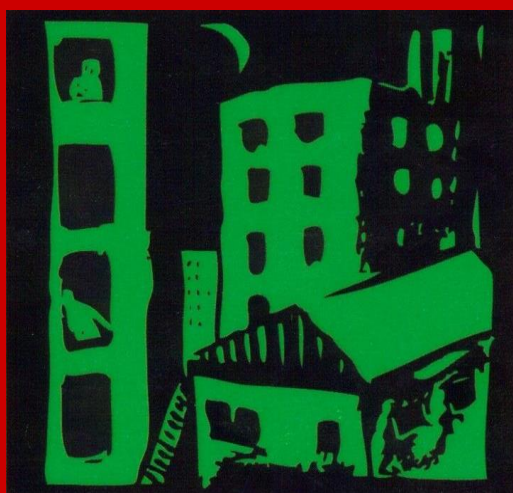
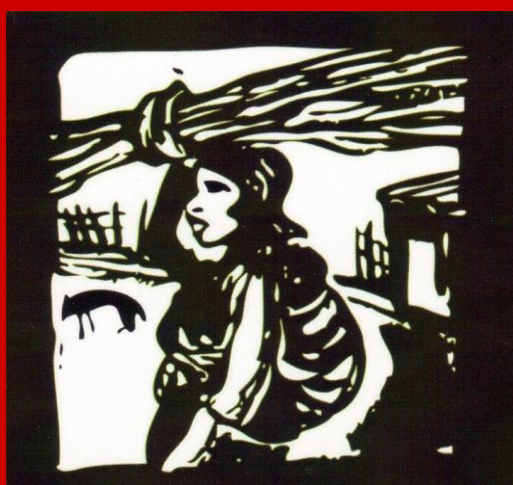


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**The incentivisation
of inclusionary
housing by South
African
municipalities: a
property law
perspective**

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ABSTRACT

Although it is still in its formative stages, the idea of inclusionary housing in South Africa's constitutional context is inescapable. The typical characteristic of inclusionary housing is that a developer

is required or encouraged to dedicate a specified portion of her housing development project to the provision of affordable housing. This raises concerns about the possible violation of developers' property rights because it affects their investment backed expectations regarding future earnings. Since municipalities are the chief agents of the implementation of inclusionary housing, it is important to investigate how they can respond effectively to the property related concerns of developers. This article conducts an overview discussion of the concept of property in South African law, with a special focus on how property regulation can be anchored on the "givings" concept. It then explores the legal mechanisms through which municipalities can pay financial incentives to housing developers to ensure the growth of a housing stock that is geared for affordability as well as social and economic integration. We undertake a critique of the current statutes governing local government financial management and illustrate their inadequacy. It is concluded that inclusionary housing can only succeed in South Africa if legal policy recognises the need for financial payments to developers that go beyond mere compensation for excessive regulation of property rights.

Keywords: Property, deprivation, inclusionary housing, incentivisation, future earnings, financial incentives, immaterial interests, givings.

1. INTRODUCTION

Inclusionary housing is a method of housing delivery that entails requiring housing developers to dedicate a part of their housing developments to the low-income segment of society.¹ This method therefore impinges upon the property rights of developers insofar as they are required to forego a certain portion of their earnings that would otherwise accrue from building at market rate.² While it is relatively well-developed in jurisdictions, such as, the United States (US),³ New Zealand⁴ and some European

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¹ Ellickson RC "The irony of inclusionary zoning" (1981) 54 *Southern California Law Review* 1167 at 1169; Iglesias T "Inclusionary zoning affirmed: *California Building Industry Association v City of San Jose*" (2016) 24 *Journal of Affordable Housing & Community Development Law* 409 at 410-411; Arpey C "The multifaceted manifestations of the poor door: examining forms of separation in inclusionary housing" (2017) 6 *American University Business Law Review* 627 at 629; Curtin DJ & Naughton EM "Inclusionary housing ordinance is not facially invalid and does not result in a taking" (2002) 34 *Urban Lawyer* 913 at 914; Floryan M "Cracking the foundation: highlighting and criticizing the shortcomings of mandatory inclusionary zoning practices" (2010) 37 *Pepperdine Law Review* 1039 at 1044; Padilla LM "Reflections on inclusionary housing and a renewed look at its viability" (1995) 23 *Hofstra Law Review* 539 at 540.

² See Ellickson (1981) at 1170; Kautz BE "In defense of inclusionary housing: successfully creating affordable housing" (2002) 36 *University of South Florida Law Review* 971 at 974 & 987; See generally Berger L "Inclusionary zoning devices as takings: the legacy of the *Mount Laurel* cases" (1991) 70 *Nebraska Law Review* 186.

³ The US states that have instituted some form of inclusionary housing requirement include California (see *Home Builders Association v City of Napa* 108 Cal Rptr 2d 60 (Ct App 2001) and New Jersey

countries,⁵ inclusionary housing has yet to establish a foothold in the South African legal system because it is still in the introductory stages of development.

It bears mentioning here that the South African legal context is one where there are contested meanings of property.⁶ This contestation has played out in a variety of legal debates, ranging from litigation on the meaning and scope of the property clause in the Constitution of the Republic of South Africa Act 200 of 1993, to the argument about whether immaterial interests are a property form worthy of constitutional protection.⁷

The purpose of this article is, first, to explore the law as it relates to the protection of immaterial interests as forms of property. We show that future earnings can fit the “property” criterion that is set out in section 25(1) of the Constitution of the Republic of South Africa, 1996 (Constitution) and applicable case law. We then explore the “givings” perspective of South African property law by arguing that the regulation of windfalls emanating from the State is important from a property law perspective. This sets the tone for our second objective, which is to consider the legal powers under which municipalities can pay financial incentives to developers for housing

(following the landmark decision in *South Burlington County NAACP v. Township of Mount Laurel* 456 A2d 390 (NJ 1983). Also see Floryan (2010) at 1045; Calavita N, Grimes K & Mallach A “Inclusionary housing in California and New Jersey: a comparative analysis” (1997) 8 *Housing Policy Debate* 109.

⁴ See ss 14(1)(d) and 15(3) of the Housing Accord and Special Housing Areas Act 2013.

⁵ These include the UK, The Netherlands and Spain. In the UK, s 106 of the Town and Country Planning Act 1990 requires developers to contribute to affordable housing. Also see Morrison N & Burgess G “Inclusionary housing policy in England: the impact of the downturn on the delivery of affordable housing through section 106” (2013) 29 *Journal of Housing & the Built Environment* 423 at 426. As for The Netherlands, see Buitelaar E & De Kam G “The emergence of inclusionary housing: continuity and change in the provision of land for social housing in the Netherlands” (2012) 29 *Housing, Theory and Society* 56 at 67.

⁶ See *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape & others* 2015 (6) SA 125 (CC) at para 4. For a comparative perspective on the contested nature of property, see Underkuffler LS “On property: an essay” (1990) 100 *Yale Law Journal* 127 at 128; Underkuffler LS *The idea of property: its meaning and power* Oxford: Oxford University Press (2003) at 16; Waldron J *The right to private property* New York: Oxford University Press (1988) at 26; Philbrick FS “Changing conceptions of property in law” (1938) 86 *University of Pennsylvania Law Review* 691 at 694.

⁷ In *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC) at para 75, the Constitutional Court held that intellectual property rights can be protected under s 25 of the Constitution. In *Phumelela Gaming and Leisure Ltd v Grundlingh & others* 2006 (6) SA 350 (CC) (*Phumelela case (2006)*) at paras 38 & 42, the Constitutional Court’s analysis of business goodwill appeared to be grounded in the notion that such goodwill amounted to property, even though the Court did not expressly state this. This view was later confirmed in *Law Society of South Africa & others v Minister of Transport & another* 2011 (1) SA 400 (CC) at para 81, where the Constitutional Court read the *Phumelela case (2006)* as having decided that loss of goodwill is property in terms of s 25 of the Constitution. See also Du Bois M & Shay R “Regulation at the edge of the property concept: judicial treatment of intangible interests” in Muller G, Brits R, Slade BV & Van Wyk J (eds) *Transformative property law: festschrift in honour of AJ Van der Walt* Cape Town: Juta & Co. Ltd. (2018) 421 at 425; Kellerman M *The constitutional property clause and immaterial property interests* (unpublished LLD thesis, Stellenbosch University, 2011) at 95-97.

development. We argue that these powers are sparse and ineffective, and that they need to be augmented through legislation if the objectives of inclusionary housing are to be realised.

2. PROPERTY AND INCLUSIONARY HOUSING

2.1. Are future earnings property?

South African property law has grappled with questions regarding whether specific forms of interest amount to property for purposes of legal protection.⁸ However, with the enactment of a democratic Constitution, these questions have become more significant given that the concept of property has now been reconfigured to reflect the kind of transformative society that is envisaged by the Constitution.⁹ Now more than ever before, lawyers must first consider the sort of immutable values that should characterise South Africa before they attempt to define a property interest.¹⁰ Not all interests qualify as property under the Constitution.¹¹ Moseneke DCJ alluded to this in *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape & another (Shoprite Checkers case (2015))* when he stated that there may well be sound reasons for not protecting an interest as property under section 25(1) of the Constitution.¹² Nevertheless, the concept of constitutional property in South African law requires us to expand our conception of property beyond the common law notion of exclusive ownership,¹³ while ensuring that non-property interests are also protected under the

⁸ See, in general, Muller G, Brits R, Pienaar JM & Boggenpoel ZT *Silberberg and Schoeman's The Law of Property* 6th ed South Africa: LexisNexis (2019) at 615–622; Louw AM “Suggestions for the protection of star athletes and other famous persons against unauthorised celebrity merchandising in South African law” (2007) 19 *South African Mercantile Law Journal* 272 at 300; Du Bois M “Intellectual property as a constitutional property right: the South African approach” (2012) 24 *South African Mercantile Law Journal* 177 at 178; Van der Walt AJ & Shay RM “Constitutional analysis of intellectual property” (2014) 17 *Potchefstroom Electronic Law Journal* 52 at 53; Erlank W “Don’t touch my virtual property: justifications for the recognition of virtual property” (2016) 133 *South African Law Journal* 664. See further, *Moroka Swallows Football Club Ltd v The Birds Football Club & others* 1987 (2) SA 511 (W) at 531E–G; *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons & another* 2003 (3) SA 313 (SCA) at 321 E–G; *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

⁹ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 49.

¹⁰ Mulvaney T & Singer JW “Move along to where? Property in service of democracy” in Muller G, Brits R, Slade BV & Van Wyk J (eds) *Transformative property law: festschrift in honour of AJ Van der Walt* Cape Town: Juta & Co. Ltd. (2018) 1 at 19.

¹¹ *Shoprite Checkers case (2015)* (see fn 12 below) at paras 94, 115 and 120. See also Van der Sijde E *Reconsidering the relationship between property and regulation* (unpublished LLD thesis, Stellenbosch University, 2015) at 273 & 282; Singer JW *Entitlement: the paradoxes of property* New Haven & London: Yale University Press (2000) at 142, 144 & 208.

¹² 2015 (6) SA 125 at para 115.

¹³ Van der Walt AJ “Un-doing things with words: the colonization of the public sphere by private-property discourse” (1998) *Acta Juridica* 235 at 239 & 281; Van der Walt AJ “The South African law of

umbrella of section 25 of the Constitution (property clause).¹⁴ Therefore, the definition of property rights now serves the purpose of achieving social goals that go beyond the mere enjoyment of the right of ownership.¹⁵

Developers' objections to inclusionary housing centre around the expectation of earnings in the housing development endeavour. Against this backdrop, the question arises as to how to characterise future earnings for purposes of property law analysis. Generally, the fact that a benefit is contingent or expected to materialise sometime in the future is not a bar to its being protected as property.¹⁶ The important consideration here is whether such contingent interests are recognised, and have vested, in terms of private law. Incorporeal interests, such as, licences and shares, are recognised and protected as property by private law.¹⁷ However, it is clear that interests, such as, licences and permits, are significantly protected by administrative law and are therefore different from other commercial interests.¹⁸ Kellerman observes that there is some

ownership: a historical and philosophical perspective" (1992) 25 *De Jure* 446 at 447; Van der Walt AJ "Roman-Dutch land and environmental land-use control" (1992) 7 *South African Public Law* 1 at 4; Milton JRL "Ownership" in Zimmermann R & Visser DP (eds) *Southern cross: civil law and common law in South Africa* Oxford: Clarendon Press (1996) 657 at 699; Dhliwayo P *A constitutional analysis of access rights that limit landowners' right to exclude* (unpublished LLD thesis, Stellenbosch University, 2015) at 27.

¹⁴ Van der Walt AJ "The modest systemic status of property" (2014) 1 *Journal of Law, Property, and Society* 15 at 28-30.

¹⁵ See *Reflect-All 1025 CC & others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) at para 33 (*Reflect-All case (2009)*); *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 64; *Mkontwana v Nelson Mandela Municipality & another; Bisset & others v Buffalo City Municipality & Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and others (KZN Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) at para 81; *Phumelela Gaming and Leisure Ltd v Grundlingh & others* 2007 (6) SA 350 (CC) at para 38; *Mohunram & another v National Director of Public Prosecutions & another (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC); Van der Walt & Shay (2014) at 53. From a foreign law perspective, the idea of the social obligations of property is reflected in several constitutional provisions, such as, the German Constitution (The Constitution (Basic Law) of the Federal Republic of Germany (1949) art 14, The Italian Constitution (1947) art 42, and the Japanese Constitution (1946) art 29. See Chen AHY "The basic law and the protection of property rights" (1993) 23 *Hong Kong Law Journal* 31 at 35.

¹⁶ This interpretive approach is supported by some foreign law examples. Initially, the European Court of Human Rights (ECtHR) insisted that only pre-existing interests could be regarded as "possessions" in terms of Art 1 of the First Optional Protocol to the European Convention on Human Rights (ECHR). See *Marckx v Belgium* (1979) 2 EHRR 330 at para 50. This position subsequently changed because the ECHR has been open to the idea of protecting interests, as property, that do not yet exist. See *Stran Greek Refineries and Stratis Andreadis v Greece* (1995) 19 EHRR 293 at para 75; *Kopecký v Slovakia* (2005) 41 EHRR 43 at para 35.

¹⁷ Van der Walt AJ *Constitutional property law* Wetton: Juta & Co (2005) at 87-88; see also Du Bois (2012) at 183; Kellerman M *The constitutional property clause and immaterial property interests* (unpublished LLD thesis, Stellenbosch University, 2011) at 95; *Cooper v Boyes NO & another* 1994 (4) SA 521 (C).

¹⁸ See *Shoprite Checkers case (2015)* at para 122.

resistance to recognising these interests as property in terms of the property clause.¹⁹ Such interests may acquire property status if they have some commercial value and if they vest in terms of the applicable statutes and regulations.²⁰

There are two main reasons for recognising future earnings as a property interest in terms of section 25 of the Constitution. First, the generally favourable disposition to recognise incorporeal interests as property supports the notion of a property right in such earnings. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service ; First National Bank of SA Ltd t/a Wesbank v Minister of Finance (FNB case (2002))* the Court's reasoning made clear that it was concerned with a corporeal movable given the facts of the case. The Court stated that the ownership of both corporeal movables and land was "at the heart of our constitutional concept of property".²¹ The Court's reasoning shows that the door was left open for the consideration of incorporeal interests as property. Roux argues that the pursuit of a transformation oriented, public law definition of property (which is required by the Constitution) would ineluctably lead to such recognition.²²

Secondly, the Constitutional Court has indicated how it is likely to treat the rights of ownership in future cases. The Court appears prepared to move away from the unitary conception of ownership as understood in South African law.²³ In *South African Diamond Producers Organization v Minister of Minerals and Energy NO & others (Diamond Producers case (2017))*,²⁴ diamond producers and dealers challenged certain provisions of the Diamonds Amendment Acts.²⁵ These laws effectively prevented producers and dealers from receiving the full market value of their diamonds. They argued that this amounted to deprivation of property. They complained that the laws amounted to arbitrary deprivation of property in that it did not provide a sufficient reason for this deprivation.²⁶

The appellant viewed this amendment as a limitation affecting its members' ownership rights, especially their *ius disponendi* (right to dispose of property) since they could no longer obtain their goods' market value upon selling.²⁷ The Court held that, to establish deprivation, the limitation imposed must be substantial in that it must have a "legally relevant impact on the rights of the affected party".²⁸ According to

¹⁹ See Kellerman (2011) at 95.

²⁰ See Kellerman (2011) at 96.

²¹ 2002 (4) SA 768 (CC) at para 51.

²² See generally Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed Cape Town : Juta (2013) at 46-10.

²³ Van der Walt AJ "Unity and pluralism in property theory: a review of property theories and debates in recent literature: Part I" (1995) *Journal of South African Law* 15 at 30.

²⁴ 2017 (6) SA 331 (CC).

²⁵ Act 29 of 2005 & Act 50 of 2005.

²⁶ See *Diamond Producers case (2017)* at para 20.

²⁷ See *Diamond Producers case (2017)* at para 36.

²⁸ See *Diamond Producers case (2017)* at para 61.

Khampepe J, the limitation in this case was directed at the manner in which the producers and dealers were able to conduct sales, rather than the right to sell *per se*.²⁹

She regarded the right of ownership as consisting of discrete components (including the *ius disponendi*), and then conceptually severed the *ius disponendi* from the aggregate right of ownership. Since the rest of the rights of ownership were unaffected by the limitation, no deprivation had taken place.³⁰

Although the *Diamond Producers case* approach is problematic for conceptual reasons,³¹ it shows that the regulation of property rights becomes easier to justify when courts are prepared to break the right of ownership into discrete parts. The allure of this approach is that it enables those involved in property regulation to pursue a distributive agenda with more ease. Van der Walt does not support the unity approach in the land reform context, favouring a fragmentation approach (a la the *Diamond Producers case*) instead.³²

2.2. Is there deprivation and is it arbitrary?

2.2.1. Deprivation

The decision in *Mkontwana v Nelson Mandela Metropolitan Municipality and another; Bisset and others v Buffalo City Municipality and others; Transfer Rights Action Campaign and others v MEC, Local Government and Housing, Gauteng and others (KZN Law Society and Msunduzi Municipality as Amici Curiae)* (*Mkontwana case (2005)*) established the principle that section 25 of the Constitution is a protection against deprivation of property that falls into two categories. The first is deprivation that constitutes substantial interference, and the second is deprivation that goes beyond the normal restrictions on property use that one would find in an open and democratic society.³³ This definition of deprivation is in contrast to that which had earlier been announced by the Constitutional Court in the *FNB case (2002)* that “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”.³⁴ It seems that in the *Mkontwana case (2005)* the Constitutional Court qualified (and even retreated from) the deprivation standard that it had laid down in the *FNB case (2002)*.³⁵ Subsequent

²⁹ See *Diamond Producers case (2017)* at para 52.

³⁰ See *Diamond Producers case (2017)* at para 52.

³¹ Marais EJ “Narrowing the meaning of ‘deprivation’ under the property clause? A critical analysis of the implications of the Constitutional Court’s *Diamond Producers* judgment for constitutional property protection” (2018) 34 *South African Journal on Human Rights* 167 at 182.

³² Van der Walt AJ “The fragmentation of land rights” (1992) 8 *South African Journal on Human Rights* 431 at 436.

³³ 2005 (1) SA 530 (CC) at para 32.

³⁴ See *FNB case (2002)* at para 57.

³⁵ Van der Walt AJ “Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*” (2005) 122 *South African Law Journal* 75 at 78.

Constitutional Court decisions³⁶ have done little to remove this confusion, as Van der Walt³⁷ and Bezuidenhout³⁸ argue.

The significance of the preceding point is that the two different approaches to the definition of deprivation will impact how inclusionary housing is implemented. On the one hand, if the wider *FNB case (2002)* standard is adopted then compensation will be required in most cases, provided that all the other requirements for compensation are met. On the other hand, the *Mkontwana case (2005)* standard for deprivation allows municipalities more leeway to regulate property in the interest of affordable housing. As Van der Walt has noted,³⁹ the weight of authority subsequent to the *Mkontwana case (2005)* now seems to favour the wider definition in the *FNB case (2002)*.⁴⁰ In *National Credit Regulator v Opperman and others (Opperman case (2013))*,⁴¹ the Constitutional Court reiterated that a deprivation would occur whenever there was interference with the use, enjoyment and exploitation of property in so significant a manner as to have “a legally relevant impact on the rights of the affected party”.⁴²

2.2.2. Arbitrariness

Generally, a deprivation will be arbitrary if no sufficient reason is given for it (which renders it substantively arbitrary),⁴³ or if it is procedurally unfair.⁴⁴ The first type of arbitrariness is exemplified, according to the *FNB case (2002)*,⁴⁵ when an owner is deprived of all her property as opposed to only part of it. Much more cogent justifications are required in the case where the ownership of the property, as opposed to a lesser property right, is affected.⁴⁶ The same rationale applies where an owner is

³⁶ In the *Reflect-All case (2009)* the Court referred to both the *FNB case (2002)* and the *Mkontwana case (2005)* insofar as the definition of deprivation was concerned. Its decision indicated a preference for the wider definition in the *FNB case (2002)* inasmuch as it found that depriving property owners of the right to transfer property deprived them “in some respects of the use, enjoyment and exploitation of their properties” (para 38). Subsequently, *Offit Enterprises (Pty) Ltd & another v Coega Development Corporation (Pty) Ltd & others* 2011 (1) SA 293 (CC) referred to both the *FNB case (2002)* and *Mkontwana case (2005)* definitions of deprivation. However, the Court stated that “substantial interference” was required before the Court could consider whether there had been deprivation. This reasoning is consistent with the narrower definition of deprivation in the *Mkontwana case (2005)*. See Van der Walt AJ *Constitutional property law* 3ed Cape Town: Juta Law (2011) at 207.

³⁷ See Van der Walt (2011) at 207.

³⁸ See Bezuidenhout K *Compensation for excessive but otherwise lawful regulatory state action* (unpublished LLD thesis, Stellenbosch University, 2015) at 16-17.

³⁹ Van der Walt AJ “Constitutional property” (2012) *Annual Survey of South African Law* 182 at 186.

⁴⁰ See Muller, Brits, Pienaar & Boggenpoel (2019) at 626–630.

⁴¹ 2013 (2) SA 1 (CC).

⁴² At para 66.

⁴³ See Muller, Brits, Pienaar & Boggenpoel (2019) at 631–637.

⁴⁴ See *FNB case (2002)* at para 100; Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88 at 93 & 94

⁴⁵ At para 100.

⁴⁶ See Van der Walt (2005) at 153.

deprived of all her property, and not just some of it.⁴⁷ In this section we explore the reasons for the limitation of property rights in South African law in view of the dire housing situation that is addressed by legislation and housing policy. The discussion utilises deductive reasoning to link legislative and policy objectives with section 25 jurisprudence to formulate a coherent justification for the implementation of inclusionary housing through property rights limitation.

The housing crisis in South Africa consists mainly in the fact that many poor (mainly black) people have no access to adequate housing. Instead, these people live in cramped spaces in informal settlements under the most appalling and dehumanising conditions characterised by rampant disease and insecurity, as well as lack of access to clean drinking water and sanitation facilities. However, it is also widely acknowledged that there is a slightly different dimension to the housing crisis in South Africa because the spatial architecture and settlement patterns continue to compound the problems of economic and social exclusion that were a feature of apartheid spatiality.⁴⁸ The housing experiences of many middle income households are affected by vestiges of apartheid planning which manifest in poorly located and unaffordable housing.⁴⁹ This limits access to employment, education and healthcare because housing is located far from these opportunities.⁵⁰ Furthermore, this housing situation hampers efforts to encourage economic and social integration because of the racial dimensions of poverty in South Africa.

The South African government's attempts to address this dire housing situation have taken the form of legislative and policy interventions since the advent of democracy in 1994. For example, the National Development Plan (NDP)⁵¹ and the 1994 White Paper on Housing⁵² (Housing White Paper) recognise that apartheid spatiality still exerts its influence in post-apartheid South Africa. This realisation leads the NDP to state that pro-active steps must be taken to reverse the trend and to assist those who have been locked out of opportunities.⁵³ The NDP bemoans the link between poverty

⁴⁷ See Van der Walt (2005) at 153.

⁴⁸ Smith DM "Urban fragmentation, inequality and social justice: ethical perspectives" in Harrison P, Huchzermeyer M & Mayekiso M (eds) *Confronting fragmentation: housing and urban development in a democratising society* Cape Town: University of Cape Town Press (2003) at 29.

⁴⁹ Jacobs BJ "The post-apartheid city in the new South Africa: a constitutional *Triompf*" (2006) 18 *Pace International Law Review* 407 at 426.

⁵⁰ Centre for the Study of Violence and Reconciliation (CSVR) *An overview of the housing policy and debates, particularly in relation to women (or vulnerable groupings)* (2004) at 4.

⁵¹ National Planning Commission (NPC) *National Development Plan: vision for 2030* (2012).

⁵² The Department of Housing (DOH) *White Paper: a new housing policy and strategy for South Africa*, (GN 1376 of 1994 in GG 16178 of 23 December 1994).

⁵³ NDP at 233. Also see Socio-Economic Rights Institute of South Africa (SERI) *Edged out: spatial mismatch and spatial justice in South Africa's main urban areas* (2016) at 3 available at http://www.seri-sa.org/images/SERI_Edged_Out_report_final_high_res.pdf (accessed 12 February 2020).

and the lack of opportunities: people's physical location continues to condemn them to a life of poverty due to missed opportunity.

These concerns are replicated in the Breaking New Ground Policy (BNG)⁵⁴ which laid the groundwork for the introduction of inclusionary housing in South Africa. The BNG identifies some of the key impediments to spatial transformation in South Africa. Through the concept of "sustainable human settlements"⁵⁵ it aims for the synchronisation of economic and social growth with the goals of wealth creation, poverty alleviation and equity. It recognises that densification and integration are key elements in the pursuit of these goals.⁵⁶ In apparent reference to the failures of the market, it calls for "public interventions" in the building of towns and cities, and in the manner of generating and distributing wealth.⁵⁷

Insofar as legislation is concerned, the Housing Act,⁵⁸ the Social Housing Act,⁵⁹ and the Rental Housing Act,⁶⁰ as well as other subsidiary legislation,⁶¹ constitute the most important pointers to how the constitutional right of access to adequate housing is to be achieved. These statutes contain key objectives on housing, including that the State must prioritise the needs of the poor in the housing development process.⁶² The housing development process must also lead to socially and economically integrated living environments that are based on densification and the optimal use of land and services.⁶³ In addition, the Social Housing Act aims to ensure that affordable housing is constructed near development nodes so that it remains affordable and is also able to grant access to opportunities for self-realisation.⁶⁴ Through the use of accredited Social Housing Institutions, the Act ensures that affordable housing is built and maintained for the benefit of the needy.⁶⁵

⁵⁴ The Department of Human Settlements (DHS) *Breaking New Ground: a comprehensive plan for the development of integrated sustainable human settlements* (2004), available at http://www.dhs.gov.za/sites/default/files/documents/26082014_BNG2004.pdf (accessed 30 March 2020).

⁵⁵ BNG (2004) at para 3.

⁵⁶ BNG (2004) at para 3.2.

⁵⁷ BNG (2004) at para 3.2.

⁵⁸ Act 107 of 1997.

⁵⁹ Act 16 of 2008.

⁶⁰ Act 50 of 1999.

⁶¹ An example is the National Housing Code 2009 (promulgated under s 4 of the Housing Act). This Code also incorporates the National Norms and Standards in respect of Permanent Residential Structures (2007), which specify the technical details that must characterise the building of stand-alone houses under the National Housing programmes. These Norms and Standards are made applicable to Social Housing through s 14 (2) (c) of the Social Housing Act.

⁶² Section 2 (1) (a) of the Housing Act.

⁶³ Section 2 (e) (iii) of the Housing Act.

⁶⁴ Sections 2 (1) (b) and 2 (1) (i) (viii) of the Social Housing Act.

⁶⁵ Section 13 (3) of the Social Housing Act.

Significantly, the Act regulates the Social Housing Institution's right, as owner, to sell its social housing stock. It obliges the Social Housing Institution to "seek permission from the Regulatory Authority for the sale of any properties in their ownership on the basis that such sale will not endanger the security of tenure of existing residents meeting the conditions of their tenancy and that the grant component of the proceeds receipt (*sic*) from such sale will be used to provide social housing".⁶⁶ This provision effectively controls an owner's *ius disponendi* inasmuch as she may only dispose of her property upon permission being sought and granted, and inasmuch as the proceeds of any sale must be applied to social housing. This is a significant attenuation of the power of disposition that is inherent in the right of ownership. The approach of the Social Housing Act is therefore to recognise the right of ownership in social housing stock while controlling this right by regulating how an owner may dispose of the property.⁶⁷

It is submitted that the Social Housing Act is a step towards addressing the deplorable living conditions of South Africa's urban poor. It recognises the ownership rights of Social Housing Institutions while at the same time regulating this right in the interest of affordable housing. The regulatory framework takes the form of controlling the rent that may be charged by Social Housing Institutions,⁶⁸ as well as limiting a Social Housing Institution's right to dispose of the social housing units that it owns. However, Maass raises valid concerns regarding the efficacy of the Act in encouraging developers to participate in social housing given the abovementioned regulatory mechanisms.⁶⁹ For instance, she questions the reversion of social housing stock to the public sector when the housing project is completed.⁷⁰ Since social housing projects are meant to take place exclusively within designated "restructuring zones,"⁷¹ its impact is limited in that the identification of restructuring zones is not necessarily guided by the imperatives of social and economic integration.

⁶⁶ Section 14 (1) (i) of the Social Housing Act.

⁶⁷ The Social Housing Act significantly limits the property rights of the owners of social housing stock. Apart from the right to sell this stock, there is also the issue of the reversion of the stock's ownership from the private owner to the State at the conclusion of the project. Maass argues that this is an unusual position from a comparative law perspective. Consequently, she questions the likelihood that private developers will participate in social housing projects, given that they are designed to be wholly charitable and therefore give little return on investment. She argues that this may amount to arbitrary deprivation of property. See Maass S "The South African social housing sector: a critical comparative analysis" (2013) 29 *South African Journal on Human Rights* 571 at 578-580.

⁶⁸ Section 23 (2) (a) of the Social Housing Act. For this reason, SHIs are essentially charitable institutions since they cannot generate profit. See Maass (2013) at 577; SAPOA [South African Property Owners Association] *Inclusionary housing: Towards a new vision in the City of Johannesburg and Cape Town metropolitan cities* (2018) at 10, available at https://www.sapoa.org.za/media/2948/inclusionary-housing_revised.pdf (accessed 03 March 2020).

⁶⁹ See Maass (2013) at 579.

⁷⁰ See Maass (2013) at 579.

⁷¹ See Maass (2013) at 575.

An additional objective of inclusionary housing is that it aims to foster social and economic integration.⁷² This objective therefore goes a step further than social housing's focus on housing affordability. The spatial form of the post-apartheid city is still beset by a history of segregation and the denial of opportunities to the urban poor. Such opportunities include the building of social relations among residents.⁷³ Post-apartheid cities do not support this objective because they consist of enclaves where racially spatialised living is the norm.⁷⁴ In these enclaves, there is resistance to the idea of different social groups living side by side. Social housing does not respond to this difficulty because it is focused exclusively on housing affordability. Hence the need for inclusionary housing in South Africa.⁷⁵

3. THE NORMATIVE BASIS FOR THE PAYMENT OF FINANCIAL INCENTIVES

3.1. Introduction

The use of financial incentives to achieve the objectives of government is a controversial matter because financial incentives are invariably derived from public funds.⁷⁶ The use of public funds must be properly accounted for, according to the principles of legality and the rule of law.⁷⁷ Webb argues that there is a preoccupation in legal circles with the systems of governance that are based on the State's power of coercion, usually at the expense of considering more subtle methods of governance. He points out that while coercive powers have been subjected to several constraints, this cannot be said of the non-coercive methods, such as the use of financial incentives. This section attempts a structured discussion of the use of financial incentives to spur inclusionary housing in South Africa.

3.2. The Constitution

South African case law establishes distinct mandates for the national, provincial and local spheres of government.⁷⁸ This is supposed to ensure that there is no undue interference in one sphere by another. In *Minister of Local Government, Environmental*

⁷² See *Framework for an Inclusionary Housing Policy (IHP) in South Africa* (2007) at para 6.1, available at <http://abahlali.org/files> (accessed 1 April 2020). See also Lerman BR "Mandatory inclusionary zoning: the answer to affordable housing problem" (2006) 33 *Boston College Environmental Affairs Law Review* 383 at 386; see Floryan (2010) at 1060; Padilla LM "Reflections on inclusionary housing and a renewed look at its viability" (1995) 23 *Hofstra Law Review* 539 at 567.

⁷³ See SAPOA (2018) at 4.

⁷⁴ See Harrison, Huchzermeyer & Mayekiso (2003) at 29.

⁷⁵ See SAPOA (2018) at 6.

⁷⁶ Webb K "Thumbs, fingers, and pushing on string: legal accountability in the use of federal financial incentives" (1993) 31 *Alberta Law Review* 501 at 505.

⁷⁷ Section 4 (2) (b) of the Local Government: Municipal Systems Act 32 of 2000 provides that a municipality must provide democratic and accountable government.

⁷⁸ Sections 151-154 & 156 of the Constitution. Also see Du Plessis A "The readiness of South African law and policy for the pursuit of sustainable development goal" (2017) 21 *Law, Democracy & Development* 239 at 249; De Visser J "Institutional subsidiarity in the South African constitution" (2010) 21 *Stellenbosch Law Review* 90; Tissington K *A resource guide to housing in South Africa 1994—2010: legislation, policy, programmes and practice* (SERI ; 2011) at 14.

Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd & others (Lagoonbay case (2014)),⁷⁹ the Constitutional Court stated the following:

“This court’s jurisprudence clearly establishes that (a) barring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government; (b) the constitutional vision of autonomous spheres of government must be preserved; and (c) While the constitution confers municipal planning responsibilities on each of the spheres of government, those are different responsibilities based on what is appropriate to each sphere.”⁸⁰

The Constitutional Court has further held that courts, too, are not authorised to interfere with the functions of municipalities “except in the clearest of cases”.⁸¹ Significantly, the Court has clarified that the imposition of rates and taxes by municipalities constitutes a special responsibility which must be undertaken with the greatest of attention to the values of the Constitution. The nature of the regulation of this power was clarified in *Howick District Landowners Association v Umgeni Municipality & others (Howick case (2007))*,⁸² where the Supreme Court of Appeal stated that Parliament has the constitutional authority to regulate by statute the municipalities’ authority to levy rates and taxes.⁸³ This power to impose rates is a legislative rather than executive one, necessitating public participation in the process.⁸⁴

The Constitution also envisages a developmental role for municipalities.⁸⁵ In other words, municipalities must help individuals realise a suite of rights contained in the Bill of Rights, including the right to property (section 25).⁸⁶ There is, therefore, a constitutional basis for the argument that municipalities have an important role to play in the regulation of the use of property so that property owners can enjoy their property rights in terms of the Constitution, while the public derives some benefit from property and its regulation. However, the Constitution lacks an express provision that would enable municipalities to finance (through subsidies, grants and other mechanisms) incentives for the building of inclusionary housing. Nevertheless, it

⁷⁹ 2014 (1) SA 521 (CC).

⁸⁰ See *Lagoonbay case (2014)* at para 46.

⁸¹ *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (9) BCLR 1133 (CC) at para 43; *National Treasury & others v Opposition to Urban Tolling Alliance & others (Road Freight Association as applicant for leave to intervene)* 2012 (6) SA 223 (CC).

⁸² 2007 (1) SA 206 (SCA).

⁸³ See *Howick case (2007)* at para 5.

⁸⁴ See *Liebenberg NO v Bergrivier Municipality* 2013 (8) BCLR 863 (CC) at para 127. Also see *Brittania Beach Estate (Pty) Ltd v Saldanha Bay Municipality* 2013 (11) BCLR 1217 (CC) at para 19; *South African Property Owners’ Association v Council of the City of Johannesburg* 2013 (1) SA 420 (SCA) at para 9.

⁸⁵ See, in general, Rosa S “Transformative constitutionalism in a democratic developmental state” (2011) 22 *Stell LR* 542 and Rosa S *The means and the ends of justice in the interaction between socio-economic rights and administrative justice in a South African democratic developmental state* (unpublished LLD thesis, Stellenbosch University, 2017).

⁸⁶ See Du Plessis (2017) at 252.

enables Parliament to enact legislation for a variety of local government related purposes. Some of the salient, existing statutes are considered below.

3.3. Municipal Property Rates Act

The Local Government: Municipal Property Rates Act (MPRA)⁸⁷ empowers municipalities to impose rates on property, to reduce the rate payable on a property,⁸⁸ and also to exempt certain property from rating.⁸⁹ Although, as a general rule, all rateable property within a municipality's area must be rated, this does not prevent a municipality from exempting certain kinds of property from this requirement. The long title of the MPRA expressly states that the municipality may do this "in the national interest".⁹⁰ However, in terms of section 16 of the MPRA read with section 229(a) of the Constitution, a municipality may not impose rates on property in a manner that prejudices the national interest.⁹¹

The provision is arguably applicable to both the manner and form in which rates are imposed and to the amount involved. This provision grants the power of veto to the Minister in charge of local government who may override and substitute the rate imposed by a municipality.⁹² Thus, national interest in the regulation of property rights is provided for by the MPRA,⁹³ even though this responsibility must be exercised by municipalities as the chief oversight agencies responsible for land use planning in their respective areas.

⁸⁷ Act 6 of 2004.

⁸⁸ Section 15 of the MPRA.

⁸⁹ Act 6 of 2004, Long Title, para 1.

⁹⁰ Act 6 of 2004, Long Title, para 2.

⁹¹ Section 16 of the Act provides as follows:

"(1) In terms of section 229(2)(a) of the Constitution, a municipality may not exercise its power to levy rates on property in a way that would materially and unreasonably prejudice- (a) national economic policies; (b) economic activities across its boundaries; or (c) the national mobility of goods, services, capital or labour. (2) (a) If a rate on a specific category of properties, or a rate on a specific category of properties above a specific amount in the Rand, is materially and unreasonably prejudicing any of the matters listed in subsection (1), the Minister, after notifying the Minister of Finance, must, by notice in the Gazette, give notice to the relevant municipality or municipalities that the rate must be limited to an amount in the Rand specified in the notice..."

⁹² However, it must be emphasised that even though a rate imposed upon property may, on the face of it, appear excessive, it is the effect of that rate that must be looked at. Thus, an excessive rate may not be prejudicial if it is accompanied by rate rebates. See *Kwazulu-Natal Agricultural Union v Minister of Co-operative Governance and Traditional Affairs & others* 2011 (4) SA 266 (KZP).

⁹³ Section 17 of the Act enumerates other kinds of property whose regulation through rates is not permissible. These include any part of the seashore in terms of the National Environmental Management: Integrated Coastal Management Act 24 of 2008, any part of the territorial waters of South Africa in terms of the Maritime Zones Act 15 of 1994, mineral rights and such parts of a national park, nature reserve or national botanical garden as are not utilised for residential purposes, agriculture or commerce in terms of the National Environmental Management: Protected Areas Act 57 of 2003 and the National Environmental Management: Biodiversity Act 10 of 2004.

In sum, the law requires that the regulation of property rights should be accompanied by public participation. This is especially so when municipalities impose property rates or grant rebates. This means that these powers are circumscribed by legislation in terms of the Constitution. From this we deduce that municipalities may not grant incentives for the construction of inclusionary housing without following a process of public participation.⁹⁴ Property rate rebates are also a type of financial incentive to potential property owners or developers.

3.4. Local Government: Municipal Financial Management Act

The use of rates does not address the issue of the legal powers to make disbursements of public funds as financial incentives in order to achieve an objective of local government. Only section 67 of the Local Government: Municipal Financial Management Act (MFMA)⁹⁵ appears to have any relevance to the issue of payment of financial incentives by municipalities.⁹⁶ This section typifies what Webb, in the Canadian context, refers to when he discusses the attributes of an effective incentives programme.

⁹⁴ Public participation underlies an emerging movement towards alternative urban planning. Public participation includes participatory budgeting processes which consider the input of a broad array of socio-political actors, such as civil society groups. See De Souza ML "Alternative urban planning and management in Brazil: instructive examples for other countries in the south?" in Harrison, Huchzermeyer & Mayekiso (2003) 190 at 203. In South Africa, participatory processes have helped to shape the consequences of the State's violation of socio-economic rights, especially against the urban poor. See Akintayo AE *Socio-economic rights, political action, judicial conceptions of democracy and transformation: South Africa and Nigeria* (unpublished LLD dissertation, University of Pretoria, 2014) at 255-256; Muller G *The impact of section 26 of the constitution on the eviction of squatters in South African law* (unpublished LLD thesis, Stellenbosch University, 2011) at 309.

⁹⁵ Act 56 of 2003.

⁹⁶ Section 67 provides as follows:

- “(1) Before transferring funds of the municipality to an organisation or body outside any sphere of government otherwise than in compliance with a commercial or other business transaction, the accounting officer must be satisfied that the organisation or body-
- (a) has the capacity and has agreed-
 - (i) to comply with any agreement with the municipality;
 - (ii) for the period of the agreement to comply with all reporting, financial management and auditing requirements as may be stipulated in the agreement;
 - (iii) to report at least monthly to the accounting officer on actual expenditure against such transfer; and
 - (iv) to submit its audited financial statements for its financial year to the accounting officer promptly;
 - (b) implements effective, efficient and transparent financial management and internal control systems to guard against fraud, theft and financial mismanagement; and
 - (c) has in respect of previous similar transfers complied with all the requirements of this section.

Such programmes are separate from any commercial contract that the municipality may be party to and should therefore be regarded as public law oriented mechanisms that are geared towards the achievement of local government goals. In the South African context, these goals might include land reform and the promotion of access to South Africa's natural resources as directed by section 25 (4) (a) of the Constitution. Section 67 of the MFMA makes clear that payments from municipalities to private bodies are allowed, but the section applies only if the underlying transaction is not essentially commercial (commercial transactions are governed by separate provisions).

3.5. Housing Act

The Housing Act⁹⁷ does not address this gap either, because it lacks provisions authorising the payment of incentives for housing development. Section 9 of the Act describes the functions of municipalities in relation to housing development. Municipalities must "initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development" in their areas of jurisdiction.⁹⁸ While the facilitation and promotion of housing may arguably entail the paying of financial incentives to developers, clearer language is required in this connection. Furthermore, in terms of section 11 (1) of the Act, the financing of activities under the Act shall continue to be done under the South African Housing Fund established under the repealed Housing Arrangements Act.⁹⁹ Section 12 B (1) (a) of the Housing Arrangements Act (as amended by section 9 of the Housing Amendment Act¹⁰⁰) provides that the moneys deposited in the Fund shall be used in meeting the "expenses" incurred by the Director-General or the Board when performing their functions. Ex gratia payments to developers are not expenses and, therefore, are not covered by this provision.

(2) If there has been a failure by an organisation or body to comply with the requirements of subsection (1) in respect of a previous transfer, the municipality may despite subsection (1) (c) make a further transfer to that organisation or body provided that-

(a) subsection (1)(a) and (b) is complied with: and

(b) the relevant provincial treasury has approved the transfer

(3) The accounting officer must through contractual and other appropriate mechanisms enforce compliance with subsection (1)

(4) Subsection (1) (a) does not apply to an organisation or body serving the poor or used by government as an agency to serve the poor, provided-

(a) that the transfer does not exceed a prescribed limit; and

(b) that the accounting officer-

(i) takes all reasonable steps to ensure that the targeted beneficiaries receive the benefit of the transferred funds; and

(ii) certifies to the Auditor-General that compliance by that organisation or body with subsection 1 (a) is uneconomical or unreasonable."

⁹⁷ Act 107 of 1997.

⁹⁸ Section 9(1)(f) of the Housing Act.

⁹⁹ Act 155 of 1993.

¹⁰⁰ Act 6 of 1996.

3.6. Givings

Bell and Parchomovsky have popularised the givings perspective of property law. They explain that any government action that bestows a benefit upon someone amounts to a giving.¹⁰¹ In US law, the idea of givings has not enjoyed nearly as much attention as its conceptual opposite, “takings”.¹⁰² This is odd, because givings are as susceptible to abuse as takings are, if not more so. Whenever a government is empowered to pay a benefit to an individual, there is a danger that this power may be used to gain political support.¹⁰³ Bell and Parchomovsky argue that the US Supreme Court’s explanation of the rationale behind the takings clause equally applies to the concept of givings.¹⁰⁴

In *Armstrong v United States*,¹⁰⁵ the Court stated that the takings clause is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”. If fairness and justice are regarded as important values in the takings context, they are equally relevant to givings. These values should prompt us to ask whether a government payment confers upon some people a benefit that should, in fairness and justice, be enjoyed by the public as a whole.¹⁰⁶ In the final analysis, any compensation for takings must take into account any benefit received.

The idea of a givings doctrine fits into the scheme of South African law. Several statutes have been enacted to strengthen the security of tenure of individuals in line with section 25 of the Constitution. These are, therefore, statutes whose operation is connected somewhat to the housing and living conditions of a sizeable part of the South African population. One such statute is the Extension of Security of Tenure Act (ESTA).¹⁰⁷ Section 4(1) of the ESTA empowers the Minister to grant subsidies for several purposes.¹⁰⁸ These purposes may be categorised into two groups. The first

¹⁰¹ Bell A & Parchomovsky G “Givings” (2001) 111 *Yale Law Journal* 547 at 574.

¹⁰² Takings jurisprudence emanates from the Takings Clause of the US Constitution. Amendment V of the US Constitution provides: “Nor shall private property be taken for public use, without just compensation.” In this article, we equate the takings concept to the South African idea of unlawful deprivation of property which we have outlined earlier.

¹⁰³ See Bell & Parchomovsky (2001) at 579 and Davidson NM “Property’s morale” (2011) 110 *Michigan Law Review* 437 at 459.

¹⁰⁴ See Bell & Parchomovsky (2001) at 578.

¹⁰⁵ 364 US 40 (1960) at 49.

¹⁰⁶ See Bell & Parchomovsky (2001) at 578.

¹⁰⁷ Act 62 of 1997.

¹⁰⁸ Section 4 (1) of ESTA provides:

“(1) The Minister shall, from moneys appropriated by Parliament for that purpose and subject to the conditions the Minister may prescribe in general or determine in a particular case, grant subsidies—

(a) to facilitate the planning and implementation of on-site and off-site developments;

(b) to enable occupiers, former occupiers and other persons who need long-term security of tenure to acquire land or rights in land; and

category of subsidies is targeted at people who wish to acquire land or rights in land for long-term tenure security.¹⁰⁹ The second group applies to the planning and development of on-site and off-site developments. This second group of purposes is consistent with the notion that these subsidies may be granted, inter alia, to private developers.¹¹⁰ The Act also confers a broader power on the Minister to disburse funds in the form of subsidies¹¹¹ and other assistance designed to promote the rights provided for in the ESTA.¹¹²

Since municipalities would be the chief agents for delivering housing opportunities (inter alia, through inclusionary housing) it is inconceivable that they do not have powers such as those conferred upon the Minister in the ESTA. To honour the principle of co-operative governance, which is enshrined in the Constitution,¹¹³ it must be recognised that local authorities best understand the needs of the localities that fall under them. Based on this recognition, local authorities must be given the latitude to define property relations in their respective localities, although they must observe some basic constitutional values, such as, human dignity and equality.¹¹⁴ To stem the possibility of abuse, courts should probe the extent to which a municipality is attempting to confer upon a developer a benefit that should in fairness be enjoyed by the public at large. This requires an assessment of a proposed development's social value.¹¹⁵ In a country with some of the highest levels of spatial segregation (such as South Africa) it is not enough that the proposed housing development will provide affordable units. The housing project must also be capable of leading to social integration.

(c) for the development of land occupied or to be occupied in terms of on-site or off-site developments.”

¹⁰⁹ According to Behrens & Wilkinson, individual subsidies account for 10 per cent of all approved subsidies. See Behrens R & Wilkinson P “Housing and urban passenger transport policy and planning in South African cities: a problematic relationship?” in Harrison, Huchzermeyer & Mayekiso (2003) 154 at 155-156. See also Muller, Brits, Pienaar & Boggenpoel (2019) at 703-704.

¹¹⁰ Project-linked subsidies account for the bulk of approved subsidies (approximately 83 per cent). See also Behrens & Wilkinson (2003) at 155-156.

¹¹¹ Section 4 of the ESTA.

¹¹² Section 2(3) of the ESTA.

¹¹³ This principle requires consultation, co-ordination and mutual support between the different spheres of government. See ss 40 and 41 of the Constitution; Broekhuijse I & Venter R “Constitutional law from an emotional point of view: considering regional and local interests in national decision-making” (2016) *Journal of South African Law* 236 at 238. Also see s 4 of the Intergovernmental Relations Framework Act 13 of 2005.

¹¹⁴ While we appreciate that the vast majority of municipalities in South Africa are plagued by abuse of power, corruption and maladministration allegations, this does not detract from our principled argument.

¹¹⁵ For example, s 4(2) of the ESTA requires the Minister to consider certain criteria before granting subsidies under the Act. These include : whether the development accommodates the mutual interests of occupiers and owners; whether the development is cost-effective; and whether satisfactory reasons have been provided in cases where off-site developments have been chosen.

4. CONCLUSION

In this article we attempted to highlight a contradiction in the legal system governing local government in South African law. On the one hand, local government is at the coal face of service delivery, and therefore local authorities are best placed to understand local conditions and to translate legal precepts, such as the Bill of Rights, to those conditions. On the other hand, this legal framework only enables local authorities to provide services to the neediest in society, leaving a sizeable number of people who may not be so needy in the lurch. The concept of developmental local government, as we have argued, requires that attention is paid to sections of society that have the economic capability to sustain growth, including property owners.¹¹⁶ Only then can meaningful progress be made in attaining all the rights contained in the Bill of Rights. Property owners are a crucial constituency that needs the support of local government¹¹⁷ but may not get it because municipalities understand their role as exclusively pro-poor.

A case in point is the implementation of policies, such as inclusionary housing. When property owners or developers are required to provide affordable housing by including affordable housing units in their market-rate housing developments, their property rights are thereby subjected to legal limitation. Our argument shows that the policy reasons behind the property rights limitation are sound, because South Africa faces an immense housing crisis which is partly linked to the lack of affordable housing. We argue that the deprivation of property in the form of future earnings is therefore not arbitrary in terms of the Constitution.

However, inclusionary housing requirements are a unique type of property deprivation in that they must be accompanied by some form of financial incentive if there is going to be real translation into the delivery of housing. Ellickson has illustrated that these types of property limitation often lead to an increase in the price of housing, thus defeating the purpose of the programme.¹¹⁸ The non-arbitrary nature of the deprivation that takes place under inclusionary housing does not preclude some sort of compensation for property owners. We focus on pecuniary incentives to show that this form of assistance is not catered for by the legal framework governing municipalities. Although policy envisages that developers may in some instances access government subsidies, only the national sphere is allowed to grant such subsidies.¹¹⁹ The problem is that the grant of national sphere subsidies lacks the local element that is necessary to democratise the development process. It is not based on enough knowledge of local needs.

¹¹⁶ White Paper on Local Government (1998), section B, para 2.3, available at http://www.cogta.gov.za/cgta_2016/wp-content/uploads/2016/06/whitepaper_on_Local-Gov_1998.pdf (accessed 1 April 2020).

¹¹⁷ See White Paper on Local Government (1998) at para 3.3.

¹¹⁸ See Ellickson (1981) at 1167. See also Padilla (1995) at 572 & 576; see also Floryan (2010) at 1046.

¹¹⁹ Some of the subsidies intended to provide relief to property developers include the Credit Linked Individual Subsidies and Social Housing Subsidies. See *Framework for an Inclusionary Housing Policy (IHP) in South Africa* (2007) at para 11.6.

To reverse the effects of years of apartheid spatiality and the institutionalisation of racial segregation, it is necessary to have a mix of housing types that reflects a commitment to co-existence and harmony, even if this comes at the expense of housing affordability. A further justification for focusing on the integration objective under inclusionary housing is that the affordability objective is already catered for through social housing. However, social housing has little success in encouraging integrated, well-located housing.¹²⁰ Since inclusionary housing inevitably entails some sort of incentive to the housing developer, it seems that it requires us to consider the implications of a givings doctrine much more urgently than we would otherwise be inclined to do.

Individual contributions:

The lead author carried 60 per cent of the shared responsibility for all research, conceptualisation of ideas and development of the argument.

The co-author shouldered 40 per cent of this shared responsibility.

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¹²⁰ See SAPOA (2018) at 25.

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