (then respondents) to remove the security fencing and 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.¹³ 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.¹⁴ Accordingly, the court concluded that in the common law relating to neighbours and nuisance, purely aesthetic considerations are irrelevant.¹⁵ The decision in the *Dorland* case 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

⁸ See also the discussion of the *Dorland* case that follows.

⁹ (n 1).

¹⁰ the *Dorland* case (n 1) 383.

¹¹ 383.

¹² 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 focuses on the consideration that the full bench gave to aesthetics in the context of neighbours and nuisance.

¹³ 383.

¹⁴ 383. 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 the *ratio* of neither *Vanston v Frost* 1930 NP 121 nor the *Paolo* case (n 5) 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 Hiemstra and Gonin *Trilingual Legal Dictionary* (1992) 175 as "tastes differ". The Afrikaans translation, "oor smaak val daar nie te twis nie", indicates 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 v ATandT Wireless Services* (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."

¹⁵ the *Dorland* case (n 1) 383. The appeal succeeded. Although this discussion focuses only 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.

that courts should refrain from adjudicating upon for fear of imposing unreliable subjective impressions by force of law.

Knobel¹⁶ 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. Scott¹⁷ 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.

This debate suggests that the reason for not upholding the claimed right to a certain view from a property in the *Dorland* case, namely the subjectivity of aesthetics, is not a sound or even a relevant consideration in deciding cases of this nature. When nuisance does not feature and a claim to a view is purely based on the disturbance of an existing prospect, the applicable principle is simply that a landowner does not have a right that would entitle her to prevent neighbours from using their land in ways that might disturb or terminate her existing view onto or over their properties.

2.1.1.2 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 actions that cause damage for a property owner and actions that merely interfere with an incidental advantage of property. This distinction resulted in the recognition of certain exceptions to the rule that actions that have a detrimental effect on others are unlawful, 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. Therefore, interference with such a benefit was regarded as lawful.¹⁸

¹⁶ Knobel 2003 *THRHR* 500.

¹⁷ Scott "Recent developments in case law regarding neighbour law and its influence on the concept of ownership" 2005 *Stell LR* 351 356.

¹⁸ *D* 39 2 26; 39 3 1 21 (this and all other references to the *Digest* is based on the English translation of Mommsen, Kruger and Watson *The Digest of Justinian* (1985)). The undisturbed flow of light and air 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. However, the flow of light and air to a property is mentioned in this article only 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. The right to an undisturbed flow of light and air to a property is discussed in more detail in a forthcoming article that considers the current existence and viability of comparable rights such as the right to natural light, the free flow of air and the right to receive direct sunlight or wind.

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.¹⁹ This is illustrated by the fact that, although a property owner in Roman law could institute the *actio aquae pluviae arcendae* when actions performed on a neighbouring property, for example the erection of a building, interfered with the natural flow of water to her property,²⁰ 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 damage to her property, but not if the interference merely prevented the water to reach (and therefore benefit) her property.

A Roman property owner also had the *cautio damni infecti*²¹ at her disposal. This remedy protected the owner of immoveable property against danger that might stem from a derelict neighbouring property.²² 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.²³ 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 action 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.²⁴

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 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

¹⁹ *D* 39 3 1 21; *D* 39 2 26. See also Van der Merwe “n Lastigheid in die oorlasreg: optrede wat uiteraard regmatig is, ongeag die nadelige gevolge daarvan” 1983 *De Jure* 218 220.

²⁰ The *actio aquae pluviae arcendae* is treated in *D* 39 3 1. Van der Merwe *Oorlas in die Suid-Afrikaanse Reg* (1982 thesis University of Pretoria) 3-20 gives a detailed discussion of this action, while Kaser *I Das römische Privatrecht* (1971) 126 407 refers to it as part of the law that governs neighbour relations that originated during the early Roman period.

²¹ *D* 39 2 deals with the *cautio damni infecti*.

²² The remedy of *cautio damni infecti* afforded a property owner protection against a defective building. Kaser (n 20) 407-408 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, the owner of the threatened property would be granted an action for damages. 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 ruined 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 Rodger *Owners and Neighbours in Roman Law* (1972) 41.

²³ *D* 39 2 26.

²⁴ *D* 39 2 26. Van der Merwe (n 19) 222.

purpose of inconveniencing her neighbour by obstructing her view to the ocean.²⁵ 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 purely to harm A by obstructing her view.²⁶

2.1.1.3 Roman-Dutch law

Roman-Dutch jurists received and applied the Roman law distinction between actions that cause damage for a property owner and actions that merely deprive owners of previously enjoyed incidental benefits.²⁷ 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.²⁸ Voet explains this position as follows:

“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.”²⁹

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,³⁰ 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.³¹ “The servitudes of outlook and of not having outlook obstructed (*prospectus, et ne prospectui officiat*) correspond in most things with the right of letting in openings for light and air and of not having such openings obstructed.”³²

Furthermore, Voet categorises the blocking of openings for light and air together with outlook when he discusses the *servitus altius tollendi*.³³ This shows that Voet probably reasoned that the same rules that applied to openings for light and air

²⁵ *Novella* 63; see Van der Merwe (n 20) 81; Van der Merwe (n 19) 222.

²⁶ Van der Merwe (n 20) 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 way.

²⁷ Freedman (n 1) 162-165-167.

²⁸ Voet *Commentarius ad Pandectas* (translation by Gane *The Selective Voet being the Commentary on the Pandects*, hereafter referred to as Voet) 39 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.

²⁹ Voet 39 1 1.

³⁰ Voet 39 1 1.

³¹ Voet 8 2 12.

³² Voet 8 2 12.

³³ Voet 8 2 6.

should apply to the existing view from a property and that the obstruction of a 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.

2.1.2 The right to build higher

2.1.2.1 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."³⁴ 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."³⁵ 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 on the neighbour's land even if they would interfere with such a view. Nevertheless, this freedom could be limited by

³⁴ De Groot *Inleidinge tot de Hollandsche Rechtsgeleertheid* (translated by Maasdorp *The Introduction to Dutch Jurisprudence of Hugo Grotius* (1903) 43, hereafter referred to as Grotius) 2 1 23. Old (Germanic) Dutch law already knew a right to receive the flow of wind for the sake of driving windmills ("*recht van windvang*"), which implied the right to prevent neighbours from building or planting on their land that would block the free flow of wind, see Ketelaar *Oude Zakelijke Rechten Vroeger, Nu en in de Toekomst* (1978) 192.

³⁵ Grotius 2 34 19. This rule flows from the maxim *cuius est solum, eius est usque ad coelum et ad inferos*. According to Badenhorst, Pienaar and Mostert (n 1) 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 potestas*. Van der Merwe "Things" XXVII *LAWSA* re par 304 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". 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 311 315 where Mason J applied this principle. 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. Kaser (n 20) 138 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. Badenhorst, Pienaar and Mostert (n 1) 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". Kaser II *Das römische Privatrecht* (1971) 289-290 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.

servitudes³⁶ 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.

2.1.2.2 South African law

In *Van der Heever v Hanover Municipality*,³⁷ Jones J held that a property owner could build as high as she wanted 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 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 ...”³⁸

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 article, except by analogy in instances where such a comparison is necessary for the sake of argument. For the purpose of establishing the position of the right to a view 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. By ruling that the affected property owner has to prove that her rights have been infringed upon, Jones J effectively confirmed a property 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.³⁹

³⁶ 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 officiat* might also have had this effect in order to serve its aim of protecting the prospect from the dominant tenement.

³⁷ (n 1).

³⁸ the *Van der Heever* case (n 1) 96 per Jones J.

³⁹ Voet 8 2 6 refers to the *servitus altius tollendi*, which is a category of servitude that creates a right of raising a building higher. 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 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*. Van der Merwe (n 20) 122-124, 137-139 and 205 discusses the extensive controversy regarding this servitude and 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

The decision in *Clark v Faraday*⁴⁰ confirms that South African law acknowledges the principle that the owner or occupier of land may use her property in an ordinary and natural manner.⁴¹ 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.⁴² The applicant and first respondent were neighbouring owners of properties situated on the back slope of Table Mountain with views over Hout Bay. Once the local authority had 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.⁴³ He reasoned that the local authority was therefore 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",⁴⁴ to refuse the approval of these building plans.⁴⁵

Van der Westhuizen AJ rejected this application.⁴⁶ He contemplated the scope of section 7(1)(b)(ii) and held that it must be interpreted restrictively with regard to its

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. See Koch (n 1) 33-38.

⁴⁰ (n 1).

⁴¹ the *Clark* case (n 1) 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.

⁴² the *Clark* case (n 1) 577.

⁴³ The applicant relied on the supreme court of appeal's decision in the *Paola* case (n 2), where it was held *obiter* that s 7(1)(b)(ii)(aa)(ccc) of the National Building Regulations and Building Standards Act 103 of 1977 (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 the value of such neighbouring property.

⁴⁴ s 7(1)(b)(ii)(aa)(ccc) of the National Building Act.

⁴⁵ the *Clark* case (n 1) 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 the *De Kock* case (n 1) and the *Searle* case (n 5).

⁴⁶ Van der Westhuizen AJ, in the *Clark* case (n 1) 575-576, argued that the supreme court of appeal's decision in the *Paola* case (n 2) was based on the unlawfulness of the process that was followed when the plans were approved (the local authority did not comply with the requirement that, in terms of s 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). 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 s 7(1) of the National Building Act did not form part of that judgment's *ratio decidendi* and was therefore not binding. See also Van der Walt (n 1) 367-368.

purpose and rationale.⁴⁷ 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. An interpretation that effectively protects the existing view from a property against building works on a neighbouring property would be inconsistent with the common-law rules that regulate the creation and extinction of praedial servitudes, especially the *servitus prospectus* and the *servitus altius non tollendi*.⁴⁸ 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.⁴⁹

According to the interpretation of section 7(1)(b)(ii)(aa)(ccc) of the National Building Act by the court in the *Clark* case, a local authority is compelled to reject building plans if the completed building would diminish the value of a neighbouring property 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 judgment in the *Clark* case 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.⁵⁰

2.2 Protection of an undisturbed view

A South African property owner may protect the view from her property with a negative servitude.⁵¹ 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.⁵² A *servitus prospectus* may be created in respect of two properties that are not adjacent to each other.⁵³ These

⁴⁷ the *Clark* case (n 1) 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.

⁴⁸ the *Clark* case (n 1) 577. A *servitus prospectus* gives the dominant property owner a right to an unobstructed view, while a *servitus altius non tollendi* prohibits the owner of the servient tenement from building higher. See par 2.2 below.

⁴⁹ the *Clark* case (n 1) 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 Superstate (Pty) Ltd* 1963 1 SA 102 (A) and the *Dorland* case (n 1), where the respective courts agreed with this principle.

⁵⁰ Badenhorst, Pienaar and Mostert (n 1) 127-128 refer to the decision in the *Clark* case (n 1) when they discuss the rules applicable to the protection of a South African owner's right to the existing view from her property.

⁵¹ Badenhorst, Pienaar and Mostert (n 1) 127. In the *Erasmus* case (n 1) par 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.

⁵² Van der Merwe and De Waal (n 2) par 572.

⁵³ Van der Merwe (n 2) 470 and 480.

servitudes originated in Roman law and were received in Roman-Dutch law.⁵⁴ Case law indicates that these servitudes are still applicable in South African law as a way to create a right to a view.⁵⁵ Therefore, it is possible for a property owner to protect the existing, unobstructed view from her property by registering such a servitude.

In *Myburgh v Jamison*⁵⁶ the court 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. 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.⁵⁷ 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.⁵⁸

⁵⁴ Roman law provided for the protection of the view from a property through servitudes. In terms of *D 39 1 Spr*, a property owner had the opportunity to create a *servitus ne prospectui officiat* that would protect the view from her property against any form of obstruction, or, as provided for in *D 39 1 2*, she could create a *servitus altius non tollendi* 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. Van der Merwe (n 20) 53 mentions that both the *servitus ne prospectui officiat* and the *servitus altius non tollendi* are negative servitudes. Kaser (n 20) 442 discusses these two servitudes as examples of urban servitudes in Roman law and Van der Merwe (n 2) 498 categorises the *servitus ne prospectui officiat* 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. The same servitudes were available under Roman-Dutch law. Voet 8 2 12 referred to the *servitus prospectus, et ne prospectui officiat* 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. Apart from the *servitus prospectus, et ne prospectui officiat* 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 Roman-Dutch landowner to protect the view from her property by creating a *servitus altius non tollendi*. This servitude, which is discussed in Voet 8 2 8, 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. See Koch (n 1) 39-44.

⁵⁵ the *Myburgh* case (n 1); the *Lewkowitz* decision (n 2); the *Kruger* case (n 5).

⁵⁶ (n 1).

⁵⁷ A similar argument was made by Lord Hardwicke in the English case of *Attorney-General v Doughty* (1752) 2 Ves Sen 453. In *Dalton v Angus and 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. This case is discussed in more detail in par 2.5.1 below.

⁵⁸ 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 the *Kruger* case (n 5) 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.

The supreme court of the Cape of Good Hope interpreted the condition in a deed of transfer⁵⁹ 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.⁶⁰

The dispute in *Lewkowitz v Billingham & Co*⁶¹ 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.⁶² 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 be cancelled only 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.⁶³ 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 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

⁵⁹ 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.

⁶⁰ This was the interpretation that counsel for the defendant proposed. Voet referred to the *servitus altius non tollendi* in Voet 8 2 8; 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. 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).

⁶¹ (n 2).

⁶² 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.

⁶³ 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).

creation of a contractual agreement, which could be registered as a servitude, or a similar device, such as a title deed restriction.

2.3 Exceptions to the rule that there is no inherent right of view

2.3.1 A significant “advantage” in a special development context

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.

The ruling in *Waterhouse Properties CC v Hyperception Properties 572 CC*⁶⁴ 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”,⁶⁵ such interference 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.⁶⁶ He held that the applicant’s⁶⁷ 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.⁶⁸

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 specific 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.

However, 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.⁶⁹

⁶⁴ (n 4).

⁶⁵ the *Waterhouse* case (n 4) par 33.

⁶⁶ the *Waterhouse* case (n 4) par 29.

⁶⁷ The first applicant was a close corporation that owned a river front property on the Free State side of the Vaal River. The second and third applicants were the only two members of the close corporation. See the *Waterhouse* case (n 4) par 2-3 for factual information regarding the respective parties.

⁶⁸ the *Waterhouse* case (n 4) par 34; 57.

⁶⁹ In the *Waterhouse* case (n 4) par 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 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.

There seems to be some, albeit weak, basis for the development of a flexible principle regarding the protection of “incidental benefits” 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.⁷⁰ 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 the *Waterhouse* case, there is a possibility of developing an exception to the rule against the recognition of an inherent right to the existing view from a property. It may be that such a flexible approach should apply only in the context of a specific development, where all the properties were planned and built around specific views.

However, the possibility for an exception of this kind is probably much smaller than it appears on the surface. Insofar as the *Waterhouse* case suggests that the existing view from a property could be protected as an inherent property right in certain 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 be entitled to the existing views from her property only in terms of implied consent by neighbouring property owners (B and C) to refrain from obstructing such views if planning or development of all the properties in the area occurred 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 covenants⁷¹ 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

⁷⁰ See Levy “West Roman vulgar law, the law of property” in XXIX *Memoirs of the American Philosophical Society* (1951) 117-118; Van der Merwe (n 19); Koch (n 1) 47-50.

⁷¹ 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. These covenants originated in contract and were imposed by township developers with the establishment of a new neighbourhood. Buyers of properties that are subject to restrictive covenants agree to the limitations that these measures place on their ownership entitlements. Van Wyk *Planning Law* (2012) 302-305 explains that 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 provincial ordinances were enacted. A restrictive covenant that has the effect of protecting the view from a property is similar to a servitude of view or a servitude not to build higher, since 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. It is interesting to note that 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.

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. It may be true that the coordinated development of a group of properties renders the view from each of them a significant benefit of its use, but in such a situation the importance of the view from each property indicates that it is necessary specifically to protect that view against development on the other properties, probably by way of a reciprocal servitude. Rather than changing the general rule, the importance of view in an individual case points towards the need for individualised protection of the right.

Consequently, although the recognition of an exception to the rule, in terms of which an inherent right to the existing view from a property appears possible in some cases, it is probably not workable in the absence of some form of registered 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 the registration of suitable servitudes or restrictive conditions.

2.3.2 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.⁷² This was illustrated in *Transnet Ltd v Proud Heritage Properties*,⁷³ where the public interest in the safety and navigation of ships justified the substantive protection of the existing view towards a lighthouse.⁷⁴ The decision in the *Transnet* case is an example of a situation where the state decided, for an overridingly important public purpose, to assign a specific entitlement of prospect to an owner of land who had a duty to prevent building. In terms of the National Ports Act 12 of 2005, the National Ports Authority is responsible for maintaining adequate and efficient lighthouses to assist in the navigation of ships. According to the judgment in the *Transnet* case, 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 legitimate and overriding public purpose, namely the safety and navigation of ships, to assign a specific entitlement of view to the protector of the existing view.

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 also 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

⁷² S 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. See Koch (n 1) 163-239, where 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.

⁷³ (n 5).

⁷⁴ This protection was granted in terms of the National Ports Act 12 of 2005.

unintended result of protecting the existing, unobstructed view from a property.⁷⁵ 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.

2.4 Constitutional aspects

The question might be raised whether refusing to protect an existing view from one property over neighbouring land might constitute an infringement with property that is in conflict with section 25 of the constitution. Section 25(1) provides that no one may be deprived of property except in terms of law of general application and that no law may authorise arbitrary deprivation of property. Section 25(2) (read with 25(3)) adds that property may be expropriated only in terms of law of general application, for a public purpose or in the public interest, and subject to compensation that is just and equitable. The meaning and application of these provisions have been set out authoritatively in the *FNB* decision of the constitutional court.⁷⁶ The *FNB* decision highlights the threshold requirement, before the protection of section 25 is triggered, that the complainant must prove that she has or had a property interest that qualifies as property for purposes of section 25.⁷⁷ Crucially, therefore, assuming that nobody has an inherent right to preserve the existing view from their land in terms of the common law (which is the default position, as is argued above), the fact that either a local authority (in regulating building in the area) or a court (in deciding a dispute about building) refuses to preserve an existing view purely on the basis that the existing view is not an inherent entitlement of the landowner can logically not constitute an infringement of section 25. Following the logic of the *FNB* decision, the question whether a person had been expropriated or deprived of property can arise only once it has been demonstrated that that person had a property right for purposes of section 25. Consequently, unless that person can demonstrate that she had acquired a specific right to preserve the existing view (based on legislation, a servitude or some other ground), denying its existence as a matter of inherent common-law entitlement does not qualify as a deprivation of such a right.

Conversely, if a court (or a local authority) should decide to preserve the existing view from a particular property without sound common-law authority for the proposition that such a right is inherent in ownership of the beneficiary land (as is argued above), the effect would inevitably be to impose a restriction on the affected neighbouring landowner's use entitlements. Specifically, such protection would inhibit the neighbouring landowner's entitlement to build on her land, without her consent and without consideration. Such a restriction would indeed impose a

⁷⁵ In the *Waterhouse* case (n 4) par 48, Rampai J, referring to the decision of Hoexter JA in the *Malherbe* case (n 49) 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.

⁷⁶ *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) par 100. See further Van der Walt *Constitutional Property Law* (2011) 108 ff.

⁷⁷ the *FNB* case (n 76) par 57.

deprivation or expropriation (as the case may be)⁷⁸ of the neighbouring landowner's property. In the majority of cases the restriction would qualify as a deprivation of property that must satisfy the requirements in section 25(1), the most important of which is that the deprivation may not be arbitrary. According to the *FNB* decision a deprivation of property is arbitrary if there is insufficient reason for it, considering the balance between the goal of the deprivation and the means elected to achieve it, assessed in the context of the complexity of relationships involved.⁷⁹ Generally speaking, imposing a building restriction on one landowner so as to preserve the existing view from a neighbour's land, in the absence of statutory authority, might well constitute an arbitrary deprivation of property unless the beneficiary owner is obliged to pay compensation.

2.5 Foreign law

2.5.1 English law

Like South African law, English law does not acknowledge an inherent right to the existing view from a property. 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. From as early as 1587, English courts have been reluctant to treat the enjoyment of a beautiful view over or across a neighbouring property as an inherent property right because of the perception that the enjoyment of such a view is an incidental advantage and a matter of delight, and not of necessity.⁸⁰ A few English decisions followed in which the courts indicated that the pleasant view onto or across a neighbouring property does not require protection as an inherent property right, since a beautiful view does not serve an important purpose, but merely contributes to the enjoyment of one's property.⁸¹ It was only in 1752, in the case of *Attorney-General v Doughty*,⁸² that a court provided a policy reason for not giving property owners an actionable right to a view. In this judgment, Lord Hardwicke ruled that urban development would be inhibited if the obstruction of

⁷⁸ Since there is no common-law authority for expropriation in South African law, expropriation would enter the picture only if the restriction is imposed in terms of expropriatory statutory authority. In that case the main issues would be whether the expropriation serves a legitimate public purpose or is in the public interest and whether just and equitable compensation is payable. In the absence of a statute that clearly authorises expropriation against compensation, the question might also be whether the state acquires the property in any sense; since the decision of the constitutional court in *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) par 58 state acquisition is a core feature of expropriation.

⁷⁹ the *FNB* case (n 76) par 100.

⁸⁰ 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.

⁸¹ *William Aldred's Case* (1610) 9 Co Rep 57b 59a, 77 ER 816 821; the *Dalton* decision (n 57) 24. In the *Dalton* case (n 57) 24A-C, Lord Blackburn referred to the judgment of Wray CJ in the *Bland* case (n 80), who admitted that it is "a great commendation of a house" to have a large undisturbed outlook, but contended that whilst a free flow of light and air to a property is a necessity, an unobstructed view is merely a delight.

⁸² (n 57).

the prospect from another owner's property is considered to be a nuisance.⁸³ Public policy in favour of urban development therefore determined that the obstruction of the existing view from a property should not be actionable. The effect of this policy is also evident in *Dalton v Angus*,⁸⁴ where Lord Blackburn observed that an unobstructed view normally requires a relatively large area of vacant land and that the recognition of a general right to a view would therefore inevitably restrict the erection of buildings on a large and undefined area.⁸⁵ Lord Blackburn asserted that, as opposed to the implementation of a right to an existing view, which would burden a large and undefined number of properties, the implementation of a right to an undisturbed flow of light to one's property would merely impose a burden on one adjacent property. 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 unidentified properties. These contrasting features of the right to a view and the right to light caused Lord Blackburn to infer that the right to a view would only originate from an agreement between property owners, and would not arise *ex lege*.⁸⁶

English case law therefore indicates that a property owner does not have an inherent right to the existing, undisturbed view from her property across or over adjoining properties.⁸⁷ In English law, the existing view from a property does not form an inherent part of the right of ownership and any interference with this aesthetically pleasing attribute is classified as *damnum absque injuria* – “damage without an

⁸³ Lord Hardwicke applied the same reasoning 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 the *Dalton* case (n 57) 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” and consequently inhibit development. In *Hunter v Canary Wharf Ltd* 1997 AC 655 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. The fear that the protection of an existing view would prevent building development was also raised in the South African *Myburgh* case (n 1). In this case 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.

⁸⁴ (n 57).

⁸⁵ the *Dalton* case (n 57) 24D-G. Lord Blackburn based his reasoning on that of Lord Hardwicke in the *Doughty* case (n 57).

⁸⁶ the *Dalton* case (n 57) 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.

⁸⁷ This rule was stated explicitly in the *Dalton* case (n 57) and implied by decisions such as the *Aldred* case (n 81) 59a, 821; *Butt v Imperial Gas Company* (1866) 2 Ch App 158; *Re Penny and the South Eastern Railway Co* (1857) 119 ER 1390; the *Hunter* case (n 83) 677, which determined that the obstruction of an existing view does not constitute an actionable nuisance. See also Buckley *The Law of Nuisance* (1996) 37; Pugh-Smith, Sinclair and Upton *Neighbours and the Law* (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: the *Aldred* case (n 81) 59a, 821; the *Butt* case (n 87); *Harris v De Pinna* (1886) 33 Ch D 238 262 CA; *Leech v Schweder* (1874) 9 Ch App 463 474-475; *Browne v Flower* (1911) 1 Ch 219 225, per Parker J.

unlawful act and without legal injury”.⁸⁸ 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 can be used 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.

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 *Hunter v Canary Wharf Ltd*,⁸⁹ Lord Lloyd suggested that a restrictive covenant may give a property owner a legal right to a view.⁹⁰ 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.⁹¹ Case law indicates that there have indeed been instances where property owners have employed restrictive covenants to protect amenities, including view, of their properties.⁹² The decision in *Re Buchanan - Wollaston’s Conveyance*⁹³ 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.⁹⁴ They also executed a deed in terms of which the use of this parcel of land was restricted in order to prevent the other properties from suffering any nuisance or detriment.⁹⁵ 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.⁹⁶ The deed effectively constituted a private agreement to protect the existing views from the properties.

⁸⁸ The court in the *Bland* case (n 80) classified the obstruction of the existing view from a property as *damnum absque injuria* – “damage without an unlawful act and without legal injury” (Hiemstra and Gonin (n 14) 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 the *Aldred* case (n 81) 58b, 821 ruled that interference with or the flow of air to a property that was caused by the erection of a pigpen was actionable.

⁸⁹ (n 83). The case was also heard in *Hunter v Canary Wharf Ltd* 1997 AC 655.

⁹⁰ the *Hunter* case (n 83) 699.

⁹¹ the *Hunter* case (n 83) 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) right to build.

⁹² *Re Buchanan – Wollaston’s Conveyance* 1939 2 All ER 302; *Gilbert v Spoor* 1983 Ch 27; *Dennis v Davies* 2008 EWHC 2961 (Ch).

⁹³ (n 92).

⁹⁴ the *Buchanan* case (n 92) 302 304.

⁹⁵ the *Buchanan* case (n 92) 302 304-305.

⁹⁶ the *Buchanan* case (n 92) 305.

The decisions in *Gilbert v Spoor*⁹⁷ and *Dennis v Davies*⁹⁸ 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.

The decisions in the Hunter, Buchanan, Gilbert and Dennis cases 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

⁹⁷ (n 92).

⁹⁸ (n 92). In this decision 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. Both the claimants' and the defendant's properties were situated in a building development on the banks of the 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 *Waterhouse* case (n 4), discussed in par 2.3.1, 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 the *Dennis* case (n 92) par 1-6, 80-81, the defendant's plan to extend an existing building on his property posed a threat to the views enjoyed from the claimants' 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 for 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 had 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. At first glance, this ruling appears to be in disagreement with the decision in the *Hunter* case (n 83), where 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 the *Dennis* case decided not to apply the common law and consequently did not follow the principle laid down in the *Hunter* case. 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. These covenants prohibited the use of one's property in a manner that may cause annoyance or nuisance for a neighbouring landowner. In the *Hunter* case (n 83) 685D-H; 686A-H; 699B-H; 700A-C; 708H; 709A-C; 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. 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. 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. This decision was confirmed by the court of appeal in *Dennis v Davies* 2009 EWCA Civ 1081. See the discussion of this case in Koch (n 1) 136-139.

property or it may prohibit an owner from using her property in a way that would cause nuisance or annoyance for a neighbour.⁹⁹ 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 view will only have been protected with a liability rule.¹⁰⁰ 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.

Besides confirming that the pleasant view from a property can be protected with a restrictive covenant, the court of appeal in the *Gilbert* decision also acknowledged the possibility that an undisturbed view over a landscape may be valuable and advantageous to a landowner. Importantly, 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 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.¹⁰¹ 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 ..."¹⁰² 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

⁹⁹ The courts in the *Gilbert* (n 92) and *Dennis* (n 92) cases 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.

¹⁰⁰ The difference between protection of property rights in terms of property rules and liability rules is discussed in Koch (n 1) 251-257, with reference to Calabresi and Melamed "Property rules, liability rules and inalienability: one view of the cathedral" 1972 *Harvard LR* 1089. 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 be protected in terms of a property rule only 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.

¹⁰¹ S 84(1)(aa)(1A) authorises the Lands Tribunal to, on application, modify or discharge a restriction "arising under covenant or otherwise". Its 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..."

¹⁰² s 84(1)(aa)(1A) of the Law of Property Act 1925.

persons entitled to benefit from the covenants of a “practical benefit of substantial value or advantage”,¹⁰³

On appeal, the applicant contended that the view was not a “practical benefit”, since it was not visible from the objectors’ properties.¹⁰⁴ 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 whole.¹⁰⁵ The *Gilbert* judgment 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 the *Gilbert* case.¹⁰⁶ The court recognised the respondents’ right to a view because it was indirectly provided for in a restrictive covenant and not as an inherent common law entitlement of ownership. 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.

At first glance it seems as if the existing view from a property can also be protected in terms of a negative easement that prevents a property owner from erecting buildings on her property that would interfere with the existing view from a neighbouring property.¹⁰⁷ 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.¹⁰⁸ 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

¹⁰³ the *Gilbert* case (n 92) 33 36.

¹⁰⁴ 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.

¹⁰⁵ the *Gilbert* case (n 92).

¹⁰⁶ the *Gilbert* case (n 92) 33 35.

¹⁰⁷ In terms of the definition and categorisation of a negative easement, it appears as if this type of right is suited to protect the existing view from a property. According to Gray and Gray *Elements of Land Law* (2009) 596, 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). Gaunt and Morgan *Gale on Easements* (2008) 4 define a negative easement as a right to receive something from a neighbour’s property without the neighbour interfering with or obstructing it, and list rights to light, air, support and water as examples of negative easements.

¹⁰⁸ 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 Scots law, appears to indicate that English law easements are similar to servitudes in South African law.

only a limited number of negative easements are recognised.¹⁰⁹ This principle was confirmed by the court in *Browne v Flower*,¹¹⁰ 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.¹¹¹ 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.¹¹²

McFarlane argues that the enjoyment of a view cannot be defined well enough to qualify as an easement.¹¹³ 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 can circumscribe the view that is sought

¹⁰⁹ Gray "Property in thin air" 1991 *Cambridge LJ* 252-307 261, referring to the *Aldred* case (n 81) 58b, 821, argues that the right to protect a view is not recognised in the law of easements. Gray and Gray (n 107) 617-619 reason that the categories of negative easements are "virtually closed". McFarlane *The Structure of Property Law* (2008) 838-839 agrees, arguing that easements of light, air and support are the only recognised negative easements. Gaunt and Morgan (n 107) 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 à prendre* in the sense that an easement does not confer a right to take something from a servient tenement, whereas a *profit à 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 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 the *Aldred* (n 81) 59a, 821, *Butt* (n 87), *Penny* (n 87) and *Hunter* (n 83) 685G-H and 686A-C cases.

¹¹⁰ (n 87).

¹¹¹ This staircase was erected on a neighbouring property. The facts of this case resemble those in the *Penny* case (n 87), 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 the *Penny* case 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.

¹¹² the *Browne* case (n 87) 225 227. 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.

¹¹³ McFarlane (n 109) 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 be considered an easement only if the air passes through a defined channel. In the same way, an easement of light will exist only if it

to be protected quite clearly and specifically. Similarly, at least in some instances it should be possible to identify the properties that might potentially infringe upon a specific existing view in advance with some certainty. 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.¹¹⁴

The position regarding the protection of an unobstructed, existing view from a property in English law largely 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.¹¹⁵ 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 may have a substantive right, based on the specific design of the properties in the development (but probably specifically protected in a restrictive covenant), to prevent the obstruction of the view.¹¹⁶ 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. Nevertheless, just as a property owner in English law can protect the existing view from her property

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.

¹¹⁴ 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 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 require only 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 Gaunt and Morgan (n 107) 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 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 the entitlement may be lost if the neighbour exercises her right to erect buildings on her property in a way that obstructs such a view.

¹¹⁵ The decisions in the *Hunter* (n 83) 699, *Buchanan* (n 92), *Gilbert* (n 92) and *Dennis* (n 92) cases established that the existing view from a property can be protected with a restrictive covenant. See Koch (n 1) 131-140.

¹¹⁶ the *Gilbert* case (n 92). See also the discussion of the *Dennis* case (n 92) in n 98.

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. 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 (but probably only if protected in a servitude or similar instrument).¹¹⁷

2.5.2 Dutch law

Dutch law does not acknowledge a right to the existing, unobstructed view from a property as an inherent entitlement of landownership either. However, in terms of the Dutch legal system a property owner (A) may acquire a right to prevent a neighbouring owner (B) from using B's property in a way that will interfere with the existing view from A's property. Such a right can be based on a praedial servitude (*erfdienstbaarheid*) or on statutory provisions. 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 right (*misbruik van recht*). 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.

In Dutch law, a praedial servitude¹¹⁸ can be created to protect the existing, unobstructed view from a property. For example, a praedial servitude can 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 exceed a certain height limitation. Such a servitude can have the effect of preventing the erection of buildings on B's property that will obstruct the existing view from A's property. Furthermore, the view from A's property can be preserved with a praedial servitude that compels B to maintain B's property.¹¹⁹ For example, A can have a substantive right, in terms of a praedial servitude, to compel B to maintain trees and hedges on B's property to either ensure that they do not obstruct the existing view from A's property *over B's property*, or that they continue to contribute to the pleasant view from A's property *onto B's property*.¹²⁰

Statutory regulation prohibits a property owner from having windows, openings in walls, balconies or other similar structures within a distance of two metres from the border line of a neighbouring property.¹²¹ However, overlooking (having a view *onto*) a neighbour's premises through or from such openings or structures will be

¹¹⁷ See the discussion of the *Waterhouse* case (n 4) in 2 3 1.

¹¹⁸ Snijders and Rank-Berenschot *Goederenrecht* (2012) 532 mention that respective property owners' entitlements with regard to a view (*uitzicht*) are often set out in the contents of a praedial servitude. See also Wibbens-De Jong *Mandeligheid en Erfdienstbaarheden Monografieën B27 BW* (2006) 20.

¹¹⁹ Snijders and Rank-Berenschot (n 118) 532-534. See s 5:71.2 *BW*. See also Wibbens-De Jong (n 118) 32.

¹²⁰ Wibbens-De Jong *Burenrecht Monografieën BW B26* (2009) 47.

¹²¹ s 5:50.1 *BW*. S 5:50.3 *BW* explains how the distance referred to in this provision (two metres) must be measured. See further Berger *Burenrecht, Mandeligheid en Erfdienstbaarheden* (2001) 71.

lawful if the neighbour granted permission for such “building works”.¹²² A praedial servitude can therefore 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. 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 have a view over B’s property that she would otherwise not have had.¹²³ There are also instances where the Dutch civil code provides that a property owner may not prevent her neighbour from having openings or structures within a distance of two metres from the border line.¹²⁴

¹²² S 5:50.1 *BW* provides that: “*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*” (own translation: One is prohibited from having windows, other wall openings, balconies or similar building works closer than two metres 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.)

Relying on case law, Reehuis, Heisterkamp, Van Maanen and De Jong *Goederenrecht* (2006) 445 explain that the words “*andere muuropeninge*” in s 5:50 *BW* 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, Suijling V *Inleiding tot het Burgerlijk Recht: 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 s 5:50 *BW*, Wibbens-De Jong (n 120) 53-54 remarks that a roof garden is not considered to be a building work similar to a balcony. Furthermore, referring to Hof Arnhem 8-02-2005, *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 an “other building work” in terms of s 5:50 *BW*. Instead, this will be determined by the purpose for which the relevant structure is useful with reference to its nature and construction. See Mijnsen, Van Velten and Bartels *Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht 5 Zakenrecht Eigendom en Beperkte Rechten* (2008) 192. See also 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 metres from the borderline. See also Wibbens-De Jong (n 120) 51-52; Mijnsen *et al* 191-192; Van Es *De Actio Negatoria Een Studie naar de Rechtsvorderlijke Zijde van het Eigendomsrecht* (2005) 243 for discussions of s 5:50 *BW*.

¹²³ 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 Reehuis *et al* (n 122) 445.

¹²⁴ s 5:50.2 *BW*. 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 metres (because it looks onto or is obstructed by a neighbour’s wall that is fitted with opaque windows). S 5:50.2 *BW* 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 metres away) that obstructs the view from such an opening or structure is demolished. See Mijnsen *et al* (n 122) 192. Furthermore, s 5:50.4 *BW* 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 metres from such a “point” of overlooking

This restriction on having windows or other openings within a certain distance from a neighbouring property prevents overlooking of a neighbour's premises 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 metres from B's property. The wall will obstruct the view currently 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 indirect effect of protecting the view from B's property.

Apart from protecting an existing view against obstruction caused by building works on a neighbouring property, a property owner may, in terms of Dutch neighbour law, also have the opportunity to prevent her view from being obstructed by a neighbour's trees or hedges.¹²⁵ Since trees and hedges may either obstruct or contribute to the existing view from a property, the statutory provisions¹²⁶ 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.¹²⁷ These regulations are aimed at preventing the obstruction of the view from a property and the flow of air and light to neighbouring properties. If trees or hedges are planted within the prohibited distance, a property owner may demand the removal of these plants.¹²⁸

Generally, a property owner will not lose her right to build on her property as she pleases merely because her building works will obstruct the view from a neighbouring property.¹²⁹ 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

so as to cause the neighbour nuisance by disrupting her view. This prohibition does not apply when there is already a building within two metres from the overlooking opening or structure when the prescription period ends. See also Berger (n 121) 70; Reehuis *et al* (n 122) 445–446; Wibbens-De Jong (n 120) 52 regarding the circumstances under which the restrictions on the placing of windows and other openings are not applicable.

¹²⁵ Wibbens-De Jong (n 120) 47.

¹²⁶ S 5:42 *BW* regulates the planting of trees, shrubs and hedges close to a border line.

¹²⁷ S 5:42.1 *BW* determines that trees may not be planted closer than two metres from the border line between two properties, while a distance of half a metre applies to shrubs and hedges. However, in terms of s 5:42.3 *BW*, 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 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. S 5:42.2 *BW* explains how the prescribed distances should be determined and s 5:42.4 *BW* determines how damages should be calculated when s 5:42 *BW* has been violated. Wibbens-De Jong (n 120) 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.

¹²⁸ 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 Wibbens-De Jong (n 120) 44.

¹²⁹ Van Acht (n 122) 207.

with the neighbour's enjoyment of her property.¹³⁰ In the event that the obstruction of the pleasant view from a property constitutes an unlawful nuisance in Dutch law, nuisance law can provide a way to protect the existing view from such a property.¹³¹ 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.¹³²

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.¹³³ During the nineteenth century, the doctrine of abuse of rights was often explained by way of the example of a property owner who erects a chimney with the sole purpose

¹³⁰ Mijnsen *et al* (n 122) 54 refer to the spreading of 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. Van Es (n 122) 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.

¹³¹ Van Acht (n 122) 192-193 207. 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. In terms of s 5:37 *BW*, an act of nuisance will be actionable in Dutch law only if it is unlawful according to s 6:162 *BW*. S 6:162 *BW* 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.

¹³² In his discussion of the factors that affect the lawfulness of an act of nuisance, Van Acht (n 122) 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 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 s 5:37 *BW* 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.

¹³³ Snijders and Rank-Berenschot (n 118) 140-141 specifically discuss the abuse of a property right, using the term "abuse of a (property) entitlement" (*misbruik van [eigendoms]bevoegdheid*), which they understand to include "abuse of a [property] right" (*misbruik van [eigendoms]recht*).

of obstructing the view from a neighbouring property.¹³⁴ 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 A's property if she can 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.

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 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 lays 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,¹³⁵ while public participation is also part of the process regulating an application for a building permit (*bouwvergunning*).¹³⁶ 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 application has to be advertised. 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

¹³⁴ Reehuis *et al* (n 122) 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.

¹³⁵ S 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 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.

¹³⁶ *Wet van 29 Augustus 1991 tot herziening van de Woningwet* regulates the approval of building plans. In terms of s 40(a)(1) of this act 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 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.

decision maker must consider certain aesthetic values when deciding whether or not to grant the requested building permit.¹³⁷

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 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. The Dutch planning-law system therefore entitles property owners to be informed of and possibly to object to building plans prior to their approval.¹³⁸

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 only 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.¹³⁹ 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 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, which 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

¹³⁷ S 12 of the act of 29 August 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.

¹³⁸ In terms of South African law, property owners will have the right to see, object or sometimes approve a neighbour's building plans only 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 Koch (n 1) 58-119.

¹³⁹ 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 not discussed in this article. See n 5.

involves an application for the removal or amendment of a restrictive condition, rezoning, 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. 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.

3 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 or onto 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 or onto 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. Furthermore, protecting the right to a view from one property inevitably restricts the right to use neighbouring property, possibly in a significant way, without the owners of potentially affected neighbouring land necessarily being aware of such a restriction in advance. The owner who currently enjoys a pleasing view over neighbouring land, on the other hand, enjoys the benefit of knowing exactly which neighbours she would have to negotiate with to acquire the right to preserve that view. The publicity principle therefore favours the common law rule against an inherent right to a view. Accordingly, the law attaches more value to the right to build and develop on one's land than to the incidental enjoyment of a view over or onto neighbouring land, with the effect that a South African property owner does not inherently have an actionable right to the existing view from her property.

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 v Smits*,¹⁴⁰ 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,

¹⁴⁰ the *Dorland* case (n 1).

while the decision in *Clark v Faraday*¹⁴¹ confirms that this principle is part of South African law. Earlier decisions, such as *Myburgh v Jamison*¹⁴² and *Lewkowitz v Billingham & Co*,¹⁴³ 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.

By contrast, the judgment in *Waterhouse Properties CC v Hyperception Properties 572 CC*¹⁴⁴ 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. However, it seems unlikely that the courts will protect this interest in the absence of some kind of protective servitude or restrictive covenant. Furthermore, the decision in *Transnet Ltd v Proud Heritage Properties*¹⁴⁵ indicates that an overridingly important purpose, such as public safety, may justify the protection of an existing view. 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.

Analysis of the English and Dutch legal systems indicates that a right to view is not acknowledged in these jurisdictions either. Nevertheless, the South African legal system, and more specifically a South African property owner who wants to protect the existing view from her property, may profit from an administrative scheme that, similar to that offered by the Dutch legal system, provides property owners with a right to be informed of and to comment on a neighbour's building plans prior to their approval. At the very least such a scheme might diminish the chances, at an early stage, of litigation resulting from conflicts about the right to a view.

SAMEVATTING

DIE REG OP UITSIG HEROORWEEG

Die hedendaagse Suid-Afrikaanse reg erken nie 'n selfstandige reg op uitsig nie. Die eienaar van 'n grondstuk beskik dus nie sonder meer oor die reg om buureienaars te verhinder om só op hulle grond te bou vir behoud van eersgenoemde se bestaande uitsig nie. Dit is wel moontlik om 'n reg tot beperking van bouwerk of beplanting op buurgrond te verkry, byvoorbeeld by wyse van die registrasie van 'n servituut of uit hoofde van 'n beperkende voorwaarde wat die gebruik van die dienende erf inperk. Die verstekposisie, naamlik dat daar geen selfstandige reg op uitsig is nie, kan ook deur wetgewing of stadsbeplannings- en bouregulering gewysig word. Soortgelyke beginsels geld in ander moderne regstelsels soos die Nederlandse en Engelse reg.

¹⁴¹ the *Clark* case (n 1).

¹⁴² the *Myburgh* case (n 1).

¹⁴³ the *Lewkowitz* (n 2).

¹⁴⁴ the *Waterhouse* case (n 4).

¹⁴⁵ the *Transnet* case (n 5).

Die Suid-Afrikaanse regsbeginsel berus op 'n tradisie wat dateer uit die Romeinse reg, waarvolgens die voordeel van 'n onbelemmerde uitsig vanaf een grondstuk oor ander grondstukke 'n bloot toevallige voordeel is, wat nie genoeg gewig dra om sonder meer 'n saaklike beperking op die gebruik of ontwikkeling van naburige erwe te plaas nie. In die moderne reg berus hierdie benadering op die aanname dat die naburige grondeienaar se reg om te bou en sy eiendom te ontwikkel sterker is, en meer voordelig vir die algemene belang, as die toevallige genot wat die reg op 'n uitsig aan 'n enkele eienaar bied. Enige grondeienaar se reg om op sy eie grond te bou sal dus slegs in twee gevalle beperk word, naamlik: enersyds wanneer daar belangrike oorweging van openbare belange op die spel is (stadsbeplannings- en bouregulasies) en andersyds wanneer die enkele ander grondeienaar wat deur sodanige beperking bevoordeel word (die bevoordeelde van 'n uitsig) deur ooreenkoms 'n dienooreenkomstige reg verkry en geregistreer het. Dit sal bowendien prakties onmoontlik wees om, in die afwesigheid van 'n geregistreerde reg om 'n bestaande uitsig vanaf 'n spesifieke grondstuk te beskerm, te bepaal welke ander grondstukke presies deur die reg belas word, wat teenstrydig sal wees met die publisiteitsbeginsel. Die verstekposisie is dus in die openbare belang en in ooreenstemming met die publisiteitsbeginsel. Ten spyte van 'n mate van verwarring, veral in die openbare media, is die huidige regsposisie ten aansien van die reg op uitsig sowel in beginsel as prakties die bes moontlike oplossing.