Is there a right to a view?

Though there is no common law right to a view, the case of *Paolo vs Jeeva N.O and others* 2004 (1) SA 396 SCA has led to the perception among the public that certain laws do protect an existing view. As a result of media coverage, it is now widely believed that Section 7 of the National Building Regulations and Building Standards Act (Act 103 of 1977 – the Act) obliges a municipality to refuse any building plan for a building that will interfere with the view of an adjoining property. A close examination of this court case, however, shows that this perception is wrong and the case is of limited application. Furthermore, the recent case of *Clark vs Faraday and the Municipality of the City of Cape Town (*Case 8523/03, unreported), handed down on 12 December 2003, has given a narrower interpretation to this section.

Paola v Jeeva

Mr Paola owns two erven on the Bluff in Durban. The house has a magnificent view of the city, the river, the harbour entrance and the sea. His house was built 20 years ago in a manner that took maximum advantage of the view.

The property adjoining the southern side of his property is owned by a Trust, represented by Mr Jeeva, and is slightly lower down the slope. The house on this property already existed when Mr Paola built his house.

The Jeevas submitted building plans for alterations and additions to their house, which would block a large part of the view from Mr Paola's house and would bring the neighbouring house to a mere nine meters from Mr Paola's living room.

Mr Paola objected to the approval of these building plans on the basis that the building would interfere with his view and therefore reduce the value of his property by about 30%.

Despite protests from Mr Paola, the Durban Municipality approved the building plans since they complied with all applicable laws.

Mr Paola took the Jeevas and the Municipality to court to have the building plan approval set aside.

After trying unsuccessfully to review the Municipality's decision in the High Court, Mr Paola took the matter to the Supreme Court of Appeal. Before the Court heard the case, Mr Paola discovered that the Municipality had not appointed a Building Control Officer (BCO) as is required in terms of the Act.

The Act also says that the BCO must make a recommendation to the person who approves plans on behalf of a municipality, who must take this recommendation into account. If a BCO is

key points

- There is no common law right to a view.
- Value means market value.
- Municipalities must have a qualified Building Control Officer.

not appointed, then there is no recommendation for the decision-maker to take into account.

The failure to appoint a BCO was a fatal blow to the approval of the building plans. It meant that the decision to approve the plans was flawed and the Court struck down the Municipality's approval on this ground.

Since the Municipality would now have to reconsider the building plans, it was clear that the issue of views and their impact on property values would surface again. The parties therefore took the unusual step of asking the Court to give its views on Mr Paolo's argument relating to his view and the value of his property.

Section 7(1)(b)(ii)(aa)(ccc) of the Act provides that:

> (i) if a local authority…is satisfied that the building…is to be erected in such a manner or will be of such a nature that…it will probably or in fact *derogate from the value of adjoining or neighbouring properties*…such local authority shall refuse to grant its approval…

The Jeeva's alterations would substantially interfere with Mr Paolo's view. The view was part of what made his property valuable. If it was taken away, the value of his property would be substantially reduced. Since this was the case, the Council should have applied section 7(1)(b)(ii)(aa) of the Act and refused the building plans.

The Municipality did not challenge the fact that value of Mr Paolo's property would be diminished if the building obstructed his view.

The Court held that the word 'value' must mean market value. It noted that the municipality did not try to challenge the evidence that the market value of Mr Paola's property would be reduced if the proposed building were built. Since this aspect was not challenged, the Court had to accept this as being correct and it concluded:

> *Once it is clear as it is on the facts presently before us, that the execution of the plans will significantly diminish the value of the adjoining property, then on its plain meaning the section (7)(1)(b) prevents the approval of the plans.*

Comment

The Municipality should have challenged the argument that the market value of Mr Paola's property would be reduced if the Jeeva's carried out the alterations as proposed in their plans.

Legally, market value is defined as what a willing, informed buyer will pay a willing, informed seller for a property on the open market. Market value itself is determined by a number of factors, including the zoning of the property and properties adjoining it, the size of the erf, whether schools and amenities are close by and whether there are roads and streetlights in the vicinity. Further, a willing, informed buyer wanting to buy a property with a spectacular view would check the development rights granted by a zoning scheme to surrounding properties. If the zoning scheme allows the construction of a house on an adjoining property that would interfere with or block the view from the property under consideration for purchase, then the market value of that property must take account of this.

Thus, the value that a view gives to a property must be weighed against a zoning scheme for an area that permits the construction of a building that will interfere with this view. The value of the property must be adjusted accordingly.

Clark v Faraday

This case has similar facts to those in *Paola v Jeeva* but was argued differently. Mr Clark has magnificent views over Hout Bay valley, the Hout Bay harbour and the bay. He applied for an urgent interdict to prevent his neighbour, Mr Faraday, from building a house until he had the opportunity to apply to court to review the municipality's decision to approve the building plans.

The review application relating to the municipality's approval of the building plan is still to be heard.

Mr Clark argued that the house being constructed on Mr Faraday's property would drasti-

cally interfere with the view from his property. The views from his house added to the value of his property and if they were taken away, the value of this property would drop.

As section 7(1)(b)(ii)(aa) of the Act prevents the approval of building plans in such instances, the Municipality should not have approved the building plan. They relied on the *Paola v Jeeva* judgment as authority for their argument.

Mr Faraday argued that when Mr Clark bought his property, he should have realised that the zoning scheme for the area allowed a house to be built on the vacant property in front of him. There are no title deed restrictions or servitudes to regulate the building on the property.

If Mr Clark's argument was successful, it would mean that since his house was built earlier than the house on the property in front, he could force the owner to accept more stringent requirements than those set out in the zoning scheme. This would give him more rights than those enjoyed by everyone else in the area.

The court looked at the wording of subsection 7(1)(b)(ii)(aa) of the Act, which is the preamble to the subsections dealing with derogation of value. This section requires the local authority to look at *the nature or appearance of the building* to see whether or not the building will (a) "disfigure" the area, (b) will probably, or in fact, be "unsightly or objectionable" or (c) will probably or in fact "derogate from the value or adjoining or neighbouring properties".

The Court held that this section relates only to the characteristics and qualities of the building itself and to the nature and appearance of the building. Mr Clark had not argued that the value of his property was diminished because of the nature or appearance of the building. He was arguing that his view was affected by the mere presence of the building.

If Mr Clark's interpretation were accepted, this would create a new set of unregistered real rights in land in the form of servitudes. However, this is not how real rights are created in our law.

The Court in this case considered the way the Court in *Paolo v Jeeva* interpreted the section but said that it did not need to follow this interpretation since that Court's comments on this aspect were not part of the reasons for setting aside the building plans in that matter.

After looking at the reasons why the Act was created, at how our law creates and extinguishes real rights over the property of others, as well as at the laws relating to development of urban areas, the Court concluded that the provisions of subsection 7(1)(b)(ii) of the Act must be interpreted in a way that respects the rules of common law dealing with the creation and extinction of real rights.

Mr Clark's arguments, which did not refer to the quality of the building or to its nature and appearance, would actually constitute a demand for a servitude of height over another property, for which people had neither bargained and to which they had not consented. The Court therefore did not grant the interdict.

Comment

The *Clark v Faraday* judgment takes a narrower interpretation of the provisions of section 7(1)(b)(ii) of the Act than that applied in *Paolo v Jeeva*. It will be interesting to see how the High Court deals with the pending review application.

Even if the Court's comments in *Paolo v Jeeva* relating to views and value are applicable, the application is limited. They do not constitute authority to refuse a building plan that complies with the parameters of the Zoning Scheme simply because it obstructs the view from a neighbouring property.

The *Paolo v Jeeva* judgment also illustrates that it is crucial for municipalities to appoint a BCO as required in terms of section 5 of the Act.

Fiona Ogle
Principal Legal Adviser
City of Cape Town