

Alternative strategies to protect the existing view from a property

CA KRIEK*

AJ VAN DER WALT**

1 Introduction

In terms of the common law, a South African property owner does not have an inherent right to the existing view from her property over adjoining properties,¹ although the existing view from her property can be protected with a servitude that prevents or restricts building works on adjoining land.² Furthermore, there are (weak and inconclusive) indications that the view from a specific property may be protected as an inherent part of landownership in exceptional circumstances, where the view forms an integral part of the use and enjoyment of the property and where the protection of that view was an important consideration in the development of land in that area.³ Apart from these rather limited circumstances, landowners

* Post-doctoral fellow, South African Research Chair in Property Law, University of Stellenbosch.

** Professor of Law and South African Research Chair in Property Law, 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.

¹ South African law does not recognise an inherent right to the existing view from a property, because a beautiful view is considered a mere incidental advantage, and since the recognition of a natural right to the view from a property would interfere with neighbouring owners' rights to build on their properties. See 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 Saldanhaabai Munisipaliteit* (7488/04) 2006 ZAWCHC 56 (28 Nov 2006) par 36-39; *Erasmus NO v Blom* (3311/09) 2011 ZAECPEHC (31 Mar 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) 162-184; Koch *The Right to a View: Common Law, Legislation and the Constitution* (2012 dissertation US) 20-57; Van der Walt and Koch 2013 *THRHR* 696; Van der Walt and Kriek 2015 *TSAR* 482.

² In the *Erasmus* case (n 1) par 36 it was confirmed that in South African law the existing view from a property 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. See Koch (n 1) 44-47, 76-85.

³ The ruling in *Waterhouse Properties CC v Hyperception Properties 572 CC* (2194/04) 2004 ZAFSHC 97 (28 Oct 2004) could be read as implying that the view from a property may in certain instances be considered an attribute that forms part of the ordinary use and enjoyment of that property. Accordingly, if the surroundings of a specific property are 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, if this is indeed what the decision implies, the court's reasoning appears to be flawed in terms of the South African position with regard to the right to a view (n 1 above). See Freedman (n 1) 162-184; Koch (n 1) 51-55.

can generally not claim an inherent right, as part of their ownership, to uphold the undisturbed prospect from their land against the wish of neighbouring owners to develop and build on their land.

However, case law indicates that property owners often rely (with varying degrees of success) on alternative strategies to protect the existing view from their properties. These strategies are either based on the enforcement of a substantive right to prevent or restrict building on adjoining land, with the indirect effect of protecting the existing view, or they are cast in the form of attacks on procedural irregularities in approving development or building on neighbouring land, with the same effect, albeit temporarily.

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

Procedural strategies that are used to prevent the erection of a building that would obstruct the view from a property are different from the substantive-right strategies set out above, to the extent that they are founded purely on irregularities in the process of approving the building plans. These strategies involve an attack on either a purely procedural shortcoming in the approval process or the decision maker’s exercise of its discretion to approve the plans.⁶

Property owners use these alternative strategies to protect the existing view from their properties in the absence of an inherent right to a view. The two main categories of alternative strategies (substantive and procedural) are explained and assessed in the subsections below in terms of the remedies that they offer and with reference to their application in case law.

⁴ In this article, the phrase “departure from zoning scheme” refers to the subdivision of property, or a departure from the zoning scheme in terms of a “consent use”, or a deviation from the applicable building regulations. Van Wyk *Planning Law* (2012) 352-353 defines “consent use” and “departures”.

⁵ Strategies based on a substantive right to prevent or restrict building are discussed in 2 below.

⁶ Purely procedural strategies are examined in 3 below.

2 Strategies based on a substantive right to prevent or restrict building

2.1 Basis of the right to prevent or restrict building

A property owner (A) has a substantive right, which flows from her right of ownership, to be informed of – and sometimes prevent by withholding consent to – a neighbour's (B's) building plans when these plans involve the removal or change of a restrictive condition;⁷ when the application for the approval of B's building plans includes an application for the re-zoning of B's property⁸ or for a departure from the zoning scheme that affects A's property;⁹ or if the building plans are in conflict with any applicable legislation. If A's substantive right is created by legislation or a restrictive condition that prohibits any or a particular form of building on B's property, no building may be erected on B's property in conflict with that condition without A's consent, unless a state body (the local or provincial government or a court) has the authority to qualify or override A's right to object. If her right is based on a restrictive condition, a zoning scheme or building regulations that prohibit the erection of buildings in a certain spot, or of a certain height or kind, B may not erect any building that would be in conflict with these limitations without allowing A an opportunity to object or,¹⁰ in some cases, without A's consent.¹¹ In some instances, a state body such as the local or provincial government or a court can qualify or override A's right to object and if they do, B may erect a building despite A's objections.

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

A substantive right to prevent the erection of a building on a neighbouring property can in certain cases amount to an actual veto that prevents any form of building. For example, if the substantive right originates in legislation that places a duty on a specific landowner (B) not to build (at all or in a specific location or manner) on its property, such a person or authority must refrain from any building that will interfere with the duty, and the beneficiary (A) can enforce compliance with that duty. An example is the National Ports Act 12 of 2005, which determines that the National Ports Authority is, *inter alia*, responsible for maintaining adequate and efficient lighthouses to assist in the navigation of ships. This provision places a duty on the National Ports Authority to protect the views to lighthouses and therefore entitles and compels it to prevent the obstruction of such views by building on any

⁷ Van Wyk (n 4) 351, 355, 357, 394, 396. See 2.2.1.

⁸ See 2.2.2.

⁹ *Walele v City of Cape Town* 2008 6 SA 129 (CC) par 130; see Van Wyk (n 4) 354, 357, 396 and cf 2.2.3.

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

¹¹ A restrictive condition may not be removed in terms of the common law if its beneficiaries have not granted their permission; see 2.2.1.

¹² See the discussion of *Richardson v South Peninsula Municipality* 2001 3 BCLR 265 (C); the *Muller* case (n 1); *Transnet Ltd v Proud Heritage Properties* 2008 ZAECHC 155 (5 Sep 2008) in 2.2.

property in the vicinity of lighthouses. In this case the effect of the substantive right is that no building may be erected without the right holder's (the National Ports Authority's) approval and the right holder has an absolute right to prohibit the erection of any buildings that may interfere with the visibility of a lighthouse.¹³ Although it is in principle possible that the right holder can give permission for building works in conflict with this duty, it is unlikely that such permission would be granted, and (in the absence of impropriety) it is equally unlikely that another state body would ever be able to qualify or override the Port Authority's right to object. In this case, the right to prevent building on B's land is therefore an absolute veto. It stands to reason that other private property owners whose existing view might have been compromised by a particular building may benefit indirectly from enforcement of the Port Authority's statutory obligation to prevent or restrict that building.

However, a substantive right to prohibit the erection of a building on a neighbouring property would not necessarily veto all building on the neighbouring property, since such a right may be subject to qualification or removal. If the substantive right originates in zoning legislation, it can be qualified or removed by the responsible local authority (or by a court) in terms of the same legislation.¹⁴ If it originates in a restrictive condition, it may be qualified or removed by a court or, in some instances, by the responsible planning authority.¹⁵ However, in some instances it is more difficult to remove or qualify a substantive right to prevent building against the beneficiary's will than in others. If the right to prevent building on neighbouring land originates in an agreement that had been registered as a limited real right (restrictive covenants and certain categories of restrictive conditions) it is more unusual and therefore more difficult to have the right removed or qualified, while rights that originate in planning legislation (building regulations) can be qualified or overridden more easily.¹⁶ Irrespective of whether such a right is qualified or removed by a court or a local authority, removal or qualification of the right will be possible only if it is in the public interest to do so (for example to remove a restrictive covenant with a racially discriminatory foundation), and not merely to benefit the owner wanting to build.¹⁷ Because the beneficiary has a substantive right, she may

¹³ See the discussion of the *Transnet* case (n 12) in 2.2.4.

¹⁴ In the *Richardson* case (n 12) 268 the court qualified property owners' right to prevent the erection of buildings on a neighbouring property, ruling that although the beneficiaries of the substantive right did not consent to the subdivision of their neighbour's property, approval of the subdivision should not be set aside. However, it ordered that the responsible local authority should consider imposing height limitations on current and future buildings on the subdivided property. The beneficiaries' substantive right did therefore not amount to a veto of their neighbour's building works. See 2.2.2.

¹⁵ Badenhorst, Pienaar and Mostert (n 1) 354-356; Van Wyk (n 4) 345 351.

¹⁶ See 2.2.1 on the removal of restrictive conditions. Badenhorst, Pienaar and Mostert (n 1) 354 argue that a restrictive covenant can be modified or removed by agreement, since it is created by agreement.

¹⁷ Badenhorst, Pienaar and Mostert (n 1) 356, referring to *Camps Bay Ratepayers and Residents Association v Minister of Planning, Culture and Administration, Western Cape* 2001 4 SA 294 (C); *Hayes v Minister of Finance and Development Planning, Western Cape* 2003 4 SA 598 (C), explain that an application for the removal of restrictions lodged with the premier may be granted only if it serves a positive advantage, such as the public interest, and that the applicant's personal interest in such an application is irrelevant. They reason that proper notice of such an application must be given to all neighbouring owners who will be directly affected by its approval, to avoid procedurally unfair administrative action. In *Nowers NO v Burmeister* (1038/08) 2011 ZAECELLC 8 (2 Aug 2011) par 50-51 the court established that zoning schemes are aimed at protecting community interests. Van der Walt 2011: 3 *Juta's Quarterly Review* par 2 3 2 argues that the court in the *Nowers* case upheld counterclaims involving alleged unlawful building works on the ground that courts have a duty to enforce compliance with the requirements set out in zoning schemes and other planning legislation because these legislative measures protect the rights of others.

in any event be entitled to attack a qualification or removal of her right in terms of section 25 of the constitution.¹⁸

Strategies to protect the existing view from a property that are based on substantive rights to prevent or restrict building often feature only once a building project has started. The principle is that the beneficiary has a right to object or that prior permission should be obtained before the building plans are approved, but building permission is sometimes granted without prior consultation, and then the beneficiary of the right to prevent building may be forced to attack the granting of building approval on procedural grounds. When approval is granted for a building that would contravene a restrictive condition, the affected neighbour's attack on the approval of the building plans would typically focus on the administrative blunder in granting building approval without obtaining the prior consent of affected neighbours. This could create confusion of the substantive with the purely procedural strategies, but it is important to distinguish between them. If an objection against a building project that has already started is based on a pre-existing substantive right that entitles the objecting property owner to veto (or at least object against) approval of the building plans, the attack should focus on the fact that the administrative decision (approval of the building plans) has been taken in conflict with a substantive property right. Purely procedural strategies arise when there is no substantive right to prohibit building in the first place, but an administrative error was made in the granting of permission to build generally, for example if there was no building control officer employed (as is required) when the responsible local authority approved the plans.¹⁹ Consequently, if the approval of building plans is attacked on the basis of a purely procedural irregularity, the attack can focus only on the administrative irregularity in the process of approving the plans, because there is no substantive right (apart from the right that procedures be followed) underlying the attack.²⁰

¹⁸ Van Wyk (n 4) 356, referring to *Ex parte Optimal Property Solutions CC* 2003 2 SA 136 (C), explains that a restrictive condition is considered "property" for purposes of s 25(1) of the constitution, since it is classified as a praedial servitude. The removal of a restrictive condition therefore amounts to a deprivation of property in terms of s 25(1). See Badenhorst, Pienaar and Mostert (n 1) 355-356; cf 2.2.1 below.

¹⁹ In *Paola v Jeeva NO* 2004 1 SA 396 (SCA) the respondent's building plans were approved at a time when there was no building control officer employed by the responsible local authority that approved the plans. The plans were therefore approved in conflict with s 5(1), 6(1) and 7(1) of the National Building Regulations and Building Standards Act 103 of 1977 (building act). See 3.2.1 below.

²⁰ The confusion between how and where the two different strategies apply is apparent from decisions such as the *Walele* case (n 9) and *True Motives 84 (Pty) Ltd v Mahdi* 2009 4 SA 153 (SCA). These cases appear to concern purely procedural battles, but in fact there are two issues involved in both of them. The first is whether permission to build was granted in conflict with a substantive right: although the attack on the approval of the building plans has an administrative basis (namely an administrator's decision to approve building plans), it actually concerns a substantive right because the building permission was granted without obtaining the necessary consent, in a situation where such consent was required. The second question is whether s 7 of the building act creates a substantive right (in addition to the other substantive rights mentioned earlier) to prevent building on a neighbouring property. The conflicting decisions in the *Walele* and *True Motives* cases adopted different points of view regarding the latter question. In *Turnbull-Jackson v Hibiscus Court Municipality* 2014 6 SA 592 (CC) the constitutional court upheld its *Walele* interpretation of s 7(2)(b) and rejected the conflicting interpretation of the supreme court of appeal in the *True Motives* case, holding that it is not unjustifiably burdensome on either the local authority or the developing owner to expect the local authority to reject building plans when it is uncertain whether a completed building (that otherwise complies with all legal requirements) might trigger any of the disqualifying factors (including derogating of the value of neighbouring properties). This decision arguably confirms the existence of an additional, statutory substantive right to prevent or restrict building on neighbouring land.

2.2 Application

2.2.1 Restrictive conditions

A restrictive condition can create a substantive right to prevent (or at least object against) the erection of buildings on neighbouring property that would affect an existing view from the dominant property.²¹ Restrictive conditions can, for example, prohibit any building; restrict the erection of buildings within a specific distance from the street line; impose height restrictions on buildings; limit the area of a property that may be built on; or restrict the use of a property to a single-storey dwelling.²² Since building works that contravene a restrictive condition are unlawful,²³ these limitations may indirectly result in effective, substantive protection of the existing view from the beneficiary's property.²⁴

Protection of the existing view from a property in terms of a restrictive condition can be limited or forfeited only if the neighbouring owner who is prevented from building in terms of the restrictive condition successfully applies for the amendment, qualification or removal of the condition. However, the interests of the beneficiaries of such a restrictive condition are protected against unwanted alteration or removal of such a condition, and it is unlikely that conditions of this nature will be removed or amended purely for the benefit of an affected owner who wants to build.²⁵

In *Ex parte Optimal Property Solutions CC*²⁶ the court decided that, in order to comply with the constitutional requirements for a valid deprivation of property, the removal of restrictive conditions in terms of the common law must be accompanied by effective notice to affected neighbours and may not be granted without the consent of all the affected parties.²⁷ Restrictive conditions can also be amended or removed in terms of the Removal of Restrictions Act 84 of 1967 (removal act),

²¹ Van Wyk (n 4) 309 refers to restrictive conditions as “conditions registered in title deeds during the process of township establishment by the township developer in terms of which restrictions are placed on the use of land, separate from town planning or land use schemes”.

²² Van Wyk (n 4) 68, 306-307.

²³ See *Van Rensburg NO v Naidoo NO; Naidoo NO v Van Rensburg NO* 2011 4 SA 149 (SCA) par 18; Van Wyk (n 4) 315. See also *Resnekov v Cohen* 2012 1 SA 314 (WCC), which concerned an (applicant's) attempt to enforce a restrictive condition that restricted the use of a (respondent's) neighbouring property to a single-storey dwelling, protecting the existing view from the applicant's property. However, the court dismissed the applicant's case on the basis that the condition was a personal servitude that only benefitted the person who owned the property when the condition was inserted. This indicates that the effectiveness of a restrictive condition may be affected by the way in which the condition is interpreted. See Van Wyk (n 4) 68-69.

²⁴ In the *Myburgh* case (n 1) 8, a condition in the transfer deed of a property prohibited the erection of buildings that would obstruct the view from a specific adjacent property.

²⁵ The consent of the beneficiaries of a restrictive condition is required for the removal or amendment of such a condition if it is removed or amended in terms of the common law, while the removal or modification of a restrictive condition in terms of the provisions of the Removal of Restrictions Act 84 of 1967 is allowed only if the beneficiaries of the condition had the opportunity to object.

²⁶ (n 18).

²⁷ The *Optimal Property Solutions* case (n 18) par 4-6, 19-20. The court ruled that restrictive title deed conditions are similar in character to reciprocal praedial servitudes; that the registration of such servitudinal rights and obligations amounts to the creation of real rights in property; and that the loss of property rights due to the removal of a restrictive condition amounts to a deprivation of property in terms of s 25(1) of the constitution. See Badenhorst, Pienaar and Mostert (n 1) 355-356.

in which case consent of affected property owners is not required.²⁸ Nevertheless, the removal act prescribes procedures to safeguard affected owners' rights to be informed of and to object to applications for the amendment or removal of restrictive conditions that affect their land.²⁹ Therefore, as was established in *Ex parte Optimal Property Solutions CC*, restrictive conditions create property rights that, according to the requirements for the removal or amendment of a restrictive condition in terms of either the common law or the removal act, may be removed only if affected property owners have at least been given an opportunity to object. A restrictive condition that prevents a property owner from building in a manner that would obstruct the existing view from a neighbouring property therefore confers a substantive right on the neighbouring owner that indirectly protects her view to the extent that she can enforce the restrictive condition. The possibility of removing or amending a restrictive condition does not derogate from the substantive protection that is provided by a restrictive condition, since a condition may not be removed or amended without giving affected property owners an opportunity to object. Arguably, the negative effect that removal of the restriction and ensuing building on the neighbouring land may have on their properties (including removal of the existing view) may in certain circumstances be a relevant consideration in the adjudication of their objections.

2.2.2 Re-zoning of land

In the *Walele* decision, O'Regan ADCJ confirmed that neighbours have a right to be consulted when an application for the re-zoning of land is considered.³⁰ She argued that a zoning scheme limits an owner's right of ownership, but also gives an owner the right to expect other neighbours to comply with the scheme. Therefore, if a property owner wants to use her property within the parameters of the applicable zoning scheme, the rights of neighbouring owners are not materially affected and they do not have to be consulted or heard during the approval of the plans. However, if a property owner submits building plans that require a departure from the scheme, or if the land has to be re-zoned to make approval possible, the rights of neighbouring owners are negatively affected and they are entitled to be heard before the plans are approved.³¹ If a zoning scheme has the indirect effect of protecting the existing view from an owner's property, she has a substantive right to prevent the obstruction of such a view by building on a neighbouring property in the sense that she may expect her neighbours to comply with the zoning scheme and she may have

²⁸ In the *Optimal Property Solutions* case (n 18) par 21 the court explained that the removal act "enables the administrative amendment or deletion of title deed restrictions". The court reasoned that this statute is law of general application for purposes of s 25 of the constitution that allows a limitation of a praedial servitude holder's common law rights to the extent that it does not require the consent of affected owners for such an amendment or deletion.

²⁹ S 2(1)(aa) and (dd), read together with s 2(4)(a)-(c), 3(6), 5(2)(b)(ii), 5(4) of the removal act, determine that affected persons shall be informed of the proposed alteration, suspension or removal of a restriction or obligation that is applicable to a landowner in terms of a restrictive condition. In effect, these provisions confer a right on an affected owner who is the beneficiary of such a condition to be informed of an application for the amendment or removal of a restrictive condition. If such an amendment or removal is approved without notice being given in the way prescribed by s 2(4) of this act, an affected owner is entitled to appeal. In the *Optimal Property Solutions* case (n 18) par 21 the court reasoned that the removal act requires the relevant state functionary "to consider what service should be effected on affected property owners". See Van Wyk (n 4) 330, 333-335.

³⁰ the *Walele* case (n 9) par 130.

³¹ the *Walele* case (n 9) par 130, 136. See Van Wyk (n 4) 354, 357, 396.

the right to be informed of and to object when her neighbours apply for departure from the zoning scheme or the re-zoning of their land.

The applicants in *Richardson v South Peninsula Municipality*³² attacked the approval of a subdivision of the second respondent's property on the ground that the approval process did not comply with the provisions of section 24(2)(a) of the Land Use Planning Ordinance 15 of 1985, since the local authority approved the plans without advertising the subdivision that was involved in approval of the plans.³³ The applicants therefore had a substantive right³⁴ that, if enforced successfully, would indirectly prevent the erection of buildings that would obstruct the existing view from their property.³⁵ The second respondent opposed this application, arguing that the applicants acquired the property only after the impugned resolution was adopted and that they were therefore not "affected persons" in terms of section 24(2)(a) of ordinance 15 of 1985 at the time when the decision was taken. The court rejected this argument and held that an owner's right to apply for appropriate relief when she is affected by unlawful and procedurally unfair administrative action is incidental to the right of ownership. Therefore, the right to apply for appropriate relief against unjust administrative action is transferred with the ownership of property.³⁶ The court ruled that the first respondent's failure to advertise the proposed subdivision amounted to a breach of its duty to ensure lawful and procedurally fair administrative action, because it deprived persons who could be adversely affected

³² (n 12) 268.

³³ S 24(1) and (2)(a) of the ordinance deals with the application for subdivision of property and provides as follows:

"24(1) An owner of land may apply in writing for the granting of a subdivision under section 25 to the town clerk or secretary as the case may be. (2) The said town clerk or secretary shall – (a) cause the said application to be advertised if in his opinion any person may be *adversely affected* thereby". In the *Richardson* case (n 12) 272 Yekiso AJ reasoned that the use of the word "shall" in s 24(2) of the ordinance indicates that the provisions in this subsection are peremptory and not permissive; see Van der Walt (n 1) 364 n 107. He held that the local authority's (first respondent's) failure to advertise the application for the approval for subdivision meant that it was not following the procedure prescribed in s 24(2)(a) of the ordinance. Referring to the constitutional principle of just administrative action and emphasising the importance of administrative legality, Yekiso AJ concluded that the process leading to the approval of the resolution was unlawful. This meant that a right to challenge the validity of the administrative decision accrued to the persons who were adversely affected.

³⁴ This substantive right is the right of neighbours and other affected owners to have an opportunity to object to an application for subdivision, as provided for in s 24 of the ordinance.

³⁵ The *Richardson* case (n 12) 268 269. The existing view from the trust's property was the principal reason why the trustees had bought it. Although the applicants never proposed the potential obstruction of the view from their property as a cause of action, they clearly aimed to protect this view, stating in their affidavit that the loss of this "spectacular" view would cause a derogation of their property.

³⁶ the *Richardson* case (n 12) 274 275. The right of action accrued to the applicants' predecessor in title as an "affected person" in terms of s 24(2)(a) of the ordinance; as purchasers of the property, the applicants now had this right of action. The previous owner had the rights to lawful and procedurally fair administrative action in terms of s 24 of the interim constitution 200 of 1993 (applicable at the time) and, in terms of s 7(4) of the interim constitution, the right to have standing to apply to an appropriate court if these rights were infringed upon. These rights were considered incidental to ownership and therefore transferred to the applicants when ownership of the property passed. See Van der Walt (n 1) 364.

by such an application of the right to object or make representations.³⁷ However, the court considered an order setting aside approval of the subdivision to be an inappropriate remedy.³⁸ Instead, it ordered that the matter should be remitted to the first respondent to consider imposing height restrictions on present and future buildings on the subdivided land.³⁹ Van der Walt sees this decision as an example of courts' "willingness to consider a compromise" if the illegality of a building is the result of a "bona fide mistake or oversight".⁴⁰ He argues that the applicants had an opportunity to protect the view from their property indirectly, because of an irregularity in the approval of subdivision.⁴¹ It should be clear, however, that the objection in this case (although it was focused on the right to just administrative action) was based on a substantive right to be informed of and to object against the subdivision, and not purely on an administrative oversight.

In the *Walele* case it was established that a property owner may expect her neighbours to comply with the applicable zoning scheme. This was confirmed in the *Richardson* judgment, which showed that a property owner is entitled to be informed of and to comment on or object against an application for a re-zoning. A property owner may therefore rely on the protection of the existing view from her property insofar as the applicable zoning scheme prevents a neighbouring owner from erecting buildings that will interfere with that view, since she has a substantive right to enforce compliance with, or at least to object against the amendment of such a scheme. The *Richardson* decision also indicates that a successor in title who wishes to rely on a substantive right to prevent building as a way to protect the view from her property has the right to do so, because the right to lawful and procedurally fair administrative action is inherent to the ownership of land and is therefore acquired by a successor in title.⁴²

2.2.3 Departure from a zoning scheme

In *Muller NO v City of Cape Town*,⁴³ the applicants succeeded with an application for the review and setting aside of a neighbour's approved building plans, on the ground that these plans contravened the applicable zoning scheme.⁴⁴ The plans provided for alterations to a building that would, once constructed, obstruct the view from the applicants' property. The applicants showed that the first respondent should not have approved the plans, since the proposed building would exceed the

³⁷ the *Richardson* case (n 12) 272 275. The local authority's decision to dispense with the advertising of the subdivision application contravened s 24(2)(a) of ordinance 15 of 1985. S 24(2)(a) requires that an application for subdivision should be advertised, whereas s 24(2)(b) makes provision for the owner who seeks subdivision to comment on the recommendations and objections of persons that might be affected by the proposed subdivision.

³⁸ the *Richardson* case (n 12) 277. The court held that an order to set aside the approval for subdivision would cause immense financial consequences for the parties involved because a substantial amount of money had been spent in the course of developing the erven since the subdivision of the original erf had been approved.

³⁹ the *Richardson* case (n 12) 278.

⁴⁰ Van der Walt (n 1) 350.

⁴¹ Van der Walt (n 1) 349, 364.

⁴² Van der Walt (n 1) 364.

⁴³ (n 1).

⁴⁴ the applicants were co-trustees of a trust that owned immovable property in Bloubergstrand. The building plans, approved by the first respondent local authority, provided for the alteration and extension of the existing house on the directly adjoining property of the second respondent, a close corporation.

lawful height restriction;⁴⁵ would derogate from the value of their property;⁴⁶ and because they, as affected owners, were denied an opportunity to see and object to the plans.⁴⁷ On the supposition that the neighbour would comply with the applicable zoning requirements and specifically the prescribed height limitation, the applicants were unconcerned when their neighbour commenced with alterations to the existing buildings on its property. However, when the building works reached what the applicants considered an unacceptable height, they caused investigations to be conducted into the approval of their neighbour's building plans.⁴⁸ They discovered that the local authority that approved the plans used the wrong method for determining the height that the building works would reach and that it therefore did not realise that the proposed alterations would cause the buildings to exceed the height restriction laid down in the zoning scheme.⁴⁹ Building works that exceed the prescribed height limitation constitute a departure from the applicable zoning scheme. Neighbouring owners have a right to be informed of and to object to building plans that propose such a departure.⁵⁰ The applicants, who were denied the opportunity to see and object to the plans, therefore had a substantive right to attack their approval. Consequently, they had the opportunity indirectly to protect the

⁴⁵ the *Muller* case (n 1) par 27, 31, 36. The applicants contended that the building plans contravened s 7(1)(a) of the building act because the proposed building works would exceed the lawful height limitation. The height limitation was prescribed by zoning scheme regulations that were considered to be "any other applicable law". Non-compliance with this limitation implied that the plans did not comply with s 7(1) of the act, in terms of which building plans must comply with applicable law.

⁴⁶ the *Muller* case (n 1) par 32. The applicants argued that the obstruction of the view from their property would mean that the building plans were unlawfully approved, since s 7(1)(b)(ii)(aa)(ccc) of the building act provides that a local authority shall refuse to approve an application for building plans if it is satisfied that the proposed building will probably or in fact derogate from the value of adjoining or neighbouring properties. According to the applicants, obstructing the view from their property would cause its value to decrease and therefore, in terms of s 7(1)(b)(ii)(aa)(ccc), the local authority should not have approved the plans. The *Muller* case is interesting not because it confirms that building plans should not be approved when they may result in interference with a neighbour's enjoyment of her property and consequently cause the property to depreciate, but as an example of a substantive right (based on a certain interpretation of s 7(1)(b)(ii)(aa)(ccc)) that allows a landowner indirectly to prevent the erection of buildings that would obstruct the existing view from her property.

⁴⁷ the *Muller* case (n 1) par 5, 20, 33, 62, 68, 76. The applicants argued that they were denied an opportunity to object to or comment on the relevant plans, despite the fact that the first respondent initially advised them that they would have such an opportunity. The local authority considered the plans to be compliant with the applicable zoning scheme regulations. The court held that the approval of the plans without giving the applicants an opportunity to object or comment, in circumstances where they ought to have been given such an opportunity, was procedurally unfair and ruled that the plans were wrongly approved. The applicants' complaint that they were not given notice of the application for the approval of the plans does not seem to be based on the ground that the plans' departure from the relevant zoning scheme entitled them to an opportunity to be heard. Instead, it is based on the reasoning that they should have been given an opportunity to be heard because the potential effect that the proposed construction would have on the amenity enjoyed on the applicants' property was evident.

⁴⁸ the *Muller* case (n 1) par 11.

⁴⁹ the *Muller* case (n 1) par 55, 57, 58, 61, 64, 67, 68. The zoning scheme regulations that applied to the property expressly provided a method for measuring a building's height. However, this method was not used by the local authority when it considered the second respondent's building plans, and the use of an incorrect method to determine the height of the proposed constructions constituted a formal shortcoming in the approval process. The *Muller* decision is also discussed in 3.2 as an example of a case of a formal shortcoming in the approval of building plans stalling the erection of a building that would obstruct the existing view from a neighbouring property.

⁵⁰ See 2.1 for a discussion of a neighbouring owner's right to be heard when building plans that depart from the applicable zoning scheme are considered for approval.

view from their property, either temporarily or permanently. If the approval of their neighbour's building plans was reviewed but confirmed to be lawful, the existing view from their property would only have been protected for the time that it took for the appeal proceedings to be conducted. However, if the applicants could indicate that there were sufficient reasons why the plans should not have been approved and should never be approved, the approval would be set aside permanently. The court held that there indeed were enough reasons indicating that the plans should not have been approved.⁵¹ Consequently, the applicants succeeded in having the approval of their neighbour's building plans set aside, thereby permanently preventing the construction of unlawful buildings that would obstruct the existing view from their property. Their view was therefore indirectly protected insofar as the applicable zoning scheme prohibited buildings that would exceed the prescribed height limitation.⁵²

2.2.4 Legislation prohibiting building works

The decision in *Transnet Ltd v Proud Heritage Properties*⁵³ introduced the possibility of using "statutory duty" as a basis for the (possibly permanent and absolute) indirect protection of an existing view. In terms of section 74 of the National Ports Act, the National Ports Authority is, *inter alia*, responsible for maintaining adequate and efficient lighthouses to assist in the navigation of ships. Development of the first respondent's property posed a threat to the applicant's duty to assist in the navigation of ships because the finished building works would have the effect of

⁵¹ In the *Muller* case (n 1) par 76-78, the court concluded that the decision to approve the building plans was in contravention of s 7(1)(b)(ii)(aa)(ccc) of the building act, reasoning that s 7(1)(b)(ii)(aa)(ccc) prohibits the approval of building plans if their execution will probably or in fact cause a decrease in the value of a neighbouring property. The execution of the building plans in the *Muller* case would have resulted in building works that exceeded the height limitation and obstructed the view from the applicants' property. The court therefore concluded that the first respondent failed to have regard to the provisions of s 7(1)(b)(ii)(aa)(ccc) when it approved the plans. If it did consider this provision, it would have realised that the value of the applicants' property would decrease, because the part of the building work that would have exceeded the height limitation would obstruct the view from the applicants' property. The approval of the building plans was declared invalid, since it did not comply with the procedure set out in s 7(1)(b)(ii)(aa)(ccc). Van der Walt (n 1) 369 argues that the decision in the *Muller* case is case-specific "to the effect that a decision to approve building plans that had been taken in a procedurally invalid manner and that allow for deviations from the applicable legislative and regulatory framework should be invalidated and set aside if the affected owner can show that the building, once completed, would detract from the value of her property". The decision therefore indicates that the approval of building plans that would cause a decrease in the value of a neighbouring property may be set aside if it was procedurally invalid or if the plans departed from the applicable legislation or zoning scheme. Van der Walt emphasises that the approval of building plans will be set aside only on the ground that they will cause a decrease in the value of a neighbouring property (in terms of s 7(1)(b)(ii)(aa)(ccc) of the building act), if there was an irregularity in the approval process, or if the plans do not comply with applicable legislation and regulations. Therefore, the *Muller* ruling does not imply that s 7(1)(b)(ii)(aa)(ccc) of the act prohibits the approval of building plans purely because they will result in the erection of a building that will obstruct the view from a neighbouring property.

⁵² In *Capendale v Municipality of Saldanha Bay, Capendale v 12 Main St, Langebaan (Pty) Ltd* 2014 1 All SA 33 (WCC), the applicants also relied on an alternative strategy to protect the existing views from their properties, based on the substantive right to comment on a neighbour's building plans when such plans involve a departure from the applicable zoning scheme. They successfully attacked the plans for non-compliance with the relevant height limitation. In this case, the local municipality's approval of the building plans and specifically the method for determining the height of the proposed building was in dispute. See par 6-7, 15-16, 77, 80.

⁵³ (n 12).

obstructing a lighthouse signal. The court considered the applicant's statutory duty to operate and maintain the lighthouse as an indication of the fact that it had a clear right not to have the view to the lighthouse signal obstructed.⁵⁴ The statute therefore created a (substantive) legal right or duty to keep the line of sight to the lighthouse clear. Accordingly, the applicant was entitled (and obliged) to prevent neighbouring owners from building in a way that would obstruct the view to its property.⁵⁵ This judgment shows that courts may be willing to recognise that a property owner has a substantive right to an unobstructed view if she has a statutory obligation to protect a direct line-of-view to or from a specific property.⁵⁶

2.3 Remedies

The existing view from a property is protected at least insofar as building regulations, the applicable zoning scheme and restrictive conditions prevent the erection of buildings that may obstruct it. Therefore, in a situation where a property owner plans to erect or has erected a building that does not comply with these requirements or limitations, neighbouring owners have a right to be informed of and to object to the departure. The *Muller* decision⁵⁷ shows that in instances where a substantive right is relied on to prevent building works that do not comply with these limitations, the existing view from a property may be protected to the extent that the applicable building regulations, zoning scheme or restrictive conditions prohibit building works that would interfere with the view. When a procedural irregularity that results in unlawful building is attributable to a *bona fide* mistake or oversight, courts will probably attempt to reach a compromise to ensure that neighbours' interests are (at least partly) protected, despite the fact that they had not been given an opportunity to comment on or object against the plans before they were approved. In the *Richardson* case,⁵⁸ the building plans that involved subdivision of a property did not have to be approved anew to enforce affected owners' right to be heard, but their interest in preventing the subdivision, namely that it would result in the erection of buildings that would obstruct the view from their property, was nevertheless protected to the extent that the court ordered the relevant local authority to consider imposing height restrictions on existing and future buildings on the subdivided land.⁵⁹ Such height limitations would prevent the obstruction of the existing view from the affected neighbours' property.

Furthermore, the *Transnet* judgment⁶⁰ indicates that in instances where a property owner has a statutory right or duty to protect the undisturbed view to or from her property, courts may enforce such a right or duty even if it would prevent

⁵⁴ the *Transnet* case (n 12) par 11 13.

⁵⁵ This case is distinguishable from the other cases discussed in this article because it involves the obstruction of the view to, and not from, a property. Nevertheless, it corresponds with the other cases in the sense that it concerns the right to protect an existing, unobstructed view against obstruction caused by another owner's building works.

⁵⁶ Van der Walt (n 1) 373 discusses the *Transnet* case in the context of case law on sunlight, natural light, the free flow of air and privacy. He considers direct line-of-sight views, together with access to direct sunlight and free flow of air, to play an important role in the modern use of land for sun or wind power and contends that lighthouse signals rely on direct line-of-sight views. He argues that the modern uses of views require a reconsideration of the Roman-Dutch law conception that a view is only an incidental advantage of landownership.

⁵⁷ See the discussion of the *Muller* case (n 1) in 2.2.3.

⁵⁸ The *Richardson* case (n 12), discussed in 2.2.2.

⁵⁹ the *Richardson* case (n 12) 278. See Van der Walt (n 1) 349-350.

⁶⁰ (n 12), discussed in 2.2.4.

neighbouring owners from exercising their right to develop their properties within the parameters provided by restrictive conditions, zoning schemes and building regulations.

Therefore, a property owner (A) can prevent or restrict building works on a neighbour's (B's) land that would obstruct the existing view from A's property, relying on a substantive right in terms of which she is entitled to be informed of, to comment on, or to consent to the building plans. In some cases, A's right to object can amount to a veto,⁶¹ while in other instances her objection may be overruled or amended by a court⁶² or by a local authority.⁶³ If A insists on having an opportunity to see, object against or consent prior to approval of B's building plans, courts will enforce A's right to see, object or consent to the plans if approval of the plans involves removal or amendment of a restrictive condition, amendment of the existing zoning scheme or compliance with statutory duties or obligations. Accordingly, they have to ensure that the correct procedure is followed, implying that the approval process has to be repeated and that this time around neighbours have to be informed of the application and must be given an opportunity to see, comment and, in some cases, to consent to the proposed building plans. If the neighbours provide sufficient reasons why the plans should not be approved, for example why the applicable zoning scheme should not be departed from, or if they reasonably refuse consent to the approval, the obstruction of the views from their properties will be prevented permanently. If they do not provide sufficient reasons, or if they are not entitled to veto the approval, the plans may be approved against their objections, possibly with qualifications or restrictions. In the latter instance, the neighbours could at least succeed in temporarily stalling building works that would obstruct their views until the plans are properly approved.

3 Procedural strategies

3.1 Basis of procedural strategies to prevent building

Case law indicates that South African property owners sometimes rely on provisions in the building act to prevent the erection of buildings on neighbouring land in instances where they do not have substantive rights to prevent such building works, for instance because the proposed building complies with and does not depart from existing legislation, the zoning scheme or restrictive conditions.⁶⁴ These strategies rely purely on procedural shortcomings in the process of considering and granting permission to build to prevent, or at least delay, building works that would obstruct an existing view. Section 5(1), read together with sections 6(1) and 7(1) of the building act, for example requires that a building control officer must be appointed and compels a local authority to consider such an officer's recommendations in the process of approving building plans. If a building plan has been approved without complying with the obligatory provisions set out in sections 5(1), 6(1) and 7(1), the irregularity in the administrative process through which the plans were approved

⁶¹ Instances where an affected owner may prevent the erection of buildings on a neighbouring property are discussed in 2.1, 2.2.1, 2.2.4.

⁶² See 2.2.1.

⁶³ A's objections would, for example, be overruled by a local authority if it grants B's application for a departure from the relevant zoning scheme despite A's objections.

⁶⁴ *Paola v Jeeva NO 2002 2 SA 391 (D)*; the SCA decision in the *Paola* case (n 19); the *Clark* case (n 1); the *De Kock* case (n 1); *Ramdass NO v Ethekwini Municipality* (11971/13) 2014 ZAKZDHC 27 (17 June 2014) are examples.

would render such a decision (approval) unlawful. An attack on the approval procedure could thus be used to frustrate or delay the erection of building works that might interfere with an existing view, even though the objector had no substantive right to be informed of or object against approval of the plans.

The procedural strategies often rely on section 7(1)(b)(ii) of the building act, which provides a list of factors that, if present, would disqualify building plans from approval.⁶⁵ Section 7(1)(b)(ii)(aa)(ccc) specifically directs a local authority to refuse to approve an application for building plans if it is satisfied that the erection of the proposed building “will probably or in fact derogate from the value of adjoining or neighbouring properties”. This provision gives a local authority a discretionary power and has been relied on to attack the approval of building plans that would allow the erection of buildings that are otherwise completely lawful, but would interfere with the existing views from the objector’s property. Two different strategies based on these provisions in the building act have been employed in purely procedural attempts indirectly to protect hitherto undisturbed views.

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

A second strategy in which the provisions of the building act are relied on to prevent the construction of building works is where an owner questions the exercise of a discretion by a decision maker who approves building plans that, once executed, would obstruct the existing views from her property. When a litigant attacks a decision maker’s discretion in an attempt to protect the existing view from her property, she would typically argue that the view from her property contributes to the property’s market value and that the decision maker was therefore, in terms of section 7(1)(b)(ii)(aa)(ccc), obliged to refuse the approval of the building plans that proposed the erection of buildings that would obstruct such a view and therefore derogate from the value of her property.⁶⁶ This argument might seem to suggest

⁶⁵ S 7(1) of the building act reads as follows: “7. Approval by local authorities in respect of erection of buildings. (1) If a local authority, having considered a recommendation referred to in section 6(1)(a) – (a) Is satisfied that the application in question complies with all the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof; (b)(i) Is not so satisfied; or (ii) Is satisfied that the building to which the application in question relates – (aa) is to be erected in such a manner or will be of such nature or appearance that – (aaa) the area in which it is to be erected will probably or in fact be disfigured thereby; (bbb) it will probably or in fact be unsightly or objectionable; (ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties; (bb) will probably or in fact be dangerous to life or property, such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal.”

⁶⁶ The way in which a court interprets s 7(1)(b)(ii)(aa)(ccc) of the building act plays an important role in its decision about whether or not such an application should be successful. In this regard, see the *Walele* case (n 9) par 54-56 (CC) and the *True Motives* case (n 20) par 20-24, 33-39, 46-48, 94-97 (SCA), read with the *Turnbull-Jackson* case (n 20) (CC), and see the discussion below.

that section 7 of the building act creates a substantive right to prevent the erection of buildings on a neighbouring property that obstruct an existing view, but there are decisions that indicate that there is no reason why a decision maker should consider enjoyment of the existing view from a neighbouring property as a substantive right when considering an application for the approval of building plans that otherwise comply with all applicable legislation and the zoning scheme.⁶⁷

The conflicting decisions in the *Walele*⁶⁸ and *True Motives* cases⁶⁹ created some confusion regarding the interpretation of section 7.⁷⁰ As appears from 2 above, a landowner can prevent building on neighbouring land if she has a substantive property right to be informed of, to object against, and in some cases to withhold consent for, the approval of the relevant building plans.⁷¹ In principle, this substantive right can and should be exercised before building plans are approved. By contrast, the right to object against a neighbour's building works in terms of section 7 comes into existence only once a local authority has exercised its discretion in terms of that section in a certain way (namely to approve the building plans), which shows that an attempt to prevent buildings on a neighbouring property in terms of this section amounts to a strategy based purely on procedural considerations.⁷²

The procedural strategies for objecting against building on neighbouring land can assume one of two forms. If a property owner attacks a potential threat to her existing view on the basis of irregularities in the process for approving a neighbour's building plans, she has to prove only that there was non-compliance with a prescribed procedural requirement and that the approval was therefore unlawful.⁷³ Conversely, if she attacks a decision maker's exercise of a discretion in approving the building plans, interpretation of the provisions that grant the decision maker such a discretion comes into play.

3.2 Procedural shortcomings

3.2.1 Application

The supreme court of appeal decision in *Paola v Jeeva NO*⁷⁴ concerns a property owner's attempt to attack a purely procedural shortcoming in the approval of a neighbour's building plans as a strategy to prevent building works that would

⁶⁷ See the discussions of the *Paola* case (n 19, n 64); the *Clark* case (n 1), the *De Kock* case (n 1) in 3.3.1, 3.3.2.

⁶⁸ (n 9).

⁶⁹ (n 20).

⁷⁰ See 2.1.

⁷¹ See the discussion of the *Muller* case (n 1) in 2.2.3; the *Richardson* case (n 12) in 2.2.2 and the *Transnet* case (n 12) in 2.2.4.

⁷² See the discussion of the *Paola* case (n 64); the *Clark* case (n 1); the *De Kock* case (n 1) in 3.3.1, 3.3.2.

⁷³ The building act prescribes prerequisites for building to be valid. This includes that building plans must be submitted for approval by the relevant local authority (s 4) and that the local authority shall either grant or refuse approval of the plans after considering recommendations made by a building control officer (s 5-7). In the *Paola* case (n 19) there was no building control officer in the local authority's service when the application was approved and the process did not comply with the requirements in s 5(1), 6(1), 7(1).

⁷⁴ (n 19). The *a quo* decision (n 64) is discussed in 3.3.1.

obstruct the existing view from his property.⁷⁵ The approval of the building plans contravened section 5(1) of the building act, which requires local authorities to appoint building control officers, and sections 6(1) and 7(1), which further require a local authority to consider the recommendations of such an officer, since no building control officer was employed by the relevant local authority at the time when the plans in question were approved.⁷⁶ The court held that the appointment of a building control officer and a local authority's consideration of such an officer's recommendations constitute jurisdictional facts that are prerequisites for the lawful exercise of the statutory power to approve building plans.⁷⁷ The supreme court of appeal consequently set the approval of the building plans aside on the ground that they were approved in terms of an unlawful administrative process.⁷⁸

When the supreme court of appeal in *Paola* set the local authority's decision to approve the first and second respondents' building plans aside on the basis of the procedural shortcoming, the effect was that the respondents could not continue with the proposed building. This effectively prevented the obstruction of the existing view from the appellant's property. However, because it was merely a procedural irregularity that temporarily stalled approval of the building plans, the prevention of the interference with the existing view from the appellant's property was only temporary, since the shortcoming could be rectified and the plans could subsequently be approved lawfully, without the neighbours being able to object.⁷⁹ This would be true of most, if not all, purely procedural attacks of this kind.

⁷⁵ The case came before the SCA as an appeal against the dismissal of the appellant's application for the review and setting aside of the third respondent's decision to approve building plans for a neighbouring property. In the case *a quo* (n 64), the appellant (then the applicant) attacked the third respondent's (local authority's) approval of the building plans on the grounds that in terms of s 7(1) (b)(ii)(aa)(ccc) of the building act, the third respondent may not have approved the plans, since the proposed building's size and position would probably or in fact cause the value of the appellant's property to decrease; that the relevant official failed to apply her mind properly when she gave consideration to the plans; and that the plans did not comply with the town planning regulations regarding requirements that are set for rear spaces. Subsequently, the appellant discovered that the third respondent did not have a building control officer employed when the building plans were approved.

⁷⁶ the *Paola* case (n 19) par 6-7.

⁷⁷ the *Paola* case (n 19) par 11-16. In terms of s 5(1) of the building act a local authority must appoint a building control officer. Sec 6(1)(a) of the act provides that one of the functions of a building control officer is to make recommendations to a local authority regarding building plans, while s 7(1) requires a local authority to consider such recommendations when deciding whether or not to approve an application for building plans. In the *Camps Bay* case (n 17) par 14, 34, Griesel AJ followed the same reasoning that the supreme court of appeal would later rely on in the *Paola* case (n 19) par 11, namely that s 7(1) of the building act "requires a recommendation by the building control officer as a precondition for any decision to be taken by the City on an application for approval in terms of s 4". In both the *Walele* case (n 9) par 55 and the *True Motives* case (n 20) par 21 the majority and the minority judgments accepted that in terms of a decision taken under s 7(1) of the building act, "recommendation" is a jurisdictional fact.

⁷⁸ the *Paola* case (n 19) par 16. Kidd 2004 *SALJ* 556-558 argues that the court should have taken the intention of the legislature into account and that the objective of regulating the appointment and functions of a building control officer in s 5 and 6 of the building act is to maintain building standards. This objective will be served equally well when building plans are approved having considered recommendations by a building control officer or by a person with the same skills and expertise. In his view, the fact that the building plans in the *Paola* case had not been considered by a building control officer did therefore not necessarily constitute absence of a jurisdictional fact that rendered the building plans invalid. He concludes that the supreme court of appeal probably followed a too rigid approach in the *Paola* case, since the administrative process for the approval of the building plans did indeed serve the objective of maintaining building standards.

⁷⁹ Kidd (n 78) 558.

3.2.2 Remedies

The *Muller* decision,⁸⁰ like the supreme court of appeal's decision in the *Paola* case,⁸¹ shows that a procedural shortcoming in the process of approving building plans may prevent the obstruction of the existing view from a property.⁸² In both these judgments, the courts set the approval of building plans aside because procedural irregularities rendered the approval processes unlawful. The courts' rulings had the same effect in both cases, namely that the view from a neighbouring property was indirectly protected because the building plans, in terms of which a building that would interfere with such a view would be erected, were set aside. However, although these orders resulted in the indirect protection of the existing view from the respective properties, such protection was only temporary. In a case where a court sets the approval of building plans aside on a formal shortcoming, the irregularity can be rectified and the neighbour whose view will be affected by the proposed construction will still neither have the right to be informed if the plans are resubmitted, nor will she have the right to object against them, provided they comply with all formal and procedural requirements. Therefore, in cases where there has been a formal irregularity but where no substantive right of another person was affected, plans may be resubmitted and approved without informing neighbours of the "repeat procedure" or giving them the opportunity to participate in the (second) approval process. This means that the benefit that neighbours may derive from building plans being set aside because of purely procedural irregularities will probably at most result in the temporary "protection" of an existing view.

3.3 Questioning a decision maker's discretion

3.3.1 Application

The matter is more complicated when a procedural attack targets the exercise of a discretion in terms of section 7(1)(b)(ii) of the building act. In the *a quo* decision in *Paola v Jeeva NO*,⁸³ the Durban and Coast local division considered an application to protect the view from the applicant's property against obstruction caused by building on her neighbour's property.⁸⁴ The applicant maintained that view is a factor that should be taken into account when determining the value of a property⁸⁵ and that the approval of the respondents' building plans was inconsistent with section 7(1)(b)(ii) of the building act because execution of the plans would obstruct the view from his property and consequently cause the property to depreciate. According to the applicant's interpretation of this provision, the value of a property includes a value that is attributable to the view from the property. Therefore, a local authority should consider whether or not a proposed building would obstruct the

⁸⁰ (n 1).

⁸¹ (n 19), discussed in 3.2.1.

⁸² the *Muller* case (n 1) par 55, 57, 58, 61, 64, 67, 68. The court set aside the approval of the second respondent's building plans, *inter alia*, on the ground that the local authority that approved the plans used the wrong method for determining the height of the proposed building works. The decision is discussed in 2.2.3 as an example of a neighbouring owner's right to be heard when a building plan involves a departure from the applicable zoning scheme, and in 3.3.2 as an illustration of the argument that the existing view from a property contributes to the property's value.

⁸³ (n 64).

⁸⁴ The respondents were trustees of a trust that owned property adjacent to the applicant's property. The applicant lodged an application for approval of the respondents' building plans to be set aside. The building plans provided for the construction of a double-storey residence.

⁸⁵ the *Paola* case (n 64) 395.

view from a neighbouring property before approving the relevant building plans. The respondents argued that view has no value for planning purposes and that the development of the respondents' property should therefore not be prohibited to preserve the applicant's view. The respondents argued that section 7(1)(b)(ii) (aa)(ccc) concerns the general effect that the erection of a building would have on neighbouring or adjoining properties, and not its effect on a specific property.⁸⁶

The court rejected the applicant's interpretation of section 7(1)(b)(ii), reasoning that if the applicant's interpretation was followed, property owners would be treated according to the order in which their respective properties were developed.⁸⁷ Such an interpretation would result in the arbitrary treatment of owners and would therefore be inconsistent with the constitutional demands for the promotion of equality and rationality.⁸⁸ The court approved of the respondents' argument that protection of the right to an existing view⁸⁹ would cause chaos and confusion in the world of property development.⁹⁰ Furthermore, protection of the right to a view may harm the effective administration of justice by creating a new category of claims. Accordingly, the application was dismissed.⁹¹

The applicant in the *Paola* case did not have a substantive right to protect the existing view from his property, since this view was not protected with a servitude or a restrictive condition and he was not aware of any procedural or substantive irregularities regarding the approval of his neighbour's building plans. Consequently, he relied on the argument that the erection of a building that will obstruct the existing view from his property will affect his property's market value.⁹² When the court rejected this argument, the applicant appealed.⁹³ During the appeal, it became apparent that a purely procedural irregularity indeed rendered the approval of the plans unlawful from the outset.⁹⁴ The supreme court of appeal accordingly set the

⁸⁶ the *Paola* case (n 64) 403-404.

⁸⁷ If s 7(1)(b)(ii) of the building act is interpreted the way in which the applicant suggested, namely that a pleasant view enhances the value of a property, it would have the effect that an owner who develops her property first would be able to object to the building plans of all owners who develop their property later.

⁸⁸ the *Paola* case (n 64) 404-406. Kondile J referred to *S v Makwanyane* 1995 3 SA 391 (CC) par 156, where Ackermann J concluded that "[a]rbitrary action or decision-making is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way."

⁸⁹ The applicant's interpretation of s 7(1)(b)(ii) effectively promoted a right to a view.

⁹⁰ This was the professional opinion of the architect instructed by the respondents. See the *Paola* case (n 64) 397 and 406. A similar argument was made by Lord Blackburn in the English case of *Dalton v Angus* (1881) 6 AC 740 (HL) 24 par C, who reasoned that prospect should not be acquired through prescription because such a way of acquiring the right to have a view would inhibit the development of towns. According to Lord Blackburn, acknowledgment of a right to a view would have a negative effect on urban development. See Van der Walt and Kriek (n 1) 482-515, where comparisons are drawn between the acknowledgement of a right to a view in South African, English and Dutch law.

⁹¹ the *Paola* case (n 64) 406. Cf the *Clark* case (n 1); *Searle v Mossel Bay Municipality* (1237/09) 2009 ZAWCHC 10 (13 Feb 2009) par 10.

⁹² The applicants in the *Ramdass* case (n 64) relied on a similar argument in an attempt to have the approval of building plans for a neighbouring property reviewed. They reasoned that the relevant local authority was, in terms of s 7(1)(b)(ii) of the building act, obliged to refuse to approve the building plans for building works on a neighbouring property, since the proposed building would, upon completion, derogate from the value of their (applicants') properties, limit their existing views and affect their privacy. The court dismissed the application and described the applicants' strategy to prevent the obstruction of their existing views as a "determined effect to stop or delay the construction". See par 8, 12, 32.

⁹³ the *Paola* case (n 19). The appeal decision is discussed in 3.2.1.

⁹⁴ See 3.2.1.

approval of the second respondent's building plans aside because of this procedural irregularity.

However, the supreme court of appeal nevertheless commented on the question 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 section 7(1)(b)(ii)(aa)(ccc).⁹⁵ The court was of the opinion that the word "value" should be given its ordinary meaning of market value and that the wording used by the legislature cannot be understood to exclude the value that flows from a view that can be enjoyed from a property. Therefore, if it is clear that the execution of certain building plans will cause a depreciation of an adjoining property, the plans should, according to the wording of section 7(1)(b)(ii)(aa)(ccc), not be approved.⁹⁶ This interpretation of section 7, namely that a local authority may approve building plans only if it is satisfied that none of the undesirable outcomes mentioned in section 7(1)(b)(ii) would eventuate once the building is complete, might have created the impression that a property owner has an indirect right to the existing view from her property.

Van der Walt⁹⁷ submits that the supreme court of appeal's decision in the *Paola* case is often mistakenly cited as authority for the proposition that South African courts regard the view from a property as an actionable right. In fact, the court did not make a binding ruling on this issue, since the *ratio* of the decision concerned the purely procedural shortcoming regarding the non-appointment of a building control officer.⁹⁸ Kidd also argues that the decision in the *Paola* case does not "constitute a radical new direction for neighbour law".⁹⁹ According to Kidd, there are certain instances where the "social utility of a development should outweigh the market value of a particular property".¹⁰⁰ He argues that, in terms of the supreme court of appeal's judgment in the *Paola* case, section 7(1)(b)(ii)(aa)(ccc) of the act compels a local authority to reject building plans if such plans will have a negative effect on the market value of a neighbouring property. The decision to reject such plans will therefore take place without any consideration being given to the wider social

⁹⁵ the *Paola* case (n 19) par 17, 19, 20. The court was requested by counsel for all the parties to give its opinion on this matter. The appellant did not contend to have the right to a view, but he argued that he had the right that plans for building on neighbouring property may not be approved unless all the statutory requirements have been complied with. See n 96 below.

⁹⁶ the *Paola* case (n 19) par 23. This view contravened the finding of the court *a quo* (n 64) 406. Kondile J, in the court *a quo*, dismissed the notion that the pleasurable view from a property should be afforded protection because it may attribute to the value of a property.

⁹⁷ (n 1) 364.

⁹⁸ In the *True Motives* case (n 20) par 25-35 the supreme court of appeal held that the remark made by the court in the *Paola* case (n 19) regarding the protection of the view from a property was *obiter*. In the *Searle* case (n 91) par 13 the Cape high court agreed that the judgment in the *Paola* case did not establish a right to an existing view. In this regard, see Van der Walt (n 1) 366, 371, 376. Badenhorst, Pienaar and Mostert (n 1) 127 cite the *Paola* case as authority for the principle that a property owner is not entitled to claim a right to a view. However, Kritzinger 2004 *THRHR* 150-153 reasons that the *Paola* case established that a property owner does have the right to protect the view from her property.

⁹⁹ Kidd (n 78) 556.

¹⁰⁰ Kidd (n 78) 562.

interests that may be served by the development.¹⁰¹ Since the supreme court of appeal's consideration of section 7 of the act merely resulted in an *obiter* remark, this ruling did not establish that the possible obstruction of the existing view from a neighbouring property is a factor that must be taken into account when a local authority decides whether or not to approve building plans. The decision can therefore not be considered authority for the proposition that section 7 creates a substantive right to prevent the erection of a building on a neighbouring property. This conclusion is underlined by subsequent decisions.

3.3.2 Remedies

In the *New Adventure Investments* judgment,¹⁰² the Western Cape high court indirectly acknowledged that the view from a property may in certain circumstances contribute to the property's market value. However, the court *a quo* in the *Paola* case,¹⁰³ as well as the courts in *Clark v Faraday*¹⁰⁴ and *De Kock v Saldanhabaai Munisipaliteit*,¹⁰⁵ ruled that section 7(1)(b)(ii)(aa)(ccc) of the building act does not compel a local authority to consider the possibility that the execution of building plans may obstruct the view from a neighbouring property.¹⁰⁶ By implication, this provision does not create a substantive right to prevent the approval of building plans, and consequently the erection of building works on a neighbouring property, as long as such plans comply with applicable legislation, building regulations and the relevant zoning scheme. The *Muller* decision¹⁰⁷ underlines the qualification to this principle: building plans will cause neighbouring properties to depreciate if and insofar as they do not comply with the prescribed height limitations.¹⁰⁸ In that perspective, section 7(1)(b)(ii)(aa)(ccc) does prohibit the approval of building plans if they contravene legislation or the applicable zoning scheme and their execution will therefore cause a relevant decrease in the value of the property for purposes of this section if the building results in obstructing the view from neighbouring properties.

¹⁰¹ Kidd (n 78) 561 proposes that this potential problem could be dealt with in one of two ways. Firstly, "value of adjoining properties" could be interpreted as the value of the community as a whole. Secondly, the building act could be amended to ensure that a decision maker considers the social utility of a proposed development as a positive factor to be weighed against the negative impact that the development may have on the market value of a particular neighbouring owner's property. He comments that his first proposition is not a good solution, since it is a "strained" interpretation and does not give effect to the plain meaning of the words.

¹⁰² *New Adventure Investments 193 (Pty) Ltd v Trustees for the time being of the SAS Trust 2002 3 All SA 544 (C)*. The plaintiff instituted action against the defendant for cancellation of a deed of sale, since the defendant sold him a piece of property without informing him that a development was planned for the property right in front of the object of the sale. He also argued that a prospective buyer of a sea-fronting property would be influenced by the fact that a development that would obstruct the views from such a property is planned for a neighbouring property. He alleged that the defendant's fraudulent non-disclosure of this information constituted a sufficient basis for cancellation of the contract. The court concluded that the view from the sale property was of great importance to a prospective purchaser and to the plaintiff in particular and decided that the erection of the proposed block of flats would seriously impede this view and that the plaintiff's decision to contract would have been affected if he had knowledge of the fact that there was a real possibility of such a development. The non-disclosure was therefore considered to be germane to the sale of the property. See par 1-3, 6, 35-37, 42-43, 69.

¹⁰³ (n 64), see 3.3.1.

¹⁰⁴ (n 1).

¹⁰⁵ (n 1).

¹⁰⁶ See n 117 for a discussion of the *Clark* and *De Kock* courts' interpretations of s 7(1)(b)(ii).

¹⁰⁷ (n 1), see 2.2.3.

¹⁰⁸ the *Muller* case (n 1) par 75.

The scope and implications of the *Muller* decision should therefore be considered carefully. The decision to set aside approval of the building plans was based on the irregular approval of the plans,¹⁰⁹ and not purely on the fact that the completed building would possibly cause the value of a neighbouring property to depreciate.¹¹⁰ Significantly, the decision does not imply that the approval of building plans may be refused generally on the basis that such plans would cause a depreciation of neighbouring properties in the form of obstructing their existing views. It merely confirms that a formal shortcoming in the process of approving building plans¹¹¹ or building plans that contravene the applicable legislation, zoning scheme or building regulations and that *therefore* derogate from the value of adjoining properties may render the approval of such plans unlawful.¹¹²

The decision of the court *a quo* in the *Paola*¹¹³ as well as the rulings in the *Clark*¹¹⁴ and *De Kock* cases¹¹⁵ indicate that courts are reluctant to acknowledge the obstruction of the existing view from a property as a factor that may decrease the value of the property and therefore render building plans that will cause such an obstruction unfit for approval.¹¹⁶ These decisions indicate that there is no easy remedy for a property owner who attempts to prevent the erection of buildings on a neighbouring property with an attack on the relevant local authority's decision to approve building plans. Local authorities do not consider the fact that such building plans may amount to a depreciation of the value of neighbouring properties, since property owners do not have a substantive right – nor is such a right created by section 7 of the building act – to prevent the erection of buildings on neighbouring properties, unless they are entitled or obliged to do so in terms of a servitude, restrictive condition, legislation, building regulations or the applicable zoning scheme.¹¹⁷ To the extent that some

¹⁰⁹ See 3.2.2, 2.2.3.

¹¹⁰ Van der Walt (n 1) 368-369 reasons that the court in the *Muller* case protected the applicants against the negative impact that the unlawful approval procedure had and not against the impact of the obstruction of their view. He adds that even if the view would not have been blocked by the construction, the plans could have been reviewed because they were wrongfully approved.

¹¹¹ See 3.2.2.

¹¹² See 2.2.3.

¹¹³ the *Paola* case (n 64), see 3.3.1.

¹¹⁴ the *Clark* case (n 1).

¹¹⁵ the *De Kock* case (n 1).

¹¹⁶ See n 117 for a discussion of the interpretations of s 7(1)(b)(ii) of the building act in the *Clark* case (n 1) and the *De Kock* case (n 1).

¹¹⁷ In the *Clark* case (n 1), the court ruled that s 7(1)(b)(ii) should be interpreted restrictively to prevent it from having the effect of prohibiting the erection of a building purely because it would cause the obstruction of the view from a neighbouring property. According to Van der Westhuizen AJ, the (indirect) protection of the right to a view would be in conflict with the rules and regulations regarding the creation and extinction of praedial servitudes. Moreover, such protection would impair an owner's common law right to build as high as she likes, within the formal restrictions laid down by law and in the applicable zoning and building regulations. Supporting the judgment in the *Clark* case and the supreme court of appeal's decision in the *Paola* case, Klopper AJ in the *De Kock* case (n 1) concluded that the value that is referred to in s 7 of the building act is the market value of a property. Market value is based on the price that an informed and willing buyer is prepared to pay to an informed and willing seller for the relevant property. In par 43-45 the judge argued that an informed buyer would realise that a property owner does not have an inherent right to a view and would therefore not attach much value to the existing view from a property. This ruling confirms that s 7(1)(b)(ii)(aa)(ccc) of the act does not indirectly acknowledge a right to an existing view from a property. By implication, s 7(1)(b)(ii)(aa)(ccc) of the building act does not compel a local authority to consider, when deciding whether or not to approve building plans, that the execution of such plans might interfere with a neighbour's existing view. According to the *De Kock* court's interpretation of s 7 of the act, a local authority is obliged to approve building plans if they comply with the relevant legal provisions. Similarly, the court in the *Searle* case (n 91) par 10 decided that a local

decisions¹¹⁸ seem to indicate that property owner A can successfully prevent building on neighbouring property B when the building would cause a decrease in the value of A's property, they were decided on the basis of the unlawfulness of the building plans or an irregularity in the approval of the plans.¹¹⁹ Section 7 of the building act does therefore not create a substantive right to prevent building purely on the basis that the building would diminish the value of neighbouring property by obstructing the existing, unobstructed view from that property.

4 Conclusion

In the absence of a servitude to protect the undisturbed, existing view from a property, alternative strategies are often relied on to prevent building that will interfere with such a view. Case law shows that South African property owners rely on three alternative strategies that may result in the indirect protection of their existing views. The effectiveness of these strategies depends on whether or not they are based on a substantive right to prevent building works on a neighbouring property; a purely procedural shortcoming during the approval of a neighbour's building plans; or an attack on the discretion exercised when a decision maker approved the building plans.

authority has a statutory duty to enforce the applicable legislation and zoning scheme when deciding whether or not to approve building plans. Although s 7(1)(b)(ii)(aa)(ccc) prohibits a local authority from approving building plans if their execution will result in a decrease of another property's value, this does not indirectly afford a property owner a right to the existing view from her property. The *Searle* court's interpretation of "market value" resembles that of the court in the *De Kock* case. In the *De Kock* case, the court argued that a willing and informed buyer would be aware of the fact that the owner of property does not have an inherent right to or protection of the view from a property and would therefore not attach much value to it. Similarly, in the *Searle* case, the court reasoned that a notional informed buyer would be aware of the potential advantages and disadvantages of the property that she wishes to buy and, accordingly, a notional willing buyer of a property with a view of the ocean will take the possibility that this view may be obstructed into consideration before determining the price that she is willing to pay. See the *Searle* case (n 91) par 13; the *De Kock* case (n 1) par 44-45. See also the *True Motives* case (n 20) par 30, 120, and Van der Walt (n 1) 376. The constitutional court confirmed this definition and implications of the word "value" in s 7. In the *Camps Bay* case (n 17) par 38-40, the constitutional court explained the applicability of the word "value" within the context of this provision, confirming that it refers to "market value". Market value, it was held, is determined by the price that an informed buyer will pay an informed seller, taking into account the potential risks that threaten the subject property. The constitutional court specifically referred to the potential risk that the view from a property may be obstructed by later development on a neighbouring property. Where such a view directly affects the value of the property (for example, a sea-fronting property), the informed buyer would give due consideration to the potential that it may be obstructed and adjust the price that she is willing to pay accordingly. The court continued that an informed buyer would also consider the limitations that may be applicable to such a potential new development. However, limitations that restrictive conditions, town planning and zoning schemes and legislation impose on a neighbour's building works would usually not affect the market value of a property, because it would effectively be a realisation of a risk that was already accounted for. The constitutional court concluded that this interpretation of the word "value" in s 7 implies that development (building work) on property A that affects an attribute that was previously enjoyed from property B will not, in itself, diminish the value of property B. It held that s 7(1)(b)(ii) comes into play only when a new building complies with legally imposed restrictions, but its unattractive or intrusive appearance exceeds the legitimate expectations of the parties to the hypothetical sale. In other words, this provision will not protect a property owner if the value of her property has depreciated because of reasonable and lawful development on a neighbouring property, but only if such a development exceeds her legitimate expectations.

¹¹⁸ the *Muller* case (n 1); the *Paola* case (n 19).

¹¹⁹ See the discussion of the *Muller* case (n 1) and the *Paola* case (n 19) in 3.2.2.

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

A substantive right to prevent building on neighbouring properties may be an effective remedy to permanently protect the existing view to or from a property if the holder of such a right can provide sufficient reasons why the proposed building works should not be erected. In the *Muller* case,¹²⁰ the court indicated that a substantive right to prevent building on a neighbouring property can indeed prevent the obstruction of the existing view from a property, at least insofar as the applicable building regulations, zoning scheme or restrictive conditions prohibit building works that would interfere with such view. Furthermore, the decision in the *Transnet* case¹²¹ shows that a court will be prepared to enforce a substantive statutory right or duty to protect an undisturbed, existing view even if it will permanently prevent neighbouring owners from exercising their right to develop their properties.

A less effective strategy indirectly to prevent obstruction of the existing view from property is to object to the approval of a neighbour's building plans on the ground that there was a procedural shortcoming in the approval process. In both the *Muller* case¹²² and the supreme court of appeal's decision in the *Paola* case,¹²³ the approval of building plans was declared unlawful and set aside on the basis of procedural irregularities in the approval process. The irregular approval of building plans does not entitle neighbouring owners to raise objections that may result in an absolute prohibition against proposed building, and will merely temporarily stall building works and prevent the obstruction of neighbours' views until the irregularity has been rectified. This strategy is therefore less effective than the strategy based on a substantive right.

The least useful strategy to prevent building that would obstruct the existing view from property is based on an attack against a local authority's discretion to approve building plans. This kind of attack is usually based on the argument that the existing view from a property contributes to the property's market value and that section 7(1)(b)(ii)(aa)(ccc) of the building act prohibits a local authority from approving building plans that will cause a decrease in the value of the neighbouring property.

¹²⁰ the *Muller* case (n 1).

¹²¹ the *Transnet* case (n 12).

¹²² the *Muller* case (n 1).

¹²³ the *Paola* case (n 19). The *a quo* decision (n 64) is discussed in 3.3.1.

This strategy has been rejected in the court *a quo* in the *Paola* case¹²⁴ as well as in the rulings in the *Clark*¹²⁵ and *De Kock* cases.¹²⁶ However, in an *obiter* remark in the supreme court of appeal's judgment in the *Paola* case¹²⁷ the court seemingly suggested that building plans should, according to the wording of section 7(1)(b)(ii) (aa)(ccc) of the building act, not be approved if it is clear that their execution will cause a decrease in the value of an adjoining property.¹²⁸ This may have created the impression that a property owner has an indirect right to the existing view from her property. Furthermore, in *Muller NO v City of Cape Town*,¹²⁹ the court upheld the applicants' argument that their neighbour's building plans should not have been approved because the proposed building would cause a decrease in the value of their own property. Nevertheless, the court accepted only that the proposed building would cause the neighbouring property to depreciate insofar as it would exceed the prescribed height limitations, thus indicating that the real ground for the successful objection was failure to comply with the substantive right of neighbouring owners' that plans should comply with building regulations.¹³⁰

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

¹²⁴ the *Paola* case (n 64), discussed in 3.3.1.

¹²⁵ the *Clark* case (n 1), see n 117.

¹²⁶ the *De Kock* case (n 1), see n 117.

¹²⁷ the *Paola* case (n 19).

¹²⁸ A related but separate question, namely whether s 7(1)(b)(ii) of the building act obliges a local authority that is in doubt whether a proposed building would derogate from the value of adjoining properties to approve or to reject the building plans, was settled in the *Turnbull-Jackson* case (n 20). In the *Walele* case (n 9) the constitutional court decided that the local authority must, in case of doubt, reject the plans; in the *True Motives* case (n 20) the supreme court of appeal held that it had to approve the plans. In *Turnbull-Jackson* the constitutional court upheld its *Walele* interpretation of s 7(2)(b)(ii), rejected the conflicting interpretation of the supreme court of appeal in the *True Motives* case, and held that it is not unjustifiably burdensome on either the local authority or the developing owner to expect the local authority to reject building plans when it is uncertain whether a completed building (that otherwise complies with all legal requirements) might trigger any of the disqualifying factors (including derogating of the value of neighbouring properties). See n 20.

¹²⁹ (n 1).

¹³⁰ the *Muller* case (n 1) par 75.

SAMEVATTING

ALTERNATIEWE STRATEGIEË OM 'N BESTAANDE UITSIG VANAF 'N EIENDOM TE BESKERM

Die outeurs neem as vertrekpunt die beginsel dat daar in die Suid-Afrikaanse reg geen reg op die behoud of beskerming van 'n bestaande uitsig vanaf 'n grondstuk oor aanliggende eiendomme bestaan nie. In die afwesigheid van 'n serwituuat wat bouwerk op aanliggende grond verbied of dermate beperk om die bestaande uitsig vanaf die heersende erf te beskerm, steun grondeienaars soms op 'n aantal alternatiewe strategieë om die bestaande uitsig vanaf hulle eiendom teen bouwerk op aanliggende grond te beskerm.

Die suksesvolste alternatiewe strategie steun op 'n substantiewe reg, wat deel vorm van die grondeenaar se eiendomsreg, om ingelig te word, geleentheid te kry om kommentaar te lewer op, beswaar te maak teen of selfs om die goedkeuring van planne vir bouwerk op aanliggende grond te veto. Hierdie substantiewe reg kom slegs voor wanneer goedkeuring van die planne en uitvoering van die voorgestelde bouwerk wysiging of verwydering van 'n beperkende voorwaarde; hersonering of onderverdeling van die aanliggende grond; of 'n afwyking of vrystelling van die geldende soneringsplan behels; of wanneer die beswaarmaker 'n statutêre reg of plig het om die direkte uitsig vanaf of op sy eiendom teen bouwerk op omringende eiendomme te handhaaf. In bepaalde gevalle is dit moontlik om beperkende voorwaardes wat bouwerk op aanliggende grond verbied of beperk ingevolge die gemene reg of wetgewing te wysig of op te hef en soms kan die verantwoordelike plaaslike of provinsiale owerheid die beswaarmakende eienaar se besware van die hand wys of die bouwerk in stryd daarmee goedkeur. Oor die algemeen is dit egter moontlik dat 'n grondeenaar met 'n beroep op een van hierdie substantiewe regte sy bestaande uitsig indirek, maar effektief en soms selfs permanent, kan handhaaf deur bouwerk op naburige grond te verhoed of te beperk.

'n Minder suksesvolle strategie is om in die afwesigheid van substantiewe regte, op suiwer prosedurele gronde teen die goedkeuring van planne vir bouwerk op naburige grond beswaar te maak. Indien goedkeuring van die planne inderdaad prosedureel gebrekkig was, kan die beswaarmaker bouwerk wat met sy bestaande uitsig sal inmeng op hierdie manier vertraag. Die remedie sal egter altyd slegs tydelik van aard wees aangesien die prosedurele tekortkoming gewoonlik reggestel kan word, waarna die bouwerk sonder beswaar sou kon voortgaan.

Die mins suksesvolle strategie om bouwerk te voorkom wat 'n bestaande uitsig sal versper, berus op 'n aanval teen die diskresie wat die plaaslike bestuur uitoefen wanneer dit bouplanne goedkeur. Die howe is onwillig om die effek wat goedkeuring van bouplanne op die bestaande uitsig van naburige eiendom het as 'n faktor in ag te neem wat die uitoefening van die diskresie inkort. Daarom sal hierdie strategie ook hoogstens effektief wees wanneer dit met 'n substantiewe grond vir beswaar of met prosedurele tekortkominge in die goedkeuringsproses gepaard gaan. Op sigself, in die afwesigheid van een van die substantiewe gronde, is die feit dat bouwerk op naburige eiendom 'n bestaande uitsig sal belemmer, egter nie 'n geldige grond waarop uitoefening van die plaaslike owerheid se diskresie om bouplanne goed te keur, aangeval kan word nie.