

**GREENING DURBAN: THE CONSTITUTIONAL VALIDITY OF THE
DURBAN METROPOLITAN OPEN SPACE SYSTEM IN LIGHT OF
SECTION 25 OF THE CONSTITUTION**

by

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**Submitted in partial fulfilment of the requirements of the
Masters in Environmental Law Degree**

University of Kwa-Zulu Natal, Durban

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February 2015

DECLARATION OF ORIGINALITY

I, Jasmin Nadia Rajak do hereby declare that unless specifically indicated to the contrary in this text, this dissertation is my own original work and has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.’

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ACKNOWLEDGEMENTS

I would like to express my sincere gratitude to:

Professor Warren Freedman, for his guidance, valuable suggestions and supervision throughout this dissertation. I could not have asked for a better and more considerate supervisor.

Professor Ed Couzens, for initially discussing the D'MOSS with me and encouraging my interest in the system.

My brother Nadeem Rajak, for acting the older brother, and his continuous confidence in my abilities as an Attorney. I would not exchange him for the world.

My mother Shahmeem Banu Rajak for her patience, endless support, selfless love and late nights spent proof reading my work. Without her encouragement and input, completing this paper would have been much harder. A great woman is my mother and my role model, for sure.

My husband Nasser bin Abdel Malik for providing me with the encouragement and space I needed to complete this paper. For his continuous patience, strength and understanding, even when it meant not having my attention.

Most importantly, to my Creator Allah (SWT), to whom I owe everything. Without such guidance, strength and blessing, participation in the LLM program and completion of this paper would not have been possible.

To Durban. No matter where I am in this wide world, Durban will always be home. It has a beauty like no other and biodiversity worth protecting.

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CHAPTER ONE: INTRODUCTION

1. Background

As urban development escalates, so does the degradation of the environment, the reduction of open spaces and the depletion of biodiversity.¹ Urban development, therefore, must be managed in a way that reduces, or even eliminates, these negative consequences. One of the ways in which this can be achieved is through effective urban planning. The practice of urban planning began some four thousand years ago and entails the intentional arrangement or management of the spatial environment on the earth's surface with a view to producing order out of what would otherwise almost certainly be chaos. How that particular order is obtained and the tools used in obtaining it, is what constitutes the science and art of urban planning.²

Although urban planning initially had a strong physical planning focus and was aimed largely at producing order out of chaos, this is no longer the case. Today it is generally accepted that urban planning must take into account cultural, economic, social and especially environmental concerns. In 2009, for example, the United Nations used a comprehensive assessment of planning regimes to argue that the twenty-first century planning regime, at a minimum, required support and response to rapid urbanization and informality, poverty, planning justice, participation, safety and climate change.³

One of the reasons why urban planning must take into account environmental concerns today is because the loss of the natural environment caused by urbanisation heightens the vulnerable state of urban dwellers. While there are a number of urban planning tools that can be used to promote sustainable development and environmental conservation, one of the more significant is urban

¹ Urbanisation may be defined as an increase in the population of cities and towns versus rural areas. See 'Urbanisation', available at: <http://www.businessdictionary.com/definition/urbanization.html>. Accessed on 2/11/2014. The process of urbanisation in South Africa was stimulated by the discovery of minerals and the exploitation of human resources. Unfortunately, it was also influenced by the racially discriminatory goals of the apartheid system (see C Marx and S Charlton 'The Case of Durban, South Africa' (2003) 1 *Urban Slums Report, Understanding Slums: Case studies for the Global Report on Human Settlements* 3).

² SALGA-SAPI-MILE Municipal Planning Partnership *An Introduction to Municipal Planning in South Africa* V1 (08/2011) at 2.

³ *Ibid* at 2 and 3.

open spaces. Urban open spaces may be defined in different ways. Stanley et al, for example, define them as ‘any urban ground space, regardless of public accessibility, that is not roofed by an architectural structure’,⁴ while Royal defines them as ‘any vegetated area (green areas) within an urban environment . . . as well as open hard surfaced areas (brown areas) . . .’.⁵

Apart from promoting sustainable development and environmental conservation, urban open spaces, and especially green urban open spaces, are significant urban planning tools because they help to achieve a number of other important environmental goals. Among these are the treatment of waste, the supply of water, the reduction of air pollution, the regulation of the climate, the pollination of plants, the production of food, the formation of soil and the absorption of noise and rainwater runoff. In addition, they provide various aesthetic, economic, educational, psychological and recreational benefits.⁶

The concept of urban open spaces is as old as the concept of towns and cities themselves. They have ranged from the Hanging Gardens of Babylon to ancient London’s marshes and to the lavish formal gardens of Paris and Vienna. In most ancient towns and cities they were considered to be critical sites of cultural, economic and social life, a role that they still play in many modern towns and cities. Apart from promoting the cultural, economic and social life of a city, it was also believed that urban open spaces created a public sphere in which the exchange of beliefs, ideas and philosophies could take place. In this way urban open spaces also formed an important part of the political and scholarly life of many ancient towns and cities.⁷

⁴ See B Stanley et al ‘Urban Open spaces in Historical Perspective: A Transdisciplinary Typology and Analysis’ (2012) 33(8) *Urban Geography* 1089.

⁵ See R Royal *Public open space policy for Durban and surroundings: Is it sustainable?* (1998) MA Thesis, University of Natal, Durban at 37. As Royal points out, urban open spaces may also be classified into passive open spaces and active open spaces. Passive open spaces include beaches, estuaries, forests, parks, rivers, wetlands and so on. Active open spaces include agricultural fields, markets, sports fields, stadia, town squares and so on. Although urban open spaces are often grouped together with public spaces, the existence of urban public spaces does not automatically imply public access (see Stanley *Urban Geography* (note 4) at 1091).

⁶ *Ibid* at 7. See also J van Wyk

⁷ Stanley *Urban Geography* (note 4) at 1089-1091. See also J van Wyk ‘Open-space systems in urban land-use planning – invaluable assets in conserving the environment and enhancing the quality of life’ (2005) 2 *TSAR* 256. In *Sea Front for All v MEC: Environmental and Development Planning, Western Cape Provincial Government* 2011 (3) SA 55 (WCC) at paras 40-44, the Court referred to the important role that open spaces play in facilitating social equality which is an important part of democracy.

The decision to create urban open spaces through a formal process of town planning, however, can be traced back to the emergence of the Garden City Movement in the United Kingdom at the beginning of the Twentieth Century. As its name suggests, the goal of this Movement was to make towns and cities more attractive and healthier for their inhabitants by creating planned and interconnected urban nodes surrounded by green belts.⁸ Although the Garden City Movement did not achieve this goal – largely due to cost factors – its efforts led to the enactment of legislation specifically dealing with town planning for the first time. As a result of these and other laws, open spaces were increasingly incorporated into the urban fabric through a process of formal planning.⁹

From the United Kingdom, the idea of Garden Cities spread to a number of other countries, including South Africa. Although there are only a few ‘garden towns’ in South Africa today, for example Pinelands, Sunningdale and Greenville,¹⁰ the principles underlying the Garden City Movement have influenced the development of many, if not most, towns and cities in South Africa, including the City of Durban or the eThekweni Metropolitan Municipality as it is now known and which is the focus of this dissertation.

Although the modern City of Durban was established in 1824, when Lieutenant FG Farwell and 25 other men established a settlement on the northern shore of the Bay of Natal, the first town planning scheme was only adopted more than 100 years later after the Natal Private Townships and Town Planning Ordinance 10 of 1934 (the ‘Natal PT-TPO’) was passed by the Provincial Council.¹¹

⁸ The Garden City Movement was initiated by Sir Ebenezer Howard in 1898 when he published his book *Tomorrow – A Peaceful Path to Real Reform*. This book was reissued in 1902 as *Garden Cities of Tomorrow* (see ‘The Garden City Movement’, available at: <http://www.geni.com/projects/The-Garden-City-Movement/15255>. Accessed on 18/11/2014).

⁹ DC Roberts *An Open Space Survey of Municipal Durban* (1990) PhD Thesis, University of Natal, Durban at 19.

¹⁰ Perhaps the best known example in South Africa is Pinelands near to Cape Town. This town was established in 1919 with the goal of providing better housing and social conditions for its inhabitants. Today it forms a part of the City of Cape Town Metropolitan Municipality (see ‘Garden Cities’, available at: <http://www.gardencities.co.za/code/history.htm>. Accessed on 18/11/2014).

¹¹ SALGA-SAPI-MILE Municipal Planning Partnership *An Introduction to Municipal Planning in South Africa* (note2) at 4. Like most other town planning ordinances in South Africa, the Natal PT-TPO was based largely on the British Town Planning Act of 1925 and its successor the Town and Country Planning Act of 1932.

Prior to the enactment of the Natal PT-TPO, there was no formal system of town planning in Durban. This meant that the use of land was not regulated through a system of zoning. Instead, the use of land was regulated partly through nuisance and public health laws and partly through land use restrictions registered against the title deeds of individual pieces of land either by the landowner or the local, provincial and national authorities. These restrictions are commonly known as restrictive covenants and are similar to servitudes.¹²

When the Natal PT-TPO came into effect, this began to change. The Ordinance provided that except for health committees, every local authority in Natal was entitled to prepare a town planning scheme for its area of administration although only Durban and Pietermaritzburg were required to do so. The purpose of these schemes was to promote ‘co-ordinated and harmonious development’.¹³ Each town planning scheme had to be approved by the provincial Administrator and published in the provincial gazette.¹⁴

The Natal PT-TPO remained in force until it was repealed and replaced by the Natal Town Planning Ordinance 27 of 1949 (the ‘Natal TPO’).¹⁵ Like the Natal PT-TPO the Natal TPO also provided that every municipality had to prepare a town planning scheme¹⁶ and that the purpose of these schemes was to promote co-ordinated and harmonious development.¹⁷ The Natal TPO remained in force until it was repealed and replaced by the KwaZulu-Natal Planning and Development Act 5 of 1998 (the ‘KZN PDA’).¹⁸

The philosophy underlying both the Natal PT-TPO and the Natal TPO was heavily influenced by the British approach to town planning and based on a so-called modernist approach. In terms of this approach the goal of town planning is to create an ordered urban environment through the implementation of rational and scientific plans that are formulated at a central level by technical experts and which are strictly enforced. It was based on the belief that a change in the physical

¹² See J van Wyk *Planning Law* 2ed (2012) at 23. See also Urban Sector Network and Development Works *Scoping Study: Urban Land Issues* (22 September 2003) at 50.

¹³ Section 32 of the Natal PT-TPO.

¹⁴ Section 41 of the Natal PT-TPO.

¹⁵ The Natal TPO came into effect in 1951.

¹⁶ Section 41 of the Natal TPO.

¹⁷ Section 40 of the Natal TPO.

¹⁸ The KZN PDA came into operation on 1 May 2010, subject to certain exceptions.

environment would improve the social environment and focused strongly on physical planning and spatial ordering. It gave very little consideration to the conservation and protection of the environment in its natural state.¹⁹

2. The Durban Metropolitan Open Space System (the ‘D’MOSS’)

Given the modernist approach on which both the Natal PT-TPO and the Natal TPO were based, it is not entirely surprising that a formal system of open space planning in Durban only began in the late 1970s. This process was started in 1979 when the Wildlife Society produced a Metropolitan Open Space System (‘MOSS’) plan aimed at protecting those parts of the city it considered to be important from an environmental conservation perspective.²⁰

Building on the work done by the Wildlife Society, the Durban Municipality (as it was then known) together with academic experts from the University of Natal (as it was then known), embarked on a detailed study of the open spaces within the municipality. Following this study, the municipality produced a report entitled the Durban Metropolitan Open Space System (the ‘D’MOSS’) in 1989 which recommended that an open space network of nine park systems that was ecologically viable and self-sustaining should be created within the municipality.²¹

Following the transition to democracy in 1994, the system of local government underwent a process of transformation. This process had important implications for the D’MOSS. One of these is that the conservation of nature was no longer seen as the primary goal of the system of open spaces. Instead, the continued provision of vital ecosystem goods and services through the conservation of local biodiversity was now seen as the primary goal. This meant that the system not only had to be designed in a way that ensured the continued supply of ecosystem goods and services, but also that it conserved, managed and protected biodiversity. In addition, it had to be implemented in an effective and efficient manner.²²

¹⁹ See D Scott ‘Creative Destruction: Early modernist planning in the South Durban Industrial Zone, South Africa’ (2003) 29(1) *Journal of Southern African Studies* 235 at 238.

²⁰ See eThekweni Metropolitan Municipality – Environmental Management Branch *Durban Environmental Services Management Plan* (2002) at 16.

²¹ *Ibid.*

²² *Ibid.*

In order to ensure that the D'MOSS was implemented in an effective and efficient manner, the Environmental Management Branch of the eThekwinin Metropolitan Municipality (the 'EMB') – who were responsible for implementing the policy – argued that it should not only be included as a policy in the municipality's Spatial Development Framework, but also as a legally binding set of rules in the municipality's 54 existing town planning schemes. The most effective way of achieving this goal, the EMB went on to propose, was to include the D'MOSS as a restricted development layer over the underlying zones on the relevant physical zoning maps together with appropriate amendments to the provisions of the existing town planning schemes.²³

This proposal was advertised in late 2009 and public meetings were held at various venues across the city. Individual notices were also sent to approximately 18 000 owners of affected properties. As a result of this public participation process, the Municipality received 126 written comments. These comments were then analysed and as a result certain changes were made to the policy. Following these changes the proposal was adopted by the Municipal Council at its meeting on 9 December 2010 as amendments to the existing town planning schemes.²⁴

The 54 existing town planning schemes that existed at the time the D'MOSS Amendments were adopted by the Municipal Council have subsequently been consolidated and revised within each of the municipality's five Planning Regions and today the D'MOSS Amendments form a part of the Central, North, South, Inner West and Outer West Town Planning Schemes, although the Central Durban Scheme is still in the process of being formally adopted.²⁵

²³ eThekwinin Metropolitan Municipality – Environmental Management Branch *Proposed conversion of D'MOSS from a policy of Council to a component of the various town planning schemes found throughout the eThekwinin Municipality area by amendment of the various town planning schemes in terms of section 47BIS A of the Town Planning Ordinance No 27 of 1949* (May 2009) at para 1.3, available at:

http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Publications/Documents/CONVERSION%20OF%20DMOSS%20rev%203.1.pdf. Accessed on 29/11/ 2014.

²⁴ See eThekwinin Metropolitan Municipality *Durban Metropolitan Open Space System, Frequently Asked Questions: Background*, available at:

http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Durban_Open_Space/Pages/MOSS_FAQ.aspx. Accessed on 29/11/2014.

²⁵ The consolidated North, South and Inner West Schemes were adopted on 26 September 2012 and came into effect on 25 October 2012. The Outer West Scheme came into effect on 22 April 2013. The D'MOSS Amendments are contained in clause 1 and clause 10(3) of the existing Central Durban Town Planning Scheme and in section 1.21 and section 2.1 of the consolidated and revised North, South, Inner West and Outer West Town Planning Schemes. Copies of these town planning schemes are available at:

As the discussion of the D'MOSS Amendments set out above clearly indicate, this system is aimed at fulfilling the responsibilities imposed on the Municipality by section 24 of the Constitution. Section 24 provides in this respect that:

'Everyone has the right:

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that:
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

At the same time, however, it is important to note that the implementation of the D'MOSS Amendments will inevitably impose regulatory restrictions of the entitlement of those landowners whose property falls into an affected area. The extent to which the D'MOSS Amendments will limit a landowner's entitlements will of course depend on the degree of biodiversity contained in the affected area, the extent to which such an area requires protection and the importance of the environmental goods and services derived therefrom. In an extreme case, however, the D'MOSS Amendments may completely deprive an owner of the entitlement to economically exploit his or her land. In order to be constitutionally valid, therefore, the policy must satisfy the requirements of section 25 of the Constitution.

Section 25 of the Constitution provides, *inter alia*, that:

- '(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may only be expropriated in terms of law of general application if:
 - (a) it is for a public purpose or in the public interest, and

http://www.durban.gov.za/Resource_Centre/Current%20Projects%20and%20Programmes/LUMS%20Consolidated%20and%20Revised%20Town%20Planning%20Scheme/Forms/AllItems.aspx. Accessed on 29/11/ 2014.

- (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including:
- (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.
- (4) For the purposes of this section:
- (a) the public interest includes the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources; and
 - (b) property is not limited to land.’

In light of the obligations imposed on the eThekweni Municipality by both section 24 and section 25 of the 1996 Constitution, the purpose of this dissertation is to critically examine the restrictions that the D'MOSS Amendments impose on a land owner and to determine whether they satisfy the requirements of section 25 of the Constitution and, in particular, the requirements of section 25(1), namely the right not to be arbitrarily deprived of property.²⁶

3. Research question

As pointed out above, the purpose of this dissertation is to critically examine the restrictions that the D'MOSS Amendments impose on a land owner and to determine whether it satisfies the requirements of section 25 of the Constitution, and in particular, the requirements of section 25(1), namely the right not to be arbitrarily deprived of property.

²⁶ Although they did not argue that the D'MOSS was unconstitutional because it unjustifiably infringed section 25(1) of section 25(2), the applicants in *Le Sueur v eThekweni Municipality* (9714/11) [2013] ZAKZPHC 6 (30 January 2013) at para 17 (hereafter '*Le Sueur*') argued that the policy amounted to 'expropriation by stealth' which was 'unlawful, unconstitutional and unconscionable'. The court refused to consider this argument on the grounds that it was only raised by the applicants in reply and, accordingly, that it constituted a new matter that the applicants were attempting to introduce impermissibly.

More specifically, the purpose of this dissertation is to:

- (a) discuss what is meant by the constitutional concept of ‘property’;
- (b) discuss what is meant by the constitutional concept of ‘deprivation’;
- (c) discuss what is meant by the constitutional concept of ‘law of general application’;
- (d) discuss what is meant by the constitutional concept of an ‘arbitrary deprivation’;
- (e) determine whether the D’MOSS Amendments satisfy the requirements of the right not to be arbitrarily deprived of property guaranteed in section 25(1) of the Constitution.

Apart from the questions set out above, this dissertation will also briefly consider whether the restrictions imposed on land owners by the D’MOSS Amendments may be classified as a form of constructive expropriation.

In answering the above questions a better understanding of the relationship between the right to a healthy environment and the right to property will also be provided.

4. Research methodology

This is a desk-top study. It is based largely on primary and secondary materials. These materials include statutes, judgments and common law principles. In addition, they also include textbooks, journal articles, reports and internet websites.

5. Structure of the study

This dissertation is divided into five chapters.

The aims and objectives of the dissertation are laid out in Chapter One. Apart from the aims and objects, the background to the dissertation, the research methodology, the structure and the limits of the dissertation are also set out.

The relevant provisions of the D'MOSS Amendments and their implications for the right of ownership are set out and discussed in Chapter Two. Besides the provisions of the D'MOSS Amendments, the judgment in *Le Sueur v eThekweni Municipality* supra is also briefly discussed in this chapter.

The scope and ambit of the constitutional right not to be arbitrarily deprived of property is considered in Chapter Three. The role that section 24 of the Constitution plays in determining whether a deprivation is arbitrary or not will also be examined.

Using the concepts and requirements set out in the previous three chapters, the constitutional validity of the restrictions that the D'MOSS Amendments impose on land owners will be analysed in Chapter Four.

A number of concluding points are made in Chapter Five. Some of these concluding points touch on the important and synergetic link between the conservation and protection of the environmental and the use and enjoyment of one's property.

6. Limitations of the study

The promulgation and implementation of the D'MOSS gives rise to a host of constitutional issues.

Apart from possibly contravening section 25(1) of the Constitution, for example, it was argued in *Le Sueur v eThekweni Municipality* that the resolution adopting the D'MOSS was unlawful and invalid because it had been taken in terms of the Natal Town Planning Ordinance 27 of 1949 (the 'Natal TPO') which had already been repealed and replaced by the KwaZulu-Natal Planning and Development Act 6 of 2008 (the KZN PDA').²⁷

In addition, it was also argued in the same case that the resolution that adopted the D'MOSS was unconstitutional because its subject matter fell into the 'environment' which is a functional area

²⁷ *Le Sueur* supra (note 26) at paras 3-4.

of concurrent national and provincial competence listed in Part A of Schedule 4 of the Constitution and, consequently, that it fell outside the legislative competence of local government.²⁸

Neither of these issues is discussed critically in this dissertation. Instead, this dissertation focuses primarily on whether the D'MOSS amendments unjustifiably infringe a landowner's right not to be arbitrarily deprived of his or her property guaranteed in section 25(1) of the Constitution²⁹.

²⁸ *Le Sueur* supra (note 26) at paras 3-4.

²⁹ For a critical discussion of the issues raised in *Le Sueur v eThekweni Municipality* supra see W Freedman 'The legislative authority of the local sphere of government to conserve and protect the environment: A critical analysis of *Le Sueur v eThekweni Municipality*' (2014) 17(1) *Potchefstroom Electronic Law Journal* 567 and T Humby 'Localising environmental governance: The *Le Sueur* case' (2014) 17(4) *Potchefstroom Electronic Law Journal* 1660.

CHAPTER TWO: THE DURBAN METROPOLITAN OPEN SPACE SYSTEM (D'MOSS)

1. Introduction

As we have already seen, the goal of the D'MOSS Amendments is to conserve local biodiversity and to ensure the continued supply of ecosystem services to the current and future inhabitants of the eThekweni Metropolitan Municipality. In order to achieve this goal the Amendments provide that prior to developing, excavating, levelling, removing any natural vegetation, erecting any structures, dumping or carrying out any work on land affected by the D'MOSS, the land owner must obtain the prior approval of the municipality. In addition, it also provides that the municipality may not grant approval unless it is satisfied that the proposed activities will not materially degrade, destroy or negatively impact on the integrity of the biodiversity or environmental services that are found or generated in that area.³⁰

As we have also seen, the D'MOSS has evolved over a long period of time from being nothing more than a legally unenforceable component of the Municipality's Spatial Development Framework to being a legally enforceable component of the municipality's various town planning schemes. Beginning with the existing Central Durban Town Planning scheme the D'MOSS Amendments may be found in clause one, which defines various terms used in the scheme, and clause 10(3), which deals with limitations that may be placed on the right to develop land due to a lack of services, the unsuitability of the land itself, and environmental and other causes.³¹

A 'D'MOSS controlled area' is defined in clause one as:

³⁰ eThekweni Metropolitan Municipality – Environmental Management Branch *Proposed conversion of D'MOSS from a policy of Council to a component of the various town planning schemes found throughout the eThekweni Municipality area by amendment of the various town planning schemes in terms of section 47bis A of the Town Planning Ordinance No 27 of 1949* (note 23) at para 7. See also eThekweni Metropolitan Municipality *Durban Metropolitan Open Space System: Frequently Asked Questions* (note 24).

³¹ The Central Durban Scheme applies to the central region of the eThekweni Metropolitan Municipality. Apart from the Central Durban Scheme, four other town planning schemes apply in the municipality. These are the North, South, Inner West and Outer West Schemes.

‘any area demarcated upon the map by the overprinting of a green hatched pattern (or by a green layer in the GIS), where, by reason of the natural biodiversity, flora and fauna, topography, or the environmental goods and services provided or other like reasons, development or building may be prohibited, restricted, or permitted upon such conditions as may be specified having regard to the nature of the said area’.

The limitations imposed by D’MOSS are set out in clause 10 which provides as follows:

- (a) No person shall, within a D’MOSS controlled area (as defined in clause 1) develop any land, or excavate or level any site, or remove any natural vegetation from, or erect any structure of any nature whatsoever, dump on or in or carry out any work upon such site without having first obtained the prior approval of the Council in terms of this sub-clause.
- (b) No such approval shall be given unless the Head: Development Planning Environment and Management, after due examination, and subject to such conditions as he/she may specify, is satisfied that any such development, erection or other work referred to in paragraph (a) hereof can be carried out without materially and/or temporarily degrading, destroying, or negatively impacting on the integrity of the biodiversity and/or environmental goods and services found or generated within the said area.
- (c) For the purpose of any examination referred to in paragraph (b), the applicant shall, where required by the Head: Development Planning Environment and Management submit such plans or other supporting documentation as the Head: Development Planning Environment and Management may require. Without affecting the generality of the foregoing, such plans and supporting documentation may be required by the Head: Development Planning Environment and Management to be certified as being correct by an appropriately recognised/registered Environmental Consultant.
- (d) The conditions referred to in paragraph (b) hereof may be such as to:
 - (i) Restrict the form or nature of the building or structure;
 - (ii) Limit the size and/or shape of the building or structure;
 - (iii) Prescribe or restrict the materials of which the building or structure is to be constructed;
 - (iv) Determine the siting of any building or structure and of any soak pits or other drainage works;
 - (vi) Prohibit or control any excavation on the site, the construction of any roadways, paths and other garden features;
 - (vii) Prohibit or control the removal of any natural vegetation;
 - (viii) Control any other aspects which the Head: Development Planning Environment and Management considers to be desirable.

- (e) In any approval or any conditions as may be specified by the Head: Development Planning Environment and Management above, the applicant shall enjoy a right of appeal to the KwaZulu-Natal Planning and Development Appeal Tribunal as established in terms of Section 100(1) of the KwaZulu-Natal Planning and Development Act No 6 of 2008.³²

The existing Central Durban Scheme is currently being consolidated and revised. Section 1.21.1 of the revised Scheme provides that:

- ‘(1) The Durban Metropolitan Open Space System Controlled Area is a layer of the Scheme and enforceable by the Environmental Planning and Climate Protection Department.
- (2) No person shall, within a D’MOSS Controlled Area, as defined in section 2, develop any land or excavate or level any site, or remove any natural vegetation from, or erect any structure of any nature whatsoever, dump on or in or carry out any work upon such site without having first obtained the prior approval of the Environmental Planning and Climate Protection Department’.

Like clause 1 of the existing Scheme, section 2.1 of the revised Scheme defines a D’MOSS Controlled Area as:

‘any area demarcated upon the map by the overprinting of a green hatched patterns (or by a green layer on the GIS), where, by reasons of the natural biodiversity, the existence of flora and fauna, topography, or the environmental goods and services provided or other like reasons, development or building may be prohibited, restricted or permitted upon such conditions as may be specified having regard to the nature of the said area.’³³

These provisions also form part of the consolidated North, South, Inner West and Outer West Schemes.³⁴

³² See eThekweni Metropolitan Municipality – Environmental Management Branch *Proposed conversion of D’MOSS from a policy of Council to a component of the various town planning schemes found throughout the eThekweni Municipality area by amendment of the various town planning schemes in terms of section 47bis A of the Town Planning Ordinance No 27 of 1949* (note 23) at para 7. See also eThekweni Municipality *Durban Metropolitan Open Space System: Frequently Asked Questions* (note 24).

³³ A copy of the consolidated and revised Central Durban Town Planning Scheme may be found at: http://www.durban.gov.za/Resource_Centre/Current%20Projects%20and%20Programmes/LUMS%20Consolidated%20and%20Revised%20Town%20Planning%20Scheme/Forms/AllItems.aspx. Accessed on 29/11/ 2014.

³⁴ The consolidated North, South and Inner West Town Planning Schemes were adopted on 26 September 2012 and came into effect on 25 October 2012. The Outer West Scheme came into effect on 22 April 2013. Copies of these schemes may also be found at:

According to the municipality's 2012/2013 *State of Biodiversity Report*, the D'MOSS currently encompasses approximately 74 500 hectares of land and water representing approximately 33 percent of the municipal area linked together in a network of open spaces.³⁵ The open spaces which make up the system are divided into three key categories. These are as follows: first, wide range open space types such as forests and grasslands; second, corridors between open spaces to allow for the flow of genetic materials and to link areas of high biodiversity; and, third, corridors along the coast to allow for the flow of genetic material and to link areas of high marine biodiversity.³⁶

Examples of the sorts of areas that fall under the D'MOSS include nature reserves; rural areas in the upper catchments; riverine and coastal corridors and some areas of privately owned land. In addition the D'MOSS also includes approximately 2 000 hectares of dams; 2 400 hectares of estuarine environment, including mangroves; 11 000 hectares of forest, including dune forests; 7 500 hectares of wetlands, including floodplains; 6 700 hectares of grassland, including several threatened grassland; 15 500 hectares of dry valley thicket; and 17 700 hectares of woodland.³⁷

Given the facts set out above, the municipal Environmental Planning and Climate Protection Department (the 'EPCPD') argues that there is no doubt that D'MOSS has the potential to help protect and conserve many threatened ecosystems and thus help meet South Africa's national and provincial biodiversity conservation targets. Besides helping to achieve national and provincial biodiversity targets, the EPCPD argues further, the D'MOSS also provides a wide range of ecosystem goods to the residents of eThekweni, 'including the formation of soil, erosion

http://www.durban.gov.za/Resource_Centre/Current%20Projects%20and%20Programmes/LUMS%20Consolidated%20and%20Revised%20Town%20Planning%20Scheme/Forms/AllItems.aspx. Accessed on 29/11/ 2014.

³⁵ eThekweni Metropolitan Municipality – Environmental Planning and Climate Protection Department *State of Biodiversity Report 2012/2013* at 13, available at:

http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Publications/Pages/default.aspx. Accessed on 4/6/2014.

³⁶ Biodiversity & Conservation Biology Department of Western Cape et al *Review of Urban Conservation Strategy undertaken in Durban Metropolitan Area and Gauteng Province* (2004) 9.

³⁷ eThekweni Metropolitan Municipality – Environmental Planning and Climate Protection Department *What is the Durban Metropolitan Open Space System?*, available at:

http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Durban_Open_Space/Pages/-What-is-the-Durban-Metropolitan-Open-Space-System.aspx. Accessed on 12/2/2015.

control, water supply and regulation, climate regulation, cultural and recreational opportunities, raw materials for craft and building, food production, pollination, nutrient cycling and waste treatment'.³⁸

In light of the extensive area covered by the D'MOSS as well as the restrictions it imposes on development and use of privately owned land, it is not surprising that the constitutional validity of the policy was challenged by an affected landowner (although not primarily on the grounds that it infringed the right to property, but rather on the grounds that it fell outside the authority and competence of the municipality). This challenge, however, was dismissed by the High Court in *Le Sueur v eThekweni Municipality*.³⁹ Before turning to discuss this judgment, it will be helpful to briefly discuss the role that local government can play in the conservation and protection of the environment.

2. Local government and the protection of the environment

In light of the ECPD's arguments in favour of the D'MOSS set out above, it seems clear that the destruction and depletion of the environment is becoming an increasing concern for local governments worldwide, and that local governments are adopting programmes and policies aimed at curbing the negative effects of man's misuse and mistreatment of the environment. This is not surprising given the increasingly important role that cities are playing in the lives of most people.

According to Otto-Zimmerman – past Secretary-General of the International Council for Local Environmental Initiatives (the 'ICLEI') – in approximately forty years from now, the planet will play host to approximately 10 billion people, two thirds of which will be living in cities. Cities are predicted to account for 90 percent of the economy and consume up to 80-90 percent of

³⁸ Ibid.

³⁹ *Le Sueur* supra (note 26).

energy for immediate use, together with being responsible for a similar proportion of related CO₂ emissions.⁴⁰

Unfortunately, cities are proving to be a growing threat to the integrity of the environment, and to the social welfare and economic situation of their inhabitants. Instead of alleviating issues of poverty, the aggressive conversion of ecosystems and the exploitation of biodiversity has led to irresponsible urbanisation, which aggravates unsuitable living conditions.⁴¹ In a paper published in 2009 by leading scientists, nine planetary boundaries and safe spaces were identified for habitation by humanity.⁴² Should the limits of these boundaries and spaces be infringed, it could result in catastrophic consequences, causing abrupt changes in the environment on a continental and planetary level. The eThekweni Municipality have identified that local boundaries pertaining to terrestrial and aquatic ecosystems are at risk.⁴³

As much as it is cities that are the growing threat to the natural environment, it is not cities who are the actors in control of the regulation and management of the environment, but rather local governments that are the directors and actors responsible for a city's ability to perform and function in harmonisation with their natural environment. Cities are places for human activity and economic transactions, which consist of complex social, economic and physical systems.⁴⁴ Hence, an obligation is placed on local government together with its public at large, to manage their cities in a manner that will mitigate climate change, promote sustainable development and ensure biodiversity conservation and protection.

On an international level, provision was made in Agenda 21 for the active participation of local governments to promote sustainable development through local processes in 1992.⁴⁵ South Africa is a member country of the *Cities for Sustainability* movement and has eighteen

⁴⁰ K Otto-Zimmermann 'Embarking on Global Environmental Governance: Thoughts on the Inclusion of Local Governments and other Stakeholders in Safeguarding the Global Environment' 2011-1 vs 2b *ICLEI* at 4-6, available at: <http://www.iclei.org>. Accessed on 7/5/2014.

⁴¹ See Otto-Zimmerman *ICLEI* (note 40) 37.

⁴² J Rokström et al 'Planetary boundaries: exploring the safe operating space for humanity' *Ecology and Society* (2009) 14(2) at 32.

⁴³ See eThekweni Metropolitan Municipality *Draft Integrated Plan* (2013/2014) at 17.

⁴⁴ See Otto-Zimmermann *ICLEI* (note 40) at 4 and 5.

⁴⁵ United Nations Conference on Environment and Development, Agenda 21, Chapter 28 (1992).

municipalities registered as members of the International Council for Local Environmental Initiatives (ICLEI). The eThekweni Metropolitan Municipality is one of them.⁴⁶ The strategic inclusion of local governments in biodiversity conservation is based on the reasoning that, it need not go through the political and administrative red tape of formally enacting international legislation to bring about important environmental change for the ongoing sustainable development of its city.⁴⁷

Having briefly examined the role that local government can play in the conservation and protection of the environment, we may now turn to consider the judgment in *Le Sueur v eThekweni Municipality*.⁴⁸

3. The constitutional challenge

3.1 The facts

The applicants were Mr R A Le Sueur acting in his personal capacity and in his capacity as the trustee of the Le Sueur Family Trust. They were the owners of land located in the eThekweni Metropolitan Municipality and which fell into a D'MOSS controlled area. The respondents were the eThekweni Metropolitan Municipality, joined by the Minister of Environmental Affairs, the MEC for Agriculture and Environmental Affairs in KwaZulu-Natal, the MEC for Cooperative Governance in KwaZulu-Natal and any Other Interested Party. The City of Cape Town was also admitted as *amicus curiae*.

Following the decision of the eThekweni Municipal Council 9 December 2010 to adopt the D'MOSS Amendments, the applicants applied to the Pietermaritzburg High Court for two orders. First, for an order confirming that the decision was unlawful and therefore invalid; and, second, for an order confirming that the decision was unconstitutional and therefore invalid.⁴⁹

⁴⁶ ICLEI Member list, available at: <http://www.iclei.org/iclei-members/iclei-members.html?memberlistABC=S>. Accessed on 2/4/ 2014.

⁴⁷ See Otto-Zimmermann *ICLEI* (note 40) at 4-6.

⁴⁸ *Le Sueur* supra (note 26).

⁴⁹ *Le Sueur* supra (note 26) at paras 3 and 4.

Insofar as the first application was concerned, the applicants argued that the resolution adopting the D'MOSS Amendments had been taken in terms of the Natal TPO. However, the applicants argued further, at the time the resolution was taken the Natal TPO had been repealed and replaced by the KZN PDA. This meant that the resolution should have been adopted in terms of this KZN PDA and not the Natal TPO. The fact that it was adopted in terms of the Natal TPO also meant that it fell outside the legal authority of the municipal council and, consequently, that it was unlawful and invalid.⁵⁰

Insofar as the second application was concerned, the applicants argued that the substance of the D'MOSS Amendments fell into the functional competence of the 'environment' set out in Schedule 4A of the Constitution. In terms of sections 156(1) and 156(2) of the Constitution, the applicants argued further, the functional areas set out in Schedule 4A are vested exclusively in the national and provincial legislatures. This meant that the D'MOSS Amendments fell outside the legislative competence of local government and consequently that the resolution incorporating it into the various town planning schemes was unconstitutional and invalid.⁵¹

The reason why the D'MOSS Amendments fell into the functional area of the 'environment', the applicants also argued is because the reference to the ' . . . natural biodiversity, flora and fauna, topography, or the environmental goods and services provided or other like reasons . . .' in the definition of a D'MOSS controlled area suggested that this legislation was implemented to regulate the development of land in order to protect the environment. If controlled activities such as excavation, levelling of land or removal of vegetation were to occur, the land owner would have to first obtain the consent of the Municipality.⁵²

In addition, the applicants also relied on Chapter Five of the National Environmental Management Act 107 of 1998 (the 'NEMA'), and the regulations issued thereunder, to argue that a municipal council does not have the competence to pass legislation that falls into the functional area of the 'environment'. Chapter 5 of NEMA, the applicants argued, deals with environmental

⁵⁰ *Le Sueur* supra (note 26) at paras 5 - 7.

⁵¹ *Le Sueur* supra (note 26) at para 16.

⁵² *Le Sueur* supra (note 26) at para #. See also eThekweni Municipality *Durban Metropolitan Open Space System, Frequently Asked Questions* (note 24). Accessed on 29/11/ 2014.

authorisations for the commencement of activities that affect the environment and vests the power to grant such authorisations in the Minister and/or the MEC. It follows, therefore, that the power to grant environmental authorisations is vested in the national and provincial governments and not in local government.⁵³

3.2 The Judgment

(a) Introduction

The High Court rejected all of the applicant's arguments and held that the resolution adopted by the Municipal Council was both lawful and constitutional. In arriving at this decision, the Court dealt with each of the applicants' arguments in turn.

(b) The applicants' first argument

With respect to the applicants' first argument, the High Court began by observing that the relevant provisions of the KZN PDA had come into force on 1 May 2010. When the Municipal Council adopted the D'MOSS Amendments on 9 December 2010, the Natal TPO had already been repealed. The decision to adopt the Amendments in terms of the repealed Natal TPO rather than the KZN PDA, the High Court observed further, might therefore, still be valid if it was governed by the transitional provisions contained in Item 12 of Part 2 of Schedule 4 of the KZN PDA.⁵⁴

Item 12 of Schedule 4 of the KZN PDA provides as follows:

'A Resolution to adopt provisions of a Town Planning Scheme or rescind, alter or amend the provisions of a Town Planning Scheme in terms of Section 47bis(1)(a) or 47bisA(2) of the Ordinance that was taken before this Act commenced: that has not become effective, and has not been abandoned, must be proceeded with as if this Act has not commenced.'

⁵³ *Le Sueur* supra (note 26) at para 16.

⁵⁴ *Le Sueur* supra (note 26) at paras 5.

The key question that had to be answered, therefore, was whether the Municipal Council had passed a ‘resolution to adopt provisions’ of a town planning schemes in terms of section 47bis (1)(a) or 47bis A(2) of the Natal TPO before the 1 May 2010 when the relevant provisions of the PDA commenced.⁵⁵

In this respect, the High Court started by pointing out that a Municipal Council by its very nature is not a single person. This means that before it makes a decision to embark on a particular course of action its members must resolve to do so. It follows therefore that in order for a Municipal Council to decide whether or not to amend an existing town planning scheme its members must pass a resolution deciding to do so.⁵⁶

In addition, the High Court pointed out further, the phrase a ‘resolution to adopt provisions’ in Item 12 of Part 2 of Schedule 4 of the KZN PDA is not restricted to a resolution adopting a provision of a town planning scheme or amending a town planning scheme, but also includes a resolution to begin the process of adopting a provision of a town planning scheme or amending a town planning scheme.⁵⁷

Having set out these principles, the High Court turned to apply them to the facts. In this respect the Court found that the resolution to begin the process of adopting the D’MOSS Amendments had been taken by the Municipal Council on 30 July 2009, approximately ten months before the relevant provisions of the PDA came into operation on 1 May 2010. The decision to amend the relevant town planning scheme in order to incorporate the D’MOSS, therefore, had not been abandoned and could be adopted in terms of the Natal TPO rather than the PDA.⁵⁸

⁵⁵ *Le Sueur* supra (note 26) at para 6.

⁵⁶ *Le Sueur* supra (note 26) at para 7. The facts in this case, therefore, were very different from those in *Schoonies Een (Pty) Ltd v Mtubatuba Municipality*, unreported, case number 483/2012, where the process for amending the town planning scheme was set in motion at the instance of a landowner and not at the instance of the municipality itself. The decision in *Schoonies*, therefore, ‘cannot be regarded as authority for the proposition that in as much as no resolution is referred to, as having been taken by the municipality that the steps taken in publishing the relevant notices is not a step taken that is protected by the provisions of Item 12’.

⁵⁷ *Le Sueur* supra (note 26) at paras 10-13.

⁵⁸ *Le Sueur* supra (note 26) at paras 14-15.

The D'MOSS Amendments, therefore, were saved by Item 12 of Part 2 of Schedule 4 and the applicants' first argument had to be dismissed.

(c) The applicants' second argument

With respect to the applicants' second argument, the High Court began by observing that section 7(2) of the Constitution provides that '[t]he state must protect, promote and fulfil the rights in the Bill of Rights' and that the word 'state' includes local government. This shows that the different spheres of government do not derive their power and responsibilities from Schedules 4 and 5 alone, but also from other provisions of the Constitution. Among these are section 24(b) of the Bill of Rights, which provides that everyone has a right to have the environment protected through reasonable and other legislative measures, and section 152(2)(d), which imposes an obligation on local government 'to promote a safe and healthy environment'.⁵⁹

In light of these provisions, the High Court observed further, it is quite clear that although matters relating to the environment are primarily the concern of the national and provincial spheres of government, the Constitution did not allocate legislative and administrative powers relating to the environment among the three spheres of government in hermetically sealed, distinct and water tight compartments. Instead, the Constitution accepts that local government in the form of municipalities is usually in the best position to know, understand and deal with issues involving the environment at a local level and should have the power to do so.⁶⁰

The fact that legislative and executive power with respect to the environment is not vested in the national and provincial spheres of government only, but also in the local sphere, the High Court went on to observe, is also consistent with the principles of co-operative government. It follows, therefore, that the functional area of the 'environment' could not be inserted in Part B of Schedule 4, but had to be inserted in Part A.⁶¹

⁵⁹ *Le Sueur* supra (note 26) at para 19.

⁶⁰ *Le Sueur* supra (note 26) at para 20.

⁶¹ *Le Sueur* supra (note 26) at para 20.

Given these points, the High Court held, the legislative and executive powers conferred upon local government with respect to the functional area of ‘municipal planning’ set out in Part B of Schedule 4 must be interpreted in a manner that includes the power to pass legislation with respect to the conservation and protection of the environment. In this respect, the Court held further, it was interesting to note that municipalities have historically always exercised legislative authority over environmental affairs as a part of municipal planning.⁶²

Apart from the constitutional provisions discussed above, the High Court also pointed out that a number of different national and provincial statutes and regulations assigned the power to pass legislation dealing with the conservation and protection of the environment as a part of municipal planning on local government, at least by implication. Among these were the Local Government Transition Act 109 of 1993,⁶³ the Development Facilitation Act 67 of 1995,⁶⁴ the Municipal Systems Act 32 of 2000⁶⁵ and the Local Government: Municipal Planning and Performance Management Regulations published on 24 August 2001.⁶⁶

The power to pass the D’MOSS Amendments, therefore, did fall into the functional area of ‘municipal planning’ and, consequently, within the legislative competence of the Municipal Council. The applicants’ second argument, therefore, also had to be dismissed.⁶⁷

4. Conclusion

The outcome of the above application was a much needed victory for local government. It gave municipalities guidance regarding the authoritative power it had to implement environmental legislation within its jurisdiction and further reaffirmed the important role that Local Government plays in environmental conservation and protection. Despite the submissions made by the applicant, the underlying basis for the application was to find a way to remove the

⁶² *Le Sueur* supra (note 26) at para 21.

⁶³ See items 19 and 21 of Schedule 2 and item 14 of Schedule 2A.

⁶⁴ See section 3(1)(h) and 31(c).

⁶⁵ See section 23(1)(c).

⁶⁶ *Le Sueur* supra (note 26) at para 22-27. In its judgment, the High Court also referred to the National Environmental Management Act 107 of 1998 and the National Environmental Management: Biodiversity Act 10 of 2004.

⁶⁷ *Le Sueur* supra (note 26) at para 33 and 40.

legislative authority of D'MOSS to circumvent the restrictive use and development of its property. If the D'MOSS regulations allowed the applicant to use and develop the said properties at will, without having to go through the additional environmental rigmarole in order to obtain the necessary environmental authorisation, it is questionable whether lodgement of the application would in all probability have occurred. Furthermore, it is interesting to note that despite frustration about restricted development and an attack on its *land rights*, the applicant failed to address this issue in greater detail in its founding affidavit. It merely skimmed the surface of *expropriation by stealth* and the issue of *compensation* in its responding affidavit.⁶⁸ The above case confirmed that the enactment of the D'MOSS by the eThekweni Municipality is constitutional. While the judgement dealt with the question of legislative competence, it did not deal with all of the legal questions that the D'MOSS gives rise to, in particular the question of property rights. Hence, the rest of this dissertation shall be devoted to an examination of how the D'MOSS actually relates to and possibly infringes property rights.

⁶⁸ *Le Sueur* supra (note 26) at para 17.

CHAPTER THREE: THE CONSTITUTIONAL RIGHT TO PROPERTY

1. Introduction

In order to determine whether a statutory provision unjustifiably infringes section 25 of the Constitution, the analysis that was adopted by the Constitutional Court in *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Service, First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,⁶⁹ should be followed. In this case the Court divided its analysis of section 25 into a series of questions.⁷⁰ According to Roux these questions may be summarised as follows:

- (a) Does that which has been taken away from [the property holder] by the operation of [the law in question] amount to property for the purposes of s 25?
- (b) If so, has there been a deprivation of such property by the [organ of state concerned]?
- (c) If there has, is such deprivation consistent with the provisions of s 25(1)?
- (d) If not, is such deprivation justified under s 36 of the Constitution?
- (e) If it is, does it amount to expropriation for the purposes of s 25(2)?
- (f) If so, does the [expropriation] comply with the requirements of section 25(2)(a) and (b)?
- (g) If not, is the expropriation justified under s 36?⁷¹

The starting point, therefore, should always be section 25(1) of the Constitution. Question (a) asks whether the interest that has been affected by the law in question can be defined as property for the purposes of section 25. If the answer is yes, then question (b) asks whether the holder has been deprived of his or her property by the law in question. If the answer is yes, then question (c) asks whether the deprivation complies with the requirements of section 25(1). If the answer is yes, then the enquiry jumps to question (e). If, however, the answer is no, then question (d) asks if the deprivation can be justified in terms of the limitation clause. If the answer is no, the inquiry ends here and the deprivation is unconstitutional and invalid. If the deprivation did comply with section 25(1)(a) and (b) or can be justified in terms of the limitation clause, then question (e) asks whether it can be defined as an expropriation for the purposes of section 25(2) of the

⁶⁹ 2002 (4) SA 768 (CC) (hereafter the 'FNB case').

⁷⁰ *FNB* supra (note 69) at para 46.

⁷¹ See T Roux 'Property' in S Woolman et al (eds) *Constitutional Law of South Africa* 2ed (OS: 2003) at chapter 46.

Constitution. If the answer to this question is yes, then question (f) asks whether the expropriation complies with the requirements of section 25(2). If the answer is yes, then the expropriation is constitutionally valid. If the answer is no, then question (g) asks if the expropriation can be justified in terms of the limitation clause. If the answer is no, the expropriation is unconstitutional and invalid.

Although the analysis set out above encompasses both section 25(1) and section 25(2) of the Constitution, for the purposes of this dissertation we will focus only on that part of the analysis that applies to section 25(1). In other words, we will focus only on questions (a), (b), (c) and (d). This is because, similarly to German law, the common law does not confer the power to expropriate property on the state. The state can only expropriate property, therefore, if the power to do so is conferred upon it by a statute. If a statute does not explicitly make provision for an expropriation of property, then an expropriation cannot take place.⁷² Given that the D'MOSS Amendments do not confer the power to expropriate property on the eThekweni Metropolitan Municipality, it follows that it cannot amount to an expropriation for the purposes of section 25(2). It is, therefore, unnecessary to determine whether the D'MOSS Amendments satisfy the requirements of section 25(2) and (3).

When it comes to interpreting section 25(1), it is important to take the provisions of section 25(4) of the Constitution into account. This section provides that 'the public interest includes the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources'. Furthermore, it also provides that 'property is not limited to land'.⁷³ While section 25(4) does not guarantee a right to natural resources or even impose an obligation on the state to enact reforms aimed at bringing about equitable access to all South Africa's natural resources, it does protect such reforms from being declared unconstitutional and invalid on the grounds that they are not in the public interest.

Apart from confirming that reforms aimed at bringing about equitable access to all South Africa's natural resources satisfy the public interest requirement in section 25(2)(a) of the

⁷² See AJ van der Walt *Constitutional Property Law* 3ed (2011) 44.

⁷³ Section 25(4)(a)-(b).

Constitution, it may be argued that section 25(4) also provides that such reforms – which must include legislation aimed at conserving and protection natural resources – do not only serve a legitimate goal in our democracy, but also carry significant weight when it comes to the balancing exercise that lies at the heart of section 25(1).

This balancing exercise was referred to in the *FNB* case when the Constitutional Court explained that sections 25(1) and (2) of the Constitution cannot be interpreted in isolation. Instead, they must be interpreted: (a) in the context of the other provisions of section 25; (b) in their historical context; and (c) in the context of the Constitution as a whole. The other provisions of section 25, South Africa's history and the Constitution's commitment to social justice all emphasise, the Court explained further, that the protection of property as an individual right is not absolute, but is subject to societal considerations. The purpose of section 25, therefore, must be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a 'proportionate balance' between these two functions.⁷⁴

In addition, it should also be noted that the property clause cannot be read in isolation insofar as it relates to the environment, since there are other sections in the Bill of Rights that guarantee access to food and water,⁷⁵ and to the protection of the environment.⁷⁶ Environmental rights are protected through the enactment of reasonable legislation and other measures, which further aim to ensure the prevention of ecological degradation and to secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development.⁷⁷ Section 25(4)(a) of the Constitution gives the state additional police power leverage to regulate the use of property to further environmental conservation objectives. Hence,

⁷⁴ See *FNB* supra (note 69) at paras 49 and 50. See also *Mkontwana v Nelson Mandela Metropolitan Municipality, Bissett v Buffalo City Municipality, Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng (KwaZulu-Natal Law Society and Msunduzi Municipality as amici curiae)* 2005 (1) SA 530 (CC) at paras 81 and 82 (hereafter '*Mkontwana*') and *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at paras 60 and 61 (hereafter '*AgriSA*').

⁷⁵ Section 27(1)(b).

⁷⁶ Section 24.

⁷⁷ *Ibid.*

a purposive approach should be applied when interpreting section 25, to ensure a balance between private property rights and public interest.⁷⁸

The drafters of the Constitution set out the provisions of section 25 in a manner that protects existing property rights, in addition to leaving room for reform and transformation, thereby creating opportunities for the promotion of societal interests and benefits. Hence, section 25(1) of the property clause acts as a guarantee and protection for existing property rights against unconstitutional state interference,⁷⁹ and section 25(2), acting as the purposive portion legitimates and promotes land reform in property holdings and property law.⁸⁰

Having discussed the role that section 25(4) plays in the interpretation of not only section 25(2), but also section 25(1), we may now turn to consider the *FNB* analysis in more detail.

2. The constitutional concept of property

Traditionally, the common law has adopted a fairly narrow approach towards the concept of property. In keeping with the principles of Roman and Roman-Dutch law, the common law concept of property has been restricted largely to ownership of corporeal movable and immovable things.⁸¹ Unlike the common law concept of property, however, the constitutional concept is not restricted to ownership of corporeal movable and immovable things. Instead, it encompasses a much wider range of objects, rights and interests.⁸²

⁷⁸ See AJ van der Walt *Constitutional Property Law* 2ed (2005) at 32. According to Van der Walt the courts have adopted a purposive approach towards the interpretation of the Bill of Rights since 1994. In terms of this approach, he explains, a balance should be struck between the protection of existing property rights, and the transformative focus of the Constitution, in addition to paying heed to the historical context, which gave rise to the promulgation of the 1996 Constitution.

⁷⁹ Section 25(1) and (2).

⁸⁰ Section 25(5) - 25(9). The interpretation of the South African property clause is unique in that it calls for a general interpretation and a purposive interpretation, in addition to taking into account foreign and international law (see Van der Walt *Constitutional Property Law* 2ed (note 78) at 10).

⁸¹ See Van der Walt *Constitutional Property Law* 2ed (note 78) at 77 and 78.

⁸² *Ibid.*

In this respect, the Constitutional Court has held that the constitutional concept of property not only encompasses the right of ownership itself,⁸³ but also the individual entitlements that form a part of the content of ownership. In the *Mkontwana* case, for example, the Court held that the right to alienate property is an important incident of its use and enjoyment and is protected by section 25(1) of the Constitution.⁸⁴

In addition, the Court has also found that the constitutional concept of property includes other real rights such as servitudes, real security rights, long term leases, mineral rights and so on. In the *Agri SA* case, for example, the Court held that limited real rights in the form of mineral rights are property for the purposes of section 25 of the Constitution because they can be kept as a valuable investment or asset.⁸⁵

Apart from ownership, its entitlements and other real rights, the Constitutional Court has held that the constitutional concept of property also includes personal rights and intellectual property rights. In *National Credit Regulator v Opperman*,⁸⁶ for example, the Court accepted that a personal right to claim restitution on the grounds of unjustified enrichment was property for the purposes of section 25 and in *Laugh It Off Promotions CC v SAB International Finance BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curia)*⁸⁷ the Court accepted that a trade mark is also property for the purposes of section 25, although without actually discussing the issue.

⁸³ Although it refused to define what is meant by the constitutional concept of property, in the *FNB* case supra (note 69) at para 51 the Court held the ownership of corporeal and incorporeal movables and immovables lies at the heart of the concept of constitutional property, both in regards to the nature and object of the right. Apart from the *FNB* case supra see also *Harksen v Lane NO* 1998 (1) SA 300 (CC) at para 35, *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC) at para 3, *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at paras 30 and 36; and *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) at paras 30-32, 36 and 37 (hereafter '*Reflect-All*').

⁸⁴ *Mkontwana* supra (note 74) at para 33. See also *Geyser v Msunduzi Municipality* 2003 (5) SA 18 (N) at 37A where the High Court held that '[t]he property that is protected by s 25 of the Constitution includes property rights such as ownership and the bundle of rights that make up ownership such as the right to use property or to exclude other people from using it or to derive income from it or to transfer it to others'.

⁸⁵ *Agri SA* supra (note 74) at para 50. See also *Ex parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) at para 15, where the High Court held that '[a] purposive construction of "property" means that it should be read to include any right to, or in property. There is no valid reason to read down the provision to obtain a more limited meaning of the word. Registered praedial servitutorial rights are therefore included within the concept of "property" under s 25(1)'.

⁸⁶ 2013 (2) SA 1 (CC) at para 63 (hereafter '*Opperman*'). See also *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC).

⁸⁷ 2006 (1) SA 144 (CC) at para 17. See also *Phumelela Gaming and Leisure Ltd v Grundlingh* 2006 (8) BCLR (CC).

The meaning of the constitutional concept of property has also been considered by the Supreme Court of Appeal and the High Court on a number of occasions. One of the more significant judgments in this respect is *Transkei Public Servants Association v Government of the RSA*⁸⁸ where the Umtata High Court held that a housing subsidy paid to government employees was property for the purposes of the property clause in the interim Constitution.⁸⁹ In arriving at this decision the court explained that the constitutional concept of property is not restricted to ownership in things, but instead encompasses a variety of social and economic benefits and interests such as state contracts, pensions and medical benefits.⁹⁰

In light of these and other judgments, Van der Walt argues that the constitutional concept of property ‘relates to a wide range of objects both corporeal and incorporeal, a wide range of traditional property rights and interests both real and personal, and a wide range of other rights and interests which (in civil-law tradition) have never been considered in terms of property before’.⁹¹

Notwithstanding the acceptance of a wider meaning of property for constitutional purposes, it does not mean that all intangible interests of value will amount to constitutional property. A key requirement is that it must have vested in terms of established legal principles. Furthermore, the interest must be a concrete, specific asset and not merely relate to a person’s general wealth or financial status.⁹²

Constitutional property law is at odds with private property law, as it takes into account a more social and public interest view, whereby the requisite interests of the public may outweigh the individual’s need. In order to meet the interests of and ensure benefits to the public the

⁸⁸ 1995 (9) BCLR 1236 (Tk).

⁸⁹ Constitution of the Republic of South Africa, Act 200 of 1993. The right to property was guaranteed in section 28 of the interim Constitution.

⁹⁰ DL Carey Miller and A Pope ‘A South African Land Reform’ (2000) 44 *Journal of African Law* 167.

⁹¹ Van der Walt *Constitutional Property Law* 3ed (note 72) at 192.

⁹² Van der Walt *Constitutional Property Law* 2ed (note 78) at 119–23, 130–31 and 135.

Constitution therefore, recognizes restrictive state powers, which is also known as *state police power*,⁹³ which takes us to the step of our constitutional analysis.

3. The constitutional concept of deprivation

In the *FNB* case the Constitutional Court interpreted the concept of a deprivation very widely when it held that:

‘[t]he term “deprive” or “deprivation” is, as *Van der Walt* (1997) points out, somewhat misleading or confusing because it can create the wrong impression that it invariably refers to the taking away of property, whereas in fact “the term ‘deprivation’ is distinguished very clearly from the narrower terms ‘expropriation’ in constitutional jurisprudence worldwide.” In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If section 25 applied to this wide *genus* of interference, “deprivation” would encompass all species thereof and ‘expropriation’ would apply only to a narrower species of interference. *Chaskalson and Lewis*, using a slightly different idiom and dealing with both the interim and 1996 Constitutions, put it equally correctly thus: “Expropriations are treated as a subset of deprivations. There are certain requirements for the validity of all deprivations”.’⁹⁴

Although the Constitutional Court adopted a very wide definition of the concept of a deprivation in the *FNB*, it changed its approach in *Mkontwana* and adopted a narrower definition. In this case the Court held that the existence of a deprivation depends on the ‘extent of interference with or limitation of use, enjoyment, exploitation’ of property and that ‘at the very least, substantial interference or limitation that goes beyond the normal restrictions on property uses and enjoyment found in an open and democratic society would amount to a deprivation’.⁹⁵

Since then the Constitutional Court appears to have vacillated between the two approaches. In the *Reflect-All* case, for example, the Court followed the wider definition set in *FNB*,⁹⁶ while in

⁹³ Ibid at 72 and 73.

⁹⁴ *FNB* supra (note 69) at para 57.

⁹⁵ *Mkontwana* supra (note 74) at para 32. See also EJ Marais ‘The Constitutionality of Section 89(5)(c) of the National Credit Act under the Property Clause: *National Credit Regulator v Opperman & Others*’ (2014) 131(2) *SALJ* 222.

⁹⁶ *Reflect-All* supra (note 83) at para 36.

the *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd*⁹⁷ case and the *Opperman* case it followed (or at least claimed to follow) the narrower definition set out in *Mkontwana*.⁹⁸

The narrower approach adopted in *Mkontwana* has been criticised by Van der Walt on the grounds that it has the potential of unduly complicating the deprivation question by excluding certain interferences from protection under the property clause. In addition, he also argues that ‘it is unclear why the definition of deprivation should be linked to the notion of what is normal in an open democracy’.⁹⁹

As the Constitutional Court itself pointed out in the *FNB* case, one of the important consequences that flows from defining deprivations so widely is that while the concept of a deprivation encompass all interferences with the use, enjoyment and exploitation of private property, the concept of an expropriation does not. Instead, the concept of an expropriation encompasses a much narrower and more serious category of interferences. This means that while all expropriations are deprivations, not all deprivations are expropriations.

Given that not all deprivations are expropriations, it is important to distinguish between those deprivations that are not expropriations (these sorts of interferences are sometimes referred to as ‘regulations’ in other comparable jurisdictions),¹⁰⁰ from those deprivations that are expropriations (these sorts of interferences are sometimes referred to as ‘takings’ in other comparable jurisdictions).¹⁰¹ This is because while deprivations that are not expropriations simply have to comply with the requirements of section 25(1) of the Constitution, deprivations that are expropriations have to comply with the requirements of both section 25(1) and 25(2), especially the requirement to pay compensation.

⁹⁷ 2011 (1) SA 293 (CC) (hereafter ‘*Offit*’).

⁹⁸ *Offit* supra (note 97) at paras 38-39 and 41, and *Opperman* supra (note 86) at para 66.

⁹⁹ Van der Walt *Constitutional Property Law* 3ed (note #) 205.

¹⁰⁰ The power to regulate property is sometimes referred to as the ‘police power’ (see Van der Walt *Constitutional Property Law* 2ed (note 78) at 126, 128 and 131).

¹⁰¹ The power to expropriate or take property is sometimes referred to as the power of ‘eminent domain’ (see Van der Walt *Constitutional Property Law* 2ed (note 78) at 126, 128 and 131).

The reason why compensation does not have to be paid for a ‘regulatory deprivation’, but does have to be paid for an ‘expropriatory deprivation’ is because even though a regulatory deprivation may result in loss or damage to private property, the loss or damage usually falls on everyone who is in the affected class and is shared more or less equally among them. In the case of an ‘expropriatory deprivation’, however, this is not the case. Instead, the loss or damage usually falls on a particular individual or a small group of individuals and they have to bear the burden alone.¹⁰²

When it comes to distinguishing between regulatory deprivations and expropriatory deprivations, a number of factors may be taken into account. In light of the Constitutional Court’s judgment in *Agri SA*, however, the key factors appear to be whether the state has not only taken away a person’s property, but also whether it has acquired something substantially similar to what was taken away. This is because in this case a majority of the Court held that in order to prove that an expropriation has taken place, a claimant has to show that the state has acquired something substantially similar to what was taken away.

‘To prove expropriation, a claimant must establish that the State has acquired the substance or core content of what it was deprived of. In other words, the rights acquired by the State do not have to be exactly the same as the rights that were lost. There would, however, have to be sufficient congruence or substantial similarity between what was lost and what was acquired. Exact correlation is not required . . . There can be no expropriation in circumstances where deprivation does not result in property being acquired by the state’.¹⁰³

This means that if the state has taken away a person’s property and has acquired something substantially similar, an expropriatory deprivation has taken place and compensation has to be paid. If, however, the state has not taken away a person’s property, but simply limited the manner in which he or she may use, enjoy or exploit it; or if the state has taken a person’s property, but has not acquired something substantially similar than that is a regulatory deprivation and compensation does not have to be paid.

¹⁰² Van der Walt *Constitutional Property Law* 2ed (note 78) at 129.

¹⁰³ *Agri SA* supra (note 74) at paras 58 and 59. When it comes to determining whether the rights the State has acquired are substantially similar to those that were taken away, the majority held that a court should not adopt a very narrow or a very broad interpretation of what is meant by ‘acquisition’. Instead, it must try to strike a balance between the need to transform the economy and the need to protect private property. This means that the meaning of the concept of an ‘acquisition’ will have to be decided on a case by case basis (at paras 63-64).

4. The requirements for a valid deprivation

4.1 Introduction

Section 25(1) of the Constitution provides that a deprivation will be constitutionally valid only if the requirements set out in paragraphs (a) and (b) are satisfied. Paragraph (a) provides that the deprivation must be in terms of law of general application¹⁰⁴ and paragraph (b) provides that the deprivation must not be arbitrary.¹⁰⁵ Apart from these two explicit requirements, it may also be argued that the deprivation must serve a legitimate public purpose or interest.¹⁰⁶ Each of these requirements will be discussed in turn, starting with the public purpose/public interest requirement.

4.2 Public purpose and public interest

It is widely accepted in many foreign jurisdictions that a deprivation of property must be for public purpose. It is a standard requirement both in jurisdictions with a due process clause and in those without. For example, Germany which is known for its strict property clause, stipulates that a deprivation that limits the content and scope of property must be imposed in terms of a valid law and satisfy the proportionality test. The test known as *Übermaßverbot*, means that the deprivation must serve the public interest and the burden it imposes must not be more than what the public interest requires.¹⁰⁷

The German *Deichordnung Case* demonstrated the exercise of State police power, which restricted private property rights for the benefit of public safety and welfare.¹⁰⁸ This involved the promulgation of restrictive land development legislation subsequent to a major flood. The

¹⁰⁴ Section 25(1)(a).

¹⁰⁵ Section 25(1)(b).

¹⁰⁶ Van der Walt *Constitutional Property Law* 2ed (note 78) at 137.

¹⁰⁷ DG Kleyn 'The Constitutional Protection of Property: A comparison between German and the South African Approach' (1996) 11 *SA Public Law* 402-445 at 424 – 425. Van der Walt *Constitutional Property Law* 2ed (note 78) at 138.

¹⁰⁸ BVerfGE 24, 367 [1968] (*Deichordnung*).

legislation aimed to prevent future flooding by restricting and controlling the development of dyke land, and achieved this by transforming certain private land into public land, in addition to restricting the use of other dyke land. The interests of the public justified a shift from the protection of private property rights in order to meet the interests of the public through regulatory state control of property.¹⁰⁹

The Federal Constitutional Court described Germany's attitude towards property as one that aims to establish a balance between the personal freedom regarding property rights and the promotion of the public weal. In reference to *Leitmotiv*, a purposive interpretation has therefore, been applied to the property clause contained in article 14 of the German Basic Law of 1949 (*Grundgesetz*). This interpretation provides that a person is given the freedom to promote and develop his or her own life, but this responsibility must be undertaken within a social context. In this way, the property clause promotes the freedom of the individual while simultaneously protecting public interest in property with due regard for the social context within which property rights are established, acquired, exercised, recognized and protected.¹¹⁰

While it appears that section 25(1) of the South African Constitution does not make specific reference to the requirement of public purpose and interest, in light of the above examples which sets out a core need for such regulatory deprivations, namely to further the benefits to and interest of the public, it can be presumed that the presence of this requirement exists tacitly even within the South African property system. If section 39(1)(b) and (c) of the Constitution provides that the courts must take international and may take foreign law into consideration when interpreting and applying legislation, it stands to reason, that the public interest and purpose requirement would also apply to section 25(1) of the Constitution. Furthermore, Van der Walt citing the case of *FNB* points out that, while all expropriations are deprivations, only some deprivations are expropriations.¹¹¹ Following Van der Walt's reasoning, if purposes of public interest and benefit are a requirement of an expropriation then surely this requirement would also

¹⁰⁹ Van der Walt *Constitutional Property Law* 2ed (note 78) at 33 and BVerfGE 24, 367 [1968] (*Deichordnung*).

¹¹⁰ *Ibid* at 32.

¹¹¹ Van der Walt *Constitutional Property Law* 2ed (note 78) at 132 and *FNB* *supra* (note 69) at para 57-58.

apply to section 25(1). The requirement of public benefit and for public purpose was confirmed by the courts in cases such as *FNB* and *National Director of Public Prosecutions v Prophet*.¹¹²

4.3 Law of general application

The law of general application requirement may be divided into two components. First, the deprivation must be authorised by a law. Second, that law must be of general application.

Insofar as the first component is concerned, it is generally accepted that the term ‘law’ encompasses original legislation, subordinate legislation, common law and customary law. It does not, however, encompass guidelines, policies and practices. In addition, it also does not encompass administrative, executive, judicial and private actions. The law that authorises the deprivation must also be formally valid. This is because the requirement that a deprivation must be authorised by a law of general application gives effect to the principle of the rule of law.¹¹³

Insofar as the second component is concerned, it is generally accepted that a law which applies generally is one which does not target specific individuals or members of a specific groups for arbitrary treatment. In addition, it also means that the law must be clear, open and relatively stable. In other words, the law should not be vague or secret or subject to constant change. Those individuals who are subject to the law should be able to know what it provides so that they can comply with its requirements.¹¹⁴

State regulatory powers have been integrated into a number of statutes at the municipal, provincial and national level in order to control land use and development, and promote environmental conservation and protection. For example, municipalities adopt building regulation by-laws, which regulate the height of buildings and demarcates building lines from which buildings can be erected, in relation to the distance between the said building and public roads or from a neighbour’s property. These by-laws in themselves, amount to a deprivation of

¹¹² 2003 (6) SA 154 (C).

¹¹³ See T Roux ‘Property’ in MH Cheadle, DM Davis & NRL Haysom *The Bill of Rights in the 1996 South African Constitution* (2002) at 429 -472 and 458. See also Van der Walt *Constitutional Property Law* 2ed (note 78) at 143 and 144.

¹¹⁴ See AJ Van der Walt *Property and the Constitution* (2012).

property rights because they restrict an owner's free use and development of his or her property. Environmental legislation, such as the NEMA regulations contains environmental impact assessment (EIA) requirements that need to be complied with during the undertaking of an activity that may cause environmental damage.¹¹⁵ Despite the deprivatory nature of these regulations, they are considered a legitimate exercise of police power, which is applied under laws of general application, the purpose and interest of which is for the public benefit.

4.4 Test for arbitrariness

(a) Introduction

Apart from being authorised by a law of general application, a deprivation also has to satisfy the requirement of non-arbitrariness. In the *FNB* case the Constitutional Court held that a 'deprivation' is arbitrary when the law of general application does not provide sufficient reason for the said deprivation, or the law is procedurally unfair.¹¹⁶ A law of general application which authorises a deprivation, therefore, will only be constitutionally valid if it is procedurally fair (i.e. if it is procedurally non-arbitrary) and if there is a sufficient reason for the deprivation (i.e. if it is substantively non-arbitrary).

(b) The test for procedural arbitrariness

Although the Constitutional Court held that a law authorising a deprivation must not only be substantively non-arbitrary, but also procedurally non-arbitrary in the *FNB* case, it did not discuss what is meant by the requirement that a deprivation must be procedurally non-arbitrary. Instead, it simply discussed what is meant by the requirement that a deprivation must be substantively non-arbitrary. This is because the case was decided on the grounds of substantive arbitrariness.

¹¹⁵ Environmental Impact Assessment Regulations, Regulation 543 in *Government Gazette* 33306 of 18 June 2010.

¹¹⁶ *Opperman* supra (note 86) at para 68 and *FNB* supra (note 69) at para 100.

The Constitutional Court's failure to explain what is meant by the requirement that a deprivation must be procedurally non-arbitrary in the *FNB* case, however, was remedied to some extent by its judgment in the *Mkontwana* case. In this case the Court did discuss the requirement that a deprivation must be procedurally non-arbitrary when it held that the concept of procedural fairness in terms of section 25(1) of the Constitution is the same as the concept of procedural fairness in other contexts, namely that it is a flexible standard that depends on the circumstances of each case.¹¹⁷

Although the concept of procedural fairness in terms of section 25(1) is the same as the concept in other contexts, it is important to note that the somewhat general definition adopted by the Constitutional Court in *Mkontwana* does not apply to all deprivations. Some deprivations have to comply with the more specific definition of procedural fairness set out in section 3 of the Promotion of Administrative Justice Act 3 of 2000 (the 'PAJA').

The reason why some deprivations have to comply with the more specific definition of procedural fairness set out in section 3 of PAJA is because a distinction may be drawn between:

- (a) those cases in which a property holder has been deprived of his or her property as a result of administrative action; and
- (b) those cases in which a property holder has been deprived of his or property directly by the law in question, without involving any administrative action.¹¹⁸

Insofar as the first category of deprivations is concerned, the deprivation is governed by PAJA and must satisfy the specific requirements of that Act, including section 3. Insofar as the second category of deprivations is concerned, however, the deprivation is not governed by the PAJA. Instead, it is governed by directly by section 25(1) and will have to satisfy the test set out in the *Mkontwana* case.¹¹⁹

¹¹⁷ *Mkontwana* supra (note 74) at para 65. See also *Reflect-All* supra (note 83) at para 40 and *Opperman* supra (note 86) at para 60. In the *Opperman* case the Constitutional Court also held that a deprivation will be procedurally arbitrary if it does not allow a court to make a just and equitable order.

¹¹⁸ See Van der Walt *Constitutional Property Law* 3ed (note 72) at 264-70 and AJ van der Walt 'Procedurally arbitrary deprivation of property' (2012) 23 *Stellenbosch Law Review* 88 at 90-93.

¹¹⁹ *Ibid.*

This means that the section 25(1) procedural fairness requirement will not apply to those deprivations caused by administrative action, but only those caused directly by the law in question, without involving any administrative action.¹²⁰

(c) The test for substantive arbitrariness

As was pointed out above, in the *FNB* case the Constitutional Court held that a deprivation is arbitrary if the law in question does not provide a ‘sufficient reason’ for it. In order to determine whether there is a sufficient reason for the deprivation a court has to evaluate the relationship between the deprivation in question and the purpose of the law that authorises it.¹²¹

When it comes to evaluating the deprivation in question, the Constitutional Court held further, the relationship between the purpose of the deprivation and the person whose property is affected must be taken into account¹²² as well as the relationship between the purpose of the deprivation, the nature of the property and the extent of the deprivation.¹²³

In those cases in which the property in question is the ownership of land or a corporeal movable, the purpose of the deprivation will have to be more compelling than in those cases in which the property is not.¹²⁴ Similarly, in those cases in which the deprivation embraces all of the entitlements of ownership, the purpose of the deprivation will have to be more compelling than in those cases in which it does not.¹²⁵

Depending on the relationship between all of these factors, a wide range of different tests can be applied in order to determine whether there is a sufficient reason for the deprivation ranging from the test for rationality at the low end of the continuum to a test which is close to the test for proportionality at the high end of the continuum.¹²⁶

¹²⁰ Ibid.

¹²¹ *FNB* supra (note 69) at para 100(a).

¹²² *FNB* supra (note 69) at para 100(c).

¹²³ *FNB* supra (note 69) at para 100(d).

¹²⁴ *FNB* supra (note 69) at para 100 (e).

¹²⁵ *FNB* supra (note 69) at para 100 (f).

¹²⁶ *FNB* supra (note 69) at para 100(g).

The test for rationality is located at the low end of the range, because it merely provides that there must be a rational connection between a legitimate governmental purpose and the manner in which the state seeks to achieve that purpose. In order for a deprivation to satisfy this test it must simply be capable of achieving the state's purpose. This test imposes very few restrictions on the state's power to interfere with private property.¹²⁷

The test for proportionality is located at the high end of the continuum, because it provides that there must be a proportional relationship between a legitimate governmental purpose and the burden imposed by the state. In order for a deprivation to satisfy this test it must be the least restrictive method of achieving the state's purpose. This test imposes much greater restrictions on the state's power to interfere with private property.¹²⁸

As Roux has pointed out, this test is 'a chimera, promising more than it delivers'. The reason for this, he argues, is because 'ultimately it reserves to the court a great deal of discretion to decide future cases as it deems fit'. Given the discretion that this test reserves for the court, Roux argues further, property cases will inevitably be decided on the basis of an all-things considered assessment of the extent of the deprivation and its impact on the property holder.¹²⁹

5. The concept of 'constructive expropriation'

Apart from deprivations and expropriations, the concept of 'constructive expropriations' is also recognised in a number of comparative foreign jurisdictions, for example Germany, Switzerland and the United States. Constructive expropriation may be defined as an extreme form of deprivation in terms of which the state either imposes severe limits on or destroys the property in

¹²⁷ See Van der Walt *Constitutional Property Law* 2ed (note 78) at 156 -159. The thinner rationality test was applied in *Mkontwana* supra (note 74). In this case the Court appears to have based its decision largely on the grounds that the extent of the deprivation was not particularly significant. The law in question simply limited a landowner's power to transfer his or her property.

¹²⁸ See Marais *SALJ* (note 95) at 229-231. The thicker proportionality test was applied in *FNB* supra (note 69). In this case the Court appears to have based its decision on the grounds that the extent of the deprivation was significant. The law in question deprived the owner of his or her ownership.

¹²⁹ See T Roux 'The arbitrary deprivation vortex: Constitutional property law after FNB' in S Woolman and M Bishop (eds) *Constitutional Conversations* (2008) at 5.

question, but does not actually acquire anything.¹³⁰ This type of interference is also referred to as an inverse condemnation or regulatory taking.¹³¹

The significance of this concept is that while the interference cannot strictly speaking be classified as an expropriation because the state does not acquire anything, the holder of the property is nevertheless entitled to claim compensation given the serious nature of the interference. The occurrence of constructive expropriation has to be determined on its own set of facts, with evidence that a balance has been struck between the interests of the affected owner and the interests of the public. For instance, a state regulation that severely limits or destroys property rights, and cannot be properly justified for purposes of public health or welfare protection, could result in the payment of compensation to the owner.¹³²

The notion of constructive expropriation originated in American case law, with the courts having to deal with cases that pertained to ‘takings’ by a state, from as far back as 1922.¹³³ It was ruled in the American case of *Pennsylvania Coal Co v Mahon*¹³⁴ that police power and the power of eminent domain are different ends of a continuum. It would be impossible to govern a country if rights and values that are part of a property may never be limited through uncompensated regulation. The state is therefore at liberty to regulate private property. However, if the exercise of power goes too far, then such regulation would constitute a taking, which would give rise to the payment of compensation.¹³⁵

The German courts took a stance different to that of American courts. All forms of expropriation which give rise to the payment of compensation had to meet the requirements set out in article 14.3 GG.¹³⁶ In addition, the *Junktin-Klausel* in the German property clause provides that compensation can only be claimed for regulatory action that limits property rights if it is

¹³⁰ See E du Plessis ‘To what extent may the State regulate private property for environmental purposes? A comparative study’ (2011) 3 *TSAR* 512.

¹³¹ Van Der Walt *Constitutional Property Law* 2ed (note 78) at 212. See also S Nikiema ‘Best Practices Indirect Expropriation’ *International Institute for Sustainable Development: Best Practice Series* (March 2012).

¹³² *Steinburg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) (hereafter ‘*Steinberg*’).

¹³³ Van der Walt *Constitutional Property Law* 2ed (note 78) at 213.

¹³⁴ 260 U.S 393 (1922) at 415.

¹³⁵ Du Plessis *TSAR* (note 128) at 517. See *Pennsylvania Coal Co v Mahon* supra (note 156) at paras 413 & 415.

¹³⁶ BVerfGE 58, 300 (1981) (*NaBauskiesung*).

ordained by a statute. Hence, any owner who is unfairly burdened by a regulation, which does not make provision for compensation for the unfair limitation, has as recourse the right to apply to court to invalidate the regulation as being unconstitutional in terms of article 14.1.2.¹³⁷

In instances where a claim is made that a regulation is unconstitutional, there has to be a balancing of an individual's interest against that of societal needs. German courts will use the doctrine of *Sonderopfer* (individual sacrifice) to determine the fairness of a regulation of property. According to this doctrine, a regulation that unfairly singles out an individual to bear a disproportionate burden of the regulation that benefits the broader public shall be considered invalid and therefore unconstitutional.¹³⁸

6. The concept of constructive expropriation in South Africa

Despite the evident acknowledgement that there is a grey area between deprivation and expropriation, to date, constructive expropriation is not formally recognised within the South African legal system. The South African legal system seems to follow the German precedent, which provides a categorical distinction between deprivation and expropriation. The property clause divides state control of land as either, non-acquisitive regulatory deprivation or acquisitive expropriation. Section 25 of the Constitution leaves no room for legislative acknowledgement that there could be instances where a regulatory act of state that does not intend to lead to acquisition, can in fact result in significant loss to the property owner, which could justify the payment of compensation.¹³⁹ Insofar as the development of a doctrine of constructive expropriation goes, it is an approach associated with the notion of liberal property rights prevalent in the United States.¹⁴⁰ It is not an approach that quite suits South Africa's desire to overcome discriminations born of the apartheid era, nor fulfil its quest for land reform, and equitable access to resources. By extending the meaning of expropriation to situations where the deprivation does not have the effect of the property being acquired by the state, South African

¹³⁷ Ibid.

¹³⁸ It seems that a reasonable (man's) owner's test is applied in this doctrine. Accordingly, if a regulation that singles out an owner to disproportionately bear the burden which a reasonable owner would not otherwise, be expected to bear for the society at large, then the regulation would be invalidated as unconstitutional. See Du Plessis *TSAR* (note 128) at 520.

¹³⁹ See Van der Walt *Constitutional Property Law 2ed* (note #) at 150-153.

¹⁴⁰ See Du Plessis *TSAR* (note 128) at 520.

courts could potentially introduce confusion in the law and hamper regulation of the use of private property for public good.¹⁴¹ Furthermore, the introduction of such a doctrine has the potential of placing an undue economic strain on government.

The introduction of constructive expropriation opens the floodgates for litigation. Instead of creating a society which shares social responsibility whereby government and the public work hand in hand to abolish inequalities and past injustices, it could create tension between these parties. Be that as it may, it does not mean deprivation and expropriation is cast in stone and that compensation can never be paid to owners who bear a greater private loss for the benefit of public good. Acts such as the Mountain Catchment Areas Act 63 of 1970¹⁴² have already taken a stance similar to that of the German practice of *Ausgleich* payments (also known as equalisation payments) in instances where a property owner is affected by restrictive regulations.¹⁴³

The reason for mentioning the notion of constructive expropriation is that, there is no denying that some cases of regulatory deprivation have the potential to severely limiting the use and enjoyment of property and ownership rights, thereby possibly amounting to constructive expropriation. This most often than not could arise in instances of land use and development regulations which forms part of the central focus of this paper. However, this paper also seeks to highlight the eThekweni Municipality's authoritative police power to legislate and execute environmental regulatory legislation to further public interest and purpose hence, negating the arbitrariness of a deprivation, therefore absolving it from constitutional fault.

Even under international law, it is recognised that a state has a sovereign right to impose legitimate regulatory measures without the fear of being liable for compensation payments.¹⁴⁴ International treaties specifically exclude certain types of state regulation from the definition of constructive expropriation and list factors (by way of an annexure) to assist tribunals with

¹⁴¹ Ibid at 521. See also *Steinburg* supra (note 130) at 1247G-1248G.

¹⁴² See sections 1 and 2.

¹⁴³ See Du Plessis *TSAR* (note 128) at 520-521. According to Du Plessis, Germany makes a clear distinction between deprivations and expropriation, and does not make compensation payments in cases of severe deprivation. However, there are certain circumstances when the State will make a payment to an owner to lessen the effect of the loss suffered.

¹⁴⁴ Nikiema *International Institute for Sustainable Development: Best Practice Series* (note 129) at 3.

interpretation, when assessing an indirect expropriation claim.¹⁴⁵ Under the heading “right to regulate” a state may explicitly make provision to impose measures that will promote the public interests regarding environmental protection and conservation.¹⁴⁶

As aforementioned, South African courts are not ready to address the concept of constructive expropriation. Rather, a severely limiting deprivation will be tested under the arbitrariness test of section 25(1). The nexus requirement as set down in the “*FNB*” case must be fulfilled, meaning, there must be a proportional balance between the nature of the deprivation and the nature of the right affected, in addition to the burden caused to the affected owner and the public benefit derived from it.¹⁴⁷ The key difference between a deprivation and constructive expropriation is that of compensation and to qualify for compensation the deprivatory act would have to first pass the 25(1) enquiry.¹⁴⁸ If a deprivation can be justified under section 25(1) then in all probability it will pass the section 36 analysis.¹⁴⁹ However, if the deprivatory legislation does not make provision for an expropriation of property then the act will fail the expropriation test, and compensation cannot be awarded. It would consequently mean that, the regulatory act is a fair exercise of police power which does not entail a compensation payment.¹⁵⁰ An authorisation or deprivation does not automatically imply that an expropriation is also authorised. An expropriation must be established explicitly and separately. Unlike a deprivation which can flow from common law, an expropriation has to be authorised by legislation.¹⁵¹ It is clear that the present constitutional property clause makes no provisions for constructive expropriation. Furthermore, equalisation payments for losses suffered due to state regulation can only be catered for by way of legislation or, by way of an offer in consequence of administrative action, which will be discussed in the next chapter.

As grandiose and liberating the notion of constructive expropriation is for the added protection of property rights, South African courts and legislators tend to err on the side of caution in placing

¹⁴⁵ Ibid.

¹⁴⁶ Ibid at 8.

¹⁴⁷ *FNB* supra (note 69) at para 100.

¹⁴⁸ See C Koch *The right to a view: Common law, legislation and the Constitution* (2012) LLD Thesis, University of Stellenbosch, Stellenbosch at 229.

¹⁴⁹ Ibid at 230.

¹⁵⁰ Van der Walt *Constitutional Property Law* 3ed (note 72) at 344.

¹⁵¹ Koch *The right to a view: Common law, legislation and the Constitution* (note 146) at 231.

too much of emphasis on this possible addition to its property system. Be that as it may, can it also be said that an individual should suffer excessive loss of property and should solely bear the burden of a regulation, which benefit is for the public at large without being compensated for it?

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7. Conclusion

The negative formulation of section 25(1) and section 36 highlights the fact that not all rights contained in the Bill of Rights are absolute. Section 25 further illustrates SA's transformation from once traditional notions of absolutism to the present day notion of social responsibility, land reformation, and confirmation of a state's right to regulate property without the fear of attracting liability. The important right to property is that very right which has the potential of impeding progressive environmental conservation and reform, unless the state takes action to ensure that use and development of land is in synergy with its environmental administration. There is also a fine line between deprivation and expropriation, without there being any legal recognition for constructive expropriation. Instead of viewing any interference with property rights as a deprivation, courts adjudicating property rights subsequent to the "*FNB*" decision have introduced the doctrine that not all interferences with property will amount to a deprivation. A reasonable enough justification for a regulation may negate a deprivation that has to be tested under section 25(1). Furthermore, extreme cases of deprivation will be tested using the substantive proportionality arbitrariness test. This will determine the constitutional validity of the deprivation. If it fails the test, then the deprivation will be considered an infringement of section 25(1). There will be no need for a test of constructive expropriation to take place. The section 25(1) testing takes care of unconstitutional deprivations, and the deprivatory legislation will clearly set out whether compensations should be payable to the deprived property right holder.

¹⁵² If SA has to follow this line of thought, legislators and courts have the task of setting down clear requirements as to when certain acts of deprivation would amount to a constructive expropriation.

CHAPTER FOUR: THE CONSTITUTIONAL VALIDITY OF THE D'MOSS

1. Introduction

Apart from arguing that the D'MOSS Amendments were invalid because the eThekweni Metropolitan Municipality did not have the authority or the competence to enact such legislation, the applicants in *Le Sueur v eThekweni Municipality*¹⁵³ also argued that the Amendments were unconstitutional because they amounted to 'expropriation by stealth'.¹⁵⁴ The High Court, however, refused to consider this argument on the grounds that it was only raised by the applicants in reply and, accordingly, that it constituted a new matter that the applicants were attempting to introduce impermissibly.

The question of whether the D'MOSS Amendments unjustifiably infringe the right to property guaranteed in section 25 of the Constitution has not been resolved therefore. As was pointed out in Chapter Three, the D'MOSS Amendments do not confer the power to expropriate on the eThekweni Metropolitan Municipality and, therefore, cannot amount to an expropriation for the purposes of section 25(2). This means that they cannot unjustifiably infringe the right not to be expropriated without compensation. It is nevertheless possible that the D'MOSS Amendments unjustifiably infringe the right not to be arbitrarily deprived of property.

In order to determine whether the D'MOSS Amendments do unjustifiably infringe the right not to be arbitrarily deprived of property the analysis adopted by the Constitutional Court in *FNB*¹⁵⁵ must be applied. In this case the Court held that in order to determine whether section 25(1) has been unjustifiably infringed or not, the following questions must be answered:

- (a) Does the interest that has been affected by the operation of the law in question amount to property for the purposes of section 25?
- (b) If yes, has the holder has been deprived of his or her property by the law in question?
- (c) If yes, does the deprivation comply with the requirements of section 25(1)?
- (d) If not, can the deprivation be justified in terms of the limitation clause?

¹⁵³ *Le Sueur* supra (note 26).

¹⁵⁴ *Le Sueur* supra (note 26) at para 17.

¹⁵⁵ *FNB* supra (note 69).

Each of these questions will be answered in turn. This analysis will be based largely on the provisions of clause 10(3) of the existing Central Durban Town Planning Scheme. This is because they apply to the area that lies at the very heart of the eThekweni Metropolitan Municipality. In addition, they encompass the provisions of section 1.21 of the revised and consolidated North, South, Inner West and Outer West Town Planning Schemes. The points made in respect of clause 10(3), therefore, will also apply to section 1.21 of those Schemes.

2. Do the D'MOSS Amendments interfere with constitutional property?

As we have already seen, clause 10(3) of the Central Durban Scheme provides that before a landowner can develop, excavate or level any land located within a D'MOSS controlled area, or remove any natural vegetation from, erect a structure upon, or carry out any work on such land, he or she has to first obtain the prior approval of the Council.¹⁵⁶

In addition, we have also seen that clause 10(3) provides that no such approval may be given unless the Head of the Development Planning, Environment and Management Department (the 'DPEMD') is satisfied that any such development can be carried out without materially affecting the integrity of the biodiversity and/or environmental goods and services found on the land.¹⁵⁷

In order to satisfy him or herself that the land can be developed without materially affecting the integrity of the biodiversity and/or environmental goods and services found on the land, the Head of the DPEMD may require the landowner to submit plans and documents, possibly in the form of an environmental impact assessment.¹⁵⁸ The Head of the DPEMD may also impose conditions on the development.¹⁵⁹

The right to develop land forms a part of a landowner's right to use his or her land and is sometimes referred to as the *ius utendi*. A landowner's right to use his or her land, therefore, is

¹⁵⁶ Clause 10(3)(a) Durban Central Town Planning Scheme.

¹⁵⁷ Clause 10(3)(b) Durban Central Town Planning Scheme.

¹⁵⁸ Clause 10(3)(c) Durban Central Town Planning Scheme.

¹⁵⁹ Clause 10(3)(d) Durban Central Town Planning Scheme.

one of the entitlements or powers that the right of ownership confers on him or her. Besides the right to use his or her land, the right of ownership also confers a wide range of other entitlements or powers on a landowner. Among these are the power to possess the thing (*ius possidendi*), to dispose of the thing (*ius disponendi*), to reclaim the thing (*ius vindicandi*), to enjoy the fruits of the thing (*ius fruendi*) and consume the thing (*ius abutendi*).¹⁶⁰

In the *Mkontwana* case the Constitutional Court found that the constitutional concept of property does not only encompass the right of ownership itself, but also the entitlements or powers that it confers on an owner when it held that a landowner's entitlement to alienate his or her property is protected by section 25(1) of the Constitution.¹⁶¹ This decision was confirmed by the Constitutional Court in *Reflect-All* when it held that a landowner's entitlement to develop his or her land is also protected by section 25(1).¹⁶²

In light of these judgments and especially the *Reflect-All* judgment, it may be said that clause 10(3) of the Central Durban Town Planning Scheme does interfere with constitutional property.

3. Do the D'MOSS Amendments deprive an owner of his or her property?

Traditionally ownership has been defined in South Africa as an absolute right. The absolute nature of ownership is meant to indicate that in principle an owner may deal with his or her property as he or she pleases, except insofar as this is limited by the law. An important consequence of this approach is that ownership is considered to be an inherently unlimited right and any restrictions that are imposed on the powers of an owner are considered to be abnormal and unnatural. They should, therefore, be clearly authorised and strictly interpreted.¹⁶³

¹⁶⁰ See CG van der Merwe 'Things' in *LAWSA Vol 27* 2ed (2014) at para 135. See also AJ van der Walt *Constitutional Property Law* 3ed (2011) at 1-3; H Mostert and A Pope (eds) *The Principles of Property Law* (2010) 91-95 and P Badenhorst, J Pienaar and H Mostert *Silberberg and Schoeman's The Law of Property* 5ed (2006) 91-95.

¹⁶¹ *Mkontwana* supra (note 74) at para 33.

¹⁶² *Reflect-All* supra (note 83) at para 53.

¹⁶³ See Van der Merwe *LAWSA Vol 27* (note #) at para 136. See also Van der Walt *Constitutional Property Law* 3ed (note 72) at 1-3; Mostert and Pope *The Principles of Property Law* (note 158) at 89-91 and Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* (note 158) at 91-95.

However, this traditional approach is no longer considered acceptable in the modern economic, political and social context. Today it is argued that ownership should be defined in a manner that not only confers rights and powers on an owner, but also imposes duties and obligations. In terms of this approach, obligations imposed by environmental and planning laws, for example, are not seen as abnormal or unnatural restrictions on an inherently unlimited right, but rather as a natural and ordinary part of an inherently limited right, provided they are reasonable.¹⁶⁴

Irrespective of which approach is adopted, there is no doubt that clause 10(3) of the Central Durban Scheme does restrict a landowner's power to develop his or her land. This is because it provides that a landowner may not develop his or her land without first obtaining the prior consent of the Council and that such consent may be granted subject to conditions imposed by the Head of the DPEM or even refused. Given that these restrictions interfere with a landowner's power to develop his or her land, they clearly satisfy the broad definition of a deprivation adopted in the *FNB* case. In the *FNB* case the Court held that a deprivation may be defined as 'any interference with the use, enjoyment or exploitation of private property'.¹⁶⁵

While the restrictions imposed by clause 10(3) of the Central Durban Scheme satisfy the broad definition of a deprivation adopted in the *FNB* case, it is not so clear whether they also satisfy the narrower definition of a deprivation adopted in the *Mkontwana* case, namely that the interference has to be a substantial one that goes beyond the normal restrictions found in an open and democratic society.¹⁶⁶

Insofar as this narrower definition is concerned, it may be argued that while restrictions imposed on a landowner's right to develop his or her property in order to protect the integrity of the biodiversity and/or environmental goods and services found on that land are considered to be normal in most open and democratic societies, the restrictions imposed by clause 10(3) are potentially substantial. A requested EIA can be quite onerous and the Head of the DPEMD may impose a complete ban on the development of the land in question, which would completely strip

¹⁶⁴ See Van der Merwe *LAWSA Vol 27* (note 158) at para 137. See also Mostert and Pope *The Principles of Property Law* (note 158) at 89-91; and Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* (note 158) at 91-95.

¹⁶⁵ *FNB* supra (note 69) at para 57.

¹⁶⁶ *Mkontwana* supra (note 74) at para 32.

the owner of all entitlements once enjoyed over the property, therefore amounting to a deprivation in terms of section 25(1).

In conclusion then it may be said that irrespective of whether the broad or narrow definition is applied, clause 10(3) can amount to a deprivation. In this respect it is important to note, however, that a deprivation will only occur when an owner intends to use his or her land in a manner that has been flagged as a controlled use. Furthermore, it would be incorrect to state that the system as a whole amounts to a deprivation, as each D'MOSS related case requires assessment on its own merits. Some property owners will be more affected than others and some not at all. This depends on the environmental sensitivity of the land and the activity that the landowner wants to engage in.

4. Do the D'MOSS Amendments satisfy the requirements for a valid deprivation?

4.1 Law of general application

While clause 10(3) of the Central Durban Town Planning Scheme applies generally to all land that falls within a D'MOSS controlled area, it is not certain whether it may be classified as a law. This is because clause 10 was not passed as a municipal by-law by the eThekweni Municipal Council. Instead, it was adopted as an amendment to the town planning scheme and the legal nature of a town planning schemes is not entirely clear.

Van Wyk argues in this respect that a town planning scheme should be classified as a legislative act. This is because it shares many of the characteristics of legislation. Among these are the following:

- (a) A town planning scheme contains rules of general application that apply impersonally to everyone or to a particular group of people.
- (b) The intention to prepare a town planning scheme must be published as well as the decision to bring it into effect.

- (c) The purpose of a town planning scheme is to implement social policies that are aimed at promoting the public interest.
- (d) Like legislation, a town planning scheme can usually be amended by the body that created it. In other words, the body that created it is not *functus officio*.
- (e) Again, like legislation, a town planning scheme applies prospectively and usually remains in force indefinitely.¹⁶⁷

Besides Van Wyk, Bronstein also argues that zoning schemes, land use planning schemes, spatial development plans and other similar plans are legislative in character. In arriving at this decision, she relies on certain American and South African authorities¹⁶⁸ as well as the characteristics identified by Van Wyk and set out above.¹⁶⁹

In the *Le Sueur* case, the High Court also accepted that the D'MOSS Amendments were law, although this issue does not appear to have been argued by any of the parties to the case.¹⁷⁰

In light of these arguments, it may be said that clause 10(3) of the Central Durban Town Planning Scheme is a law of general application.

4.2 The test for arbitrariness

In the *FNB* case, the Constitutional Court held that the word 'arbitrary' in section 25(1) of the Constitution refers to a situation where the law in terms of which the deprivation has taken place 'does not provide sufficient reason for [the] deprivation in question or is procedurally unfair'.¹⁷¹ The test for arbitrariness, therefore, may be divided into a test for procedural arbitrariness and a test for substantive arbitrariness. Each of these tests will be applied to clause 10

¹⁶⁷ See Van Wyk *Planning Law* (note 12) at 281.

¹⁶⁸ In *Broadway Mansions (Pty) Ltd v Pretoria City Council* 1955 (1)SA 517 (A) at 523 and *Administrator, Transvaal and the Firs Investment (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A) at 68, the Appellate Division held that town planning schemes are legislative in character.

¹⁶⁹ See V Bronstein 'Mapping "Municipal Planning" powers: Exploring the boundaries of local, provincial and national control' (2014) 131 *SALJ* 1-29 forthcoming as cited in Humby *Potchefstroom Electronic Law Journal* (note 29) at 1674. In the *Le Sueur* case, the High Court did not address this issue and simply appears to have assumed that a town planning scheme is legislative in nature.

¹⁷⁰ *Le Sueur* supra (note 26) at para 16.

¹⁷¹ *FNB* supra (note 69) at para 100.

4.3 Are the D'MOSS Amendments procedurally arbitrary?

Insofar as the question of procedural fairness is concerned, clause 10(3) does not directly deprive a landowner of his or her property itself. Instead, it provides that the Head of the DPEMD must consent to the development in question and that he or she may grant his or her consent subject to conditions or may even refuse to grant consent.

The Head of the DPEMD's decision to grant consent, or to grant consent subject to conditions or to refuse consent may all be classified as administrative acts. In terms of the principle of subsidiarity this means that they are governed by the provisions of the PAJA which expressly provides that all administrative acts must comply with the requirements of procedural fairness.¹⁷²

Apart from the PAJA, clause 10(3)(3) of the Central Durban Town Planning Scheme also provides a landowner may appeal against the Head of the DPEM's decision to the KwaZulu-Natal Planning and Development Appeal Tribunal as established in terms of Section 100(1) of the KZN PDA.

In light of the above points, it may be said that clause 10(3) of the central Durban Town Planning Scheme is not procedurally arbitrary.

4.4 Are the D'MOSS Amendments substantively arbitrary?

(a) Introduction

Insofar as the question of substantive arbitrariness is concerned, clause 10(3) provides that the purpose of the D'MOSS Amendments is to control or prohibit the development of land that falls into a D'MOSS controlled area in order to protect the integrity of the biodiversity and/or environmental goods and services found or generated within the that area.

¹⁷² Section 3(1) of PAJA.

In order to determine whether there is a ‘sufficient reason’ for the imitations that clause 10(3) imposes on an owner entitlement to develop his or her land the following factors will be taken into account:

- the relationship between the means employed and the ends sought to be achieved;
- the relationship between the purpose of the deprivation and the owner of the property;
- the relationship between the purpose of the deprivation and the nature of the property;
- and
- the extent of the deprivation.

Each of these factors will be analysed in turn.

(b) The relationship between the means employed and the ends sought to be achieved

It is generally accepted that open space systems are a highly effective method of conserving and protecting biodiversity.¹⁷³ Unfortunately, open spaces are declining as a result of the ever increasing rate of urbanisation not only in South Africa, but globally. The conversion of ecosystems and the exploitation of biodiversity over the past century may have benefited the masses, but it came at a great cost to the natural habitat, and instead of alleviating issues of poverty, irresponsible urbanisation actually aggravates the situation for some.¹⁷⁴ While the conservation and preservation of the environment does not automatically take precedence over the right to property, it is important to note that South Africa’s flora and fauna have significant cultural, economic and social benefits for present and future generations. In chapter two the transgression of planetary boundaries was brought to the reader’s attention. The planetary boundaries identified include, climate change, change in biosphere integrity, stratosphere ozone depletion, ocean acidification, biogeochemical flows, land system change, freshwater use, atmospheric aerosol loading and introduction to novel entities. The year 2009 saw the transgression of planetary boundaries relating to climate change, biodiversity loss and changes in the nitrogen levels. In January 2015, an updated report titled ‘Planetary Boundaries 2.0’ was

¹⁷³ Biodiversity & Conservation Biology Department of Western Cape, Marlene Laros and Associates and GISCOE (Pty) Ltd *Review of Urban Conservation Strategy Undertaken in Durban Metropole Area and Gauteng Province* (April 2004).

¹⁷⁴ Supra note 39.

published by the Stockholm Resilience Centre. It was found that on a global level four of the planetary boundaries, namely, climate change, loss of biosphere integrity, land system change and altered biogeochemical cycles, have now been crossed due to human activity. Should the limits of these boundaries and spaces be infringed, it could result in catastrophic consequences, causing abrupt changes in the environment on a continental and planetary level. When a boundary has been transgressed it increases the risk that human activity can have on the Earth's System, possibly transforming it into a hostile environment, thereby thwarting efforts to reduce poverty, and ultimately leading to a deterioration in human wellbeing. Not only does transgression of planetary boundaries have a devastating effect on the natural environment, it affects the socio-economic dynamics of a population. The eThekweni Municipality acknowledged the seriousness of the situation, which poses the greatest risk to the poor and vulnerable, who are the most reliant on the natural environment for their survival yet have the least ability to adapt and protect themselves from extreme events and the gradual onslaught of certain disasters.¹⁷⁵ Climate change is identified as a significant threat to the Municipality's biodiversity and when coupled with other biodiversity stressors, it places Durban's natural ecosystems at increasing risk.¹⁷⁶ These findings clearly indicate the seriousness of the state of the local natural environment, the consequential effect that it has on the socio-economic situation of the Municipality's populace and the need for immediate action to set controls on human activity. Effective biodiversity conservation and protection emanates from land use policies and controls.

While there are various mechanisms present at the national and provincial level that seek to expand the Municipality's protected areas network,¹⁷⁷ alternatively identify benchmarks to mitigate environmental risks,¹⁷⁸ these laws do not adequately address general means by which biodiversity contained on privately owned land can be protected at the local level. Furthermore, the application of these mechanisms appear to be cumbersome, they do not work in synergy with

¹⁷⁵ eThekweni Municipality, 2013/2014 Draft Integrated Plan, 17. Stockholm Resilience Centre "Planetary Boundaries: A safe operating space for humanity" available at <http://www.stockholmresilience.org/21/research/research-news/1-15-2015-planetary-boundaries-2.0---new-and-improved.html>. Accessed on 15/03/2015.

¹⁷⁶ Environmental Planning and Climate Protection Department *Durban Climate Change Strategy: Introductory Report – Theme Biodiversity* (2013) at 9 & 10.

¹⁷⁷ National Environmental Management: Protected Areas Act 57 of 2003.

¹⁷⁸ Section 24(2) of the National Environmental Management Act 107 of 1998.

the Municipality's integrated development plans, nor does it create enough incentive at the local level to actively promote the overall protection and conservation of biodiversity, open spaces and the continued provision of environmental goods and services. The eThekweni's 2013/2014 IDP report stated that current policy, law, governance and environmental management efforts have thus far been inadequate to prevent the aforementioned degradation.¹⁷⁹ National and provincial mechanisms places a strain on already overburdened governmental capacity whereas, the D'MOSS seeks to include all landowners in the promotion of environmental conservation and protection.

Various reasons suggest that the D'MOSS Amendments appear to be the best possible 'means' of achieving the Municipal Council's environmental, social and economic 'ends' and mitigation of environmental risks. Instead of reinventing the wheel, the Municipality utilizes the age old D'MOSS to meet requirements set out in legislation such as section 24(2) of the NEMA, namely the identification of activities that require regulation, the settings of controls to regulate the use and development and the mapping of environmentally sensitive land within its jurisdiction.¹⁸⁰ Continued research in the field of biodiversity conservation and the transgression of planetary boundaries assists the D'MOSS in becoming an evolving land management mechanism, which in turn can be used to regulate use and development of land in a more fluent manner. Given that town planning schemes are the main mechanisms by which municipalities regulate the use of land, irrespective of whether it is publically or privately owned, it is logical for a scheme to contain a tool such as the D'MOSS to mitigate environmental damage and promote biodiversity conservation through streamlined control of human activity.

Furthermore, the D'MOSS is an innovative general framework for the conservation and protection of biodiversity at the local level, which is flexible enough to cater for the varied ecosystems scattered across land within the eThekweni jurisdiction. Since its incorporation into the various town planning schemes, the Municipality now has the means to manage large areas of environmentally sensitive land which is privately owned.¹⁸¹

¹⁷⁹ eThekweni Municipality, 2013/2014 Draft Integrated Plan, 38.

¹⁸⁰ Section 24(2)(a)-(b) of Act 107 of 1998.

¹⁸¹ See Environmental Planning and Climate Protection Department *Durban Climate Change Strategy: Introductory Report – Theme Biodiversity* (2013) at 8.

The eThekweni Municipal Council's decision to adopt the D'MOSS Amendments is therefore aimed at achieving the following 'ends': the expansion of open spaces, the protection and conservation of biodiversity, mitigation of the loss of indigenous and endangered species and the transgression of planetary boundaries, the continued provision of environmental goods and services and the realisation of the 'right to a healthy environment' as guaranteed in section 24 of the Constitution. Given the seriousness of the matter, it is fair to say that the intermittent harshness of the means used is proportionate to the ends that the Municipality seeks to achieve. The scientific findings by the Stockholm Resilience Centre strengthen the nexus of substantive proportionality between the ends sought and the means used.

The proportionality test calls for the least restrictive means to be used to achieve the ends sought by the Municipality. When a particular property is subjected to stringent conditions it can be presumed that the property in question is extremely important in relation to the sensitivity of the biodiversity contained therein alternatively, the provision of essential environmental goods and services to the public. Whether there are less restrictive means to avoid land use and development limitations depends on whether the public is able to derive such goods and services from alternate sources, or the owner can transport that which is sensitive or of importance to another location, which will guarantee the same protection or benefits required by the public at large. For example, less restrictive means would be impossible if vegetation growing on a property is crucial in buffering against flooding, purification of water through a natural filtration process, or important nutrient cycles through the landscape.¹⁸²

The good derived from the implementation of the D'MOSS Amendments far outweighs the negatives that may be present in the wake of its application. Should the Municipality opt not to apply the D'MOSS Amendments to regulate the use and development of environmentally sensitive land, it runs the risk of losing valued biodiversity, resulting in the eventual termination of the aforementioned benefits. This in turn would lead to the Municipality incurring huge costs in substituting these goods and services, and a decline in eco-tourism, economic and social benefits, and overall health and wellbeing of the population of eThekweni.

¹⁸² See eThekweni Municipality *Durban Metropolitan Open Space System, Frequently Asked Questions* (note 24).

In light of the above, it is clearly evident that there is an inextricable nexus between the means employed and the ends sought to achieve overall environmental conservation and protection. A limitation on the right ‘not to be deprived of property’ may be justified if it protects the rights set out in section 24, serves the greater good of the public and allows the Municipality to fulfil its own constitutional mandate.¹⁸³ Apart from the D’MOSS Amendments, there does not appear to be alternate means, appropriate enough, for the Municipality to protect and expand the open space network across its jurisdiction, thereby ensuring the provision of vital environmental goods and services to the public and the assurance of overall health and well-being.

(c) The relationship between the purpose of the deprivation and the owner of the property

The purpose of the deprivation is to promote biodiversity conservation and the provision of environmental goods and services, which is in the interest of and for the benefit of the public. The person whose right is being affected is in all probability the owner of the land that the D’MOSS Amendments apply to. It is clear that there is a direct relation between the D’MOSS Amendments and the property owner. It is the property owner who has rights in and to the property that falls into a D’MOSS controlled area, who bears the onus to comply with imposed regulatory conditions, and who has to implement environmental management plans over property with high biodiversity density. Furthermore, it is the owner who can take advantage of any tax incentives for due and proper environmental management of a D’MOSS controlled area.¹⁸⁴

In order for the deprivation to be valid there has to be a close enough nexus between the owner of the property and the deprivation.¹⁸⁵ The D’MOSS Amendments have a direct bearing on the owner and place limitations on his or her entitlements. However, there has to be a proportionate balance between the sacrifice made on the part of the owner and the benefit accrued to the public. If the public benefit derived is extremely beneficial, there is no lesser means to achieve the ends and this is means of last resort, then there is a substantively proportionate balance

¹⁸³ See *Mkontwana* supra (note 74) at 62.

¹⁸⁴ See eThekweni Municipality *Durban Metropolitan Open Space System, Frequently Asked Questions* (note 24).

¹⁸⁵ *FNB* supra (note 69) at para 109.

between the purpose of the deprivation and the affected person. Given the facts set out above, it is clear that this is the case for the D'MOSS regulations.

(d) The relationship between the purpose of the deprivation and the nature of the property

The very purpose of the D'MOSS Amendments is to protect the natural environment from misuse and degradation caused by property owners. However, it is not actual land that is being taken away from the property owner, rather it is the entitlement to develop and exploit the property that is being restricted. Furthermore, it may simply be a portion of the property that is subject to these limitations, hence resulting in a partial deprivation of the owner's entitlement to develop and exploit his or her land. Alternatively, an owner may not be able to use or develop the whole of his or her property resulting in a more severe deprivation. However, this all depends on the environmental sensitivity of the land and the reasons for the DMOSS Amendments. For example, if certain vegetation acts as a natural buffer against flooding and an owner is prohibited from removing such vegetation due to the D'MOSS Amendments, there is a justifiable purpose for the deprivation and its relationship to the nature of the property. If the owner was allowed to exercise his entitlement and remove the vegetation, there is a risk of an area being flooded in cases of bad weather or natural disasters. This example was also used to illustrate the means and ends nexus. But for the existence of the natural vegetation, the area would have been damaged due to heavy flooding. There is no mistaking that the very nature of the property determines the degree of the D'MOSS restriction, thereby creating an extremely close relationship between the purpose of the deprivation and the nature of property.

(e) The extent of the deprivation

When the restrictions imposed in terms of the D'MOSS Amendments are so rigorous that they render the property virtually undevelopable or economically unviable, it is clear that the extent of the deprivation is severe. Given that properties could be subject to varying degrees of regulations, the D'MOSS Amendments as a whole cannot be considered severe in their application. Some would argue that the D'MOSS can amount to constructive expropriation. However, each case has to be assessed on its own set of facts.

In applying the proportionality test to this factor, the harm caused to the owner has to be balanced with the interests and the benefits awarded to the public, in addition to acknowledging action taken by the Municipality to mitigate loss occurred by the owner. If an owner cannot effect any development on his or her property due to the D'MOSS Amendments, the Municipality has agreed that compensation should be paid after taking into account the otherwise restricted development potential of the land.¹⁸⁶ In view of this offered compensation, it seems that the Municipality follows the German practice of *Ausgleich* payments (equalisation payments). The practice of equalisation payments in severe cases of deprivation was referred to in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)*.¹⁸⁷ In this case the Constitutional Court ordered the State to pay compensation to the landowner for the loss he suffered as a result of the unlawful invasion and occupation of his land, and the lack of state provision for efficient enforcement procedures. In circumstances where an individual landowner or group of owners have to bear disproportionate or unfair regulatory restrictions prescribed by reform laws for a considerable time, it is just for the State to make amends by providing compensation. By providing compensation, the Municipality could circumvent potential 'expropriation by stealth' claims.

The downside to the aforementioned municipal offer is the possibility that the owner may not be compensated in an amount equal to the full purchase price paid for the property. In any event, it is commercial property owners and developers that stand a higher risk of losing income or value in their property compared to residential owners.¹⁸⁸ In these instances the Municipality would have to calculate equitable compensation to equalise the loss suffered. Residential owners would bear significant loss if vacant land has yet to be developed or they have been deprived of occupation and economical use of the land. In any event, the purpose of the proportionality test and the section 25(1) analysis as a whole is to determine whether the deprivation is constitutionally valid, hence approving the legitimate exercise of the State's power to regulate land use and development without attracting liability.

¹⁸⁶ See eThekweni Municipality *Durban Metropolitan Open Space System, Frequently Asked Questions* (note 24).

¹⁸⁷ 2005 (5) SA 3 (CC) (hereafter 'Modderklip').

¹⁸⁸ See Van der Walt *Constitutional Property Law* 2ed (note 78) at 253.

While it has been noted that the restrictions imposed by the D'MOSS Amendments could be severe, cases such as *Le Sueur* have not proven how it deprives owners of property, nor the extent of the deprivation, which proves that the extent of each D'MOSS deprivation has to be assessed on the basis of its own facts. The extent of the deprivation is minimised by the offer of 'equalisation payments', which serves as a means to create a proportionate balance between the extent of the deprivation and the legitimate interests sought by the Municipality. The extent of the deprivation cannot be assessed in isolation. Rather it has to be proportionately balanced by taking into account the close enough nexus between all of the above factors.

In light of the above assessments, it can be argued that the occasional severity of the restrictions imposed by the D'MOSS Amendments do not make it arbitrary. It can therefore be considered a constitutionally valid exercise of the State's police power in regulating private property for environmental purposes and for the greater good.

5. Do the D'MOSS Amendments constructively expropriate property?

Some of the problems associated with constructive expropriation have been addressed in the non-arbitrariness test above. Hence, the reason for setting out this section is for the purpose of completeness rather than to analyse in detail the D'MOSS Amendments under the concept of constructive expropriation.

Given the regulatory nature of the D'MOSS Amendments it is more likely than not that it has constructive expropriation qualities rather than fulfilling expropriation requirements. When the D'MOSS Amendments become so severe that they render the property virtually undevelopable or economically unviable, the state action falls within that grey area between deprivation and expropriation.

Currently, the status quo is that our legal system does not recognise the notion of constructive expropriation. In order for a property to circumvent the conditions that the D'MOSS

Amendments attach to it, an owner has to either argue that the system amounts to an unconstitutional deprivation or an unconstitutional expropriation.¹⁸⁹

Be that as it may, in the interim the Municipality has offered equalisation payments in instances where an owner is completely deprived of the entitlement to develop or exploit his or her property. It is important to note, however, that equalisation payments should not be confused with compensation for expropriation. Rather they resemble the payment of private law compensation for damage.¹⁹⁰

In the absence of clear guidelines for constructive expropriation cases, whether or not transfer of ownership of the property to the State in lieu of compensation payments, should take place, has yet to be determined. Furthermore, it is questionable whether the Municipality has the financial means to compensate all severely restricted residential and commercial owners and right holders, in addition to having the means to manage D'MOSS controlled land, which has been transferred to the Municipality incidentally to the payment of compensation. The question of compensation and the calculation of such will be an interesting yet difficult task for the court to set down especially in cases which involve commercial property. If equalisation payments can be made for severe but temporary limitations on the use of property, how will this be applied to property, which is affected on a more permanent basis due to the regulatory restrictions of the D'MOSS? As much as we can rely on international precedents, for example the American regulatory taking tests, as an argument that D'MOSS is indicative of constructive expropriation, this would potentially disrupt the transformative purpose of the constitution and hamper the promotion of environmental conservation and protection. Furthermore, it seems that courts do not necessarily want to tread on this path.¹⁹¹ Rather, innovative means require consideration to counter the possible negative regulatory impact that D'MOSS has on property rights.

Van der Walt on the other hand, argues that there are benefits for the use of constructive expropriation. He states that the *FNB* case creates a vortex effect with its test, as it places far too

¹⁸⁹ Van der Walt *Constitutional Property Law* 2ed (note 78) at 184.

¹⁹⁰ Van der Walt *Constitutional Property Law* 2ed (note 78) at 136, 137, 162 and 223.

¹⁹¹ *Steinberg* supra (note 130) at para 8. See also Van der Walt *Constitutional Property Law* 2ed (note 78) at 230 and 231.

much emphasis on a thick first stage arbitrariness analysis. It closes off the possibility of developing an argument for constructive expropriation especially in instances where an overly burdensome scheme aimed at environmental protection, freezes the current use of large areas of private land, thereby precluding an owner from commercial farming or deriving any other economical use from the property. If the guideline proposed in *FNB* is strictly followed, then the scheme would not pass the deprivation test and could be struck down as arbitrary and unconstitutional, because it deprives the owner of all economic use and benefit of the property without compensation. However, if the court is able to use a less restrictive and a more open approach then a scheme could be saved by treating it as constructive expropriation, and equitable compensation can be awarded in light of social and economic benefit justification and environmental reform.¹⁹²

While Van der Walt provides a valid argument for the recognition of constructive expropriation and it is agreed that in some instances it may provide relief to overly burdened landowners, the formal recognition of this notion should be approached with caution, especially in the case of the D'MOSS. The Constitution was drafted in a manner to promote the transformation of a country once steeped in inequality, and to enable progressive land reform and the equitable access to natural resources. If constructive expropriation is formally recognised, it may impede the progressive environmental transformation of the country. Government, more so, municipalities might be overly cautious to implement land use and environmental policies if these will always be viewed as possible constructive expropriations rather than valid regulatory state action, and which in all probability result in high court costs to refute such claims. In any event, the property clause coupled with section 36 of the Constitution provides rigorous scrutiny of state regulatory action that has the potential to arbitrarily deprive owners of their property. Conversely, if it is shown that there are justifiable reasons for the implementation of environmental legislation which promotes the interests of and are for the benefit of the public, then this would save environmental schemes from being struck down as constitutionally invalid, making the use of constructive expropriation as a means to save important transformative legislation redundant.

¹⁹² See Van der Walt *Constitutional Property Law* 2ed (note 78) at 167 and 168.

In the case of D'MOSS the issue of '*expropriation by stealth*'¹⁹³ has been left open for future debate and adjudication. Until such time, whether the D'MOSS can legally be considered an act of constructive expropriation is a moot point.

6. Conclusion

This chapter tested the D'MOSS against the backdrop of section 25(1). It was widely accepted and confirmed in the *Le Sueur* case that town planning schemes are considered legislative instruments, and the D'MOSS adoption into the said schemes was considered valid. The D'MOSS Amendments, therefore, prove to be a law of general application and thus pass the first threshold requirement for a valid deprivation.

In order to pass the non-arbitrariness test, the D'MOSS Amendments had to be tested both for procedural and substantive validity. Based on the arguments presented by Van Wyk and Bronstein it was concluded that the D'MOSS is procedurally non-arbitrary.

In order to create uniformity when using the proportionality test for substantive non-arbitrariness, all four factors were applied to the D'MOSS Amendments. While these factors were assessed individually they are inextricably linked. When applying the factors to the test it was found that the D'MOSS Amendments proved to be the most reasonable and effective method to regulate large tracts of land in private ownership, thereby attempting to achieve maximum protection of sensitive biodiversity and the assurance of the provision of environmental goods and services.

The use of recognised and certified EAPs provide scientific proof of potential harm that can be caused to the surrounding environment in cases of 'controlled' uses hence, legitimising conditions that may be attached to an authorisation. It is presumed that all possible 'means' to mitigate potentially environmental harm caused by the applicant would be considered in a report

¹⁹³ *Expropriation by stealth* is additional terminology used to describe a 'regulatory taking'. An expropriation by stealth occurs when a government regulation freezes private property without compensation, for public purpose, thereby devaluing it or severely restricting the use of it (see M Milke 'Stealth Confiscation: How governments regulate, freeze and devalue property – without compensation' (2012) *The Fraser Institute* 8).

to the Municipality. Overall the benefits received from the implementation of the D'MOSS Amendments far outweighs the negative effects that may be imposed on a few property owners and their rights, which sanctions the police power of the Municipality in implementing the system and regulating land use. Currently, the D'MOSS Amendments satisfy both threshold requirements and the public and interest purposes which prevents it from being struck down as unconstitutional.

CHAPTER 5: CONCLUSION

The ever expanding nature of cities results in the decrease of open spaces and destruction of the natural environment. Furthermore, the manner in which landowners develop or use their property may have a negative effect on biodiversity. The right to a healthy environment and the sustainable use of natural resources have been entrenched in the Bill of Rights. Hence, misuse and degradation of the environment weakens the environmental rights of the Municipality's residents, surrounding areas and future generations. Therefore, this paper further highlighted the need for legislation at the local level to ensure environmental conservation and protection.

As much as environmental administration falls within the ambit of provincial and national government functionalities, there is an array of legislation that confirms the role that municipalities play in environmental administration. The case of *Le Sueur*¹⁹⁴ laid down the basis for this conclusion and erased any doubt as to the eThekweni Metropolitan Municipality's legislative authority in adopting the D'MOSS Amendments. Additionally, local environmental administration is incidental to the functionality of municipal planning, which seems logical, since the way in which land is used and developed has a direct impact on biodiversity.

The less constitutionally obvious role that property owners play in environmental conservation has also been highlighted. The Constitution and various pieces of legislation may place environmental obligations on government, but tools like the D'MOSS Amendments place a direct obligation on property owners to also participate in environmental conservation.

In testing the D'MOSS Amendments for constitutional validity it was found that property rights are not absolute, despite the once traditional notion of absolute dominant ownership.¹⁹⁵ Section 25 of the Constitution does not guarantee the right to property, instead it assures non-arbitrary deprivation of property, and allows the state to exercise its police power for purposes of public interest and benefit, without the fear of incurring liability. However, regulations that deprive property rights have to be for a public purpose, non-arbitrary and according to laws of general

¹⁹⁴ *Le Sueur* supra (note 26).

¹⁹⁵ SBO Gutto 'Environmental Law and Rights' in Chaskalson et al (eds) *Constitutional Law of South Africa* (1998) 32-7.

application. A deprivation results in the limitation of rights whereas an expropriation has the effect of transferring ownership of property, or rights from the owner to the state.

Questions of possible constructive expropriation have also been raised in instances where extremely severe D'MOSS restrictions completely prevent an owner from developing or using his or her property. However, this may not be adjudicated due to it not being recognised under South African law. It is argued that recognition of such could upset the transformative purpose of the property clause and limit the state's police power mandate to regulate public action for purposes of land reform and environmental conservation without attracting fiscal liability. Despite the justifiable need for the D'MOSS Amendments, the legality of its application and the legitimate exercise of police power which refutes claims of an unconstitutional deprivation, the Municipality nevertheless makes provision for the payment of compensation in instances of extremely severe deprivation. This voluntary award of compensation serves to soften the burden placed on landowners and diverts questions of expropriation by stealth.

In addressing compensation various issues may arise. Firstly, can the amount of compensation offered by the Municipality be considered just and equitable? Owners stand to lose money invested in a property if compensation is paid on the current value of a D'MOSS property, which would be lower due to the development restrictions and use, than what it was initially purchased for. While the potential of deriving economic use and benefit from a D'MOSS property may render it 'less valuable' than properties free from the D'MOSS Amendments, the rands and cents of environmental goods and services derived therein may be extremely high or unascertainable. Should a matter be taken to court to determine the true 'environmental' value of a D'MOSS property in order to confirm just and equitable compensation, it is questionable whether the courts have the expertise to determine this. This may be resolved if owners are able to attach a value to their property's biodiversity using a cost benefit analysis.¹⁹⁶ If the confirmed value is extremely high, would it be possible for the Municipality to pay this compensation? If not, would the D'MOSS Amendments be struck down as invalid on the basis that a Municipality cannot pay the owners the true worth of the property, thereby depriving the general public of essential benefits derived from the property

¹⁹⁶ E Couzens 'Expropriation as a Tool for Environmental Conservation' (2010) 127(1) *SALJ* 28.

Secondly, similarly to countries such as Germany and Malaysia, constructive expropriation is not recognised in South Africa.¹⁹⁷ Hence, there are no set guidelines to determine when it has occurred. Whilst Van der Walt makes a good argument for the recognition of constructive expropriation,¹⁹⁸ it has the potential of frustrating the reform and transformative objectives of the country, especially in the environmental sector, by placing a heavy financial burden on government and stressing the balance between private property rights and the spirit, purport and objectives of the Constitution. This would impede the use of regulatory tools such as the D'MOSS Amendments to promote environmental conservation and protection.

Thirdly, if the D'MOSS Amendments were taken to court again and tested for 'expropriation by stealth' by using the analysis set out in *FNB*, there is a possibility, according to Van der Walt's argument, that the D'MOSS Amendments would fail the arbitrariness test, based on it falling short of the compensation requirement, unless the eThekweni Municipality made an offer as an equalisation payment. Assuming that a particular D'MOSS case failed the first part of the deprivation test the matter ends there and the D'MOSS would not have a chance of being legitimised under section 36 of the Constitution, thereby striking down a perfectly sensible land use system. However, if the D'MOSS Amendments could be tested under the limitation clause, there is a strong possibility of the D'MOSS Amendments passing all requirements set out therein, leaving the requirement of compensation to be determined and paid, thereby resulting in the constitutional validity of the system.¹⁹⁹ In such an instance it may be necessary to steer slightly away from the *FNB* precedent in order to validate regulatory environmental tools such as the D'MOSS Amendments.

The issue with the above line of thought is that it could lead to formal recognition of constructive expropriation. Views on whether this serves to enhance South Africa's property system are contentious to say the least, and which has been pointed out in chapter 3. Courts in the past addressed issues where compensation had to be paid in instances of extreme deprivation. In the *Modderklip* case an owner was paid compensation due to the unfair burden placed on him by the presence of illegal occupiers on his property and the absence of any immediate legal means to

¹⁹⁷ Van Der Walt *Constitutional Property Law* 2ed (note 78) at 222-224 and 230.

¹⁹⁸ *Ibid* at 252-257.

¹⁹⁹ Van der Walt *Constitutional Property Law* 2ed (note 78) at 167-168.

deal with the issue.²⁰⁰ This indicates that courts do not always view deprivation and expropriation as black and white, rather it has recognised instances where compensation is required to lighten a disproportionate burden caused to an owner for public good. It should be noted that the D'MOSS Amendments, similarly to Germany's article 14.1 GG, are not intended to protect the most profitable use of property, rather it aims to regulate the use of property in order to achieve biodiversity conservation and leverage a proportionate balance between private property rights and environmental rights.²⁰¹ Hence, if the Municipality had to follow this route equalisation payments would be determined on a case-by-case basis.

In addressing the need to alleviate financial burdens placed on the Municipality and onerous property restrictions, the Municipality has provided, upon application, rates rebate tax incentives to owners that have in place environmental management plans for D'MOSS controlled areas. The catch with participating in this tax incentive scheme is that a plan has to be registered and the owner bears the onus and costs of managing the property.²⁰² These costs may become unaffordable for some. Furthermore, owners may not know how to care for certain D'MOSS biodiversity. Whilst the Municipality confirms that it will assist in the clearing of invasive alien species, it does not provide assistance with management of private property.²⁰³ A possible solution would be to provide grants to train landowners on biodiversity management and the formation and implementation of environmental management plans.

Despite the potential of disturbing the property rights of eThekweni property owners and depriving some of full use and enjoyment of property, the D'MOSS Amendments have the potential of bridging the gap between the built environment and the natural environment. The Municipality bears the onus of planning, designing and building an environment that promotes the health and well-being of its residents. The D'MOSS Amendments do not state that a landowner cannot use or develop his or her land in all instances, instead they simply sets out

²⁰⁰ *Modderklip Boerdery* supra (note 179) at paras 52 and 68.

²⁰¹ Du Plessis *TSAR* (note 128) at 523 and 525. In the case of '*BVerfGE 100, 226 (1999) (Denkmalschutz)*', the German Court confirmed the high rank of national monuments with its framework of common good. Therefore, the property which was being 'deprived' served purposes of a higher social obligation and was allowed greater protection than that of the profitability of the property to the owner.

²⁰² See eThekweni Municipality *Durban Metropolitan Open Space System, Frequently Asked Questions* (note 24).

²⁰³ *Ibid.*

ways in which activities can be conducted to mitigate environmental damage and allow the City to become more resilient to the effects of climate change. If property owners accept certain land use restrictions as normal then why is there such an outcry against land use regulations in favour of environmental conservation?

The D'MOSS Amendments serve a more societal need as well. They assist in deterring eco-apartheid by placing environmental responsibility on all property owners within the Municipality thereby serving the needs of all. This responsibility is not based on black or white, a person's earning capacity or even the area that one lives in, but rather on the needs of the environment and the well-being of the Municipality's residents. We all have a role to play in ensuring the conservation and protection of our biodiversity, more so in light of the transformative stance that South Africa has taken to achieve equitable sharing of natural resources. Instead of finding ways to bypass environmental controls such as the D'MOSS Amendments, we should be using this framework to promote development in a more sustainable manner. If we take care of our environment, our environment will take care of us. The right to a healthy environment and to property may appear to be two opposing rights, however, upon closer inspection, they are rights that are inextricably linked in order to serve the common good.

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