



**TRH 27**

**South African Manual for  
Permitting Services in  
Road Reserves**

**Version 1.0  
August 2012**

**Committee of Transport Officials**

**TECHNICAL RECOMMENDATIONS  
FOR HIGHWAYS**

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Permitting Services in  
Road Reserves**

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**Committee of Transport Officials**

**Compiled under auspices of the:**

Roads Coordinating Body (RCB) of the  
Committee of Transport Officials (COTO)

**Published by:**

The South African National Roads Agency Limited  
PO Box 415, Pretoria, 0001

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### **Technical Recommendations for Highways:**

The Technical Recommendations for Highways consists of a series of publications that describe recommended practice for various aspects related to highway engineering. The documents are based on South African research and experience and have the support and approval of the Committee of Transport Officials (COTO). The documents are primarily aimed at ensuring uniform practice throughout South Africa.

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### **Synopsis:**

This Manual is the official requirement for providing services in road reserves in South Africa. It provides guidance to National, Provincial and Municipal spheres of government on the provision of public and private engineering and related services (utilities) within the road reserve and building restriction areas.

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## **Preface**

This Manual is the official requirement for providing services in road reserves in South Africa. It provides guidance to National, Provincial and Municipal spheres of government on the provision of public and private engineering and related services (utilities) within the road reserve and building restriction areas.

Many of the services in South Africa are governed by the Constitution and various Acts and Regulations. This Manual gives guidance on the method to be preferred when implementing those legal provisions. Care has been taken to not conflict with the legal requirements in any way, but in the event that a contradiction exists, the legal requirements will clearly require precedence.

# 1 Introduction

## 1.1 Background

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The purpose of this manual is to provide guidance to National, Provincial and Municipal road authorities on the accommodation of engineering and other related services or utilities within the road reserve and building restriction area. The manual covers both public and private services and services.

Bulk services are normally accommodated in their own servitudes, but distribution services (utilities) of all types are typically accommodated in road reserves.

When distribution (or bulk) services are owned by the same authority as the road authority, no problem exists, but if the service provider, be it another sphere of government, an agency, or private, does not own the road reserve, issues such as ownership, responsibilities and liability for the service exist. This manual therefore provides guidelines to road authorities on how these issues should be addressed.

## 1.2 Legal Framework

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The guidelines of this manual have been developed in terms of the Constitution of the Republic of South Africa (Act 108 of 1996), various other Acts and Regulations, as well as the Common Law. Care has been taken to ensure that the guidelines do not conflict with the legal requirements in any way. However, in the event that a contradiction exists, the legal requirements have precedence.

## 1.3 Responsibility for provision of services

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The Constitution of the Republic of South Africa (Act 108 of 1996) defines the responsibilities of the different spheres of government for the provision of services. According to the constitution, each sphere has the right to govern its own affairs, subject to national and provincial legislation.

In terms of the constitution, Municipalities (local authorities) have the following functional areas of competence:

- Municipal Roads;
- Traffic and parking;
- Street lighting;
- Fencing and fences;
- Stormwater management (built-up areas);
- Billboards and advertisements;
- Potable water supply;

- Domestic waste water and sewerage disposal;
- Electricity and gas reticulation; and
- Municipal public works (in respect to own needs);

Provincial Governments have the following functional areas of competence:

- Provincial Roads and traffic; and
- Public works and housing.

National functional areas not defined as the functions of Municipalities or Provincial governments are the following:

- National roads (regulated by SANRAL Act 7 of 1998). The Act contains strict requirements for the installation of services on such roads (Section 48);
- Electricity supply (regulated by the Electricity Regulation Act 4 of 2006);
- Electronic Communications (regulated by the Electronic Communications Act 36 of 2005); and
- Broadband services (regulated by the Broadband Infraco Act 33 of 2007).

### 1.4 Longitudinal or transverse services

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It must be noted that it is irrelevant whether the applicable service runs parallel within the reserve or merely across the same.

### 1.5 Need to accommodate services in road reserves

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There are several benefits associated with the accommodation of services in road reserves. These include the following:

- Each property has (must have) a road access and it is therefore logical that road reserves should as far as possible accommodate services to properties. The cost of providing services would be very high if each service must be placed in an exclusive reserve; and
- The road reserve also has the advantage that a road is available that can provide easy access to the installed services for maintenance and operational purposes.

A further aspect is that road reserves could create significant obstacles if services had to be located outside them. It is therefore essential that the majority of services are permitted in road reserves. Particular attention must be given to this aspect in the planning and design of new roads to minimize the possible disruptive impact of the road network on the provision of services. Co-operation between road authorities and service authorities as well as the private sector is therefore required to achieve the maximum level of efficiency in the provision of roads as well as the accommodation of services.

There are, however, several issues with such accommodation that must be taken into account, including the following:

- Traffic flow can be interrupted and road safety can be affected when services are installed or maintained;
- The road surface and pavement structure may be damaged during installation or maintenance of services;

## Services in Road Reserves

- The services, such as poles for the support of overhead cables, can create obstacles within the road reserve and create a potential road safety hazard;
- Spillage as a result of the failure or breakage of structures or insufficient capacity of services can create problems in the road reserve and can cause damage to the road pavement and surface;
- The width of the road reserve may have to be increased in order to accommodate the services; and
- Relocation of services can be a significant cost when roads are upgraded or diverted.

## 2 Protection of the Rights of Owners of Services in Road Reserves

### 2.1 Introduction

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Services installed in road reserves owned by the same authority as the service provider do not require further protection. However, where the land is not owned by the same authority as the service provider, the recommended method for protecting a service in a road reserve is by registering a servitude. It is further recommended that the construction of the service be arranged by means of a wayleave. These and other methods of providing services are discussed in this chapter.

This chapter is based on the legal opinion that is provided in Appendix A.

### 2.2 Service ownership

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According to South African Common Law, once a service has been installed on an immovable property, the owner of such immovable property also becomes the owner of the service. While the owner can grant, or be legally required to grant, a servitude (or wayleave) to a service provider, the owner may be entitled to compensation from the service provider, either as a lump sum or as a rental, for the accommodation of the service in the road reserve.

The above principle, however, may be amended by way of legislation such as the Electricity Regulation Act 4 of 2006, which states “*Any asset belonging to a licensee that is lawfully constructed, erected, used, placed, installed or affixed to any land or premises not belonging to that licensee, remains the property of that licensee notwithstanding the fact that such an asset may be of a fixed or permanent nature*”.

### 2.3 Wayleaves

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A wayleave is an agreement between the road authority and the service provider pertaining to the installation of services within a road reserve. Wayleaves are generally used to grant access to the road reserve by the service provider to install the service. The wayleave relates more to the actual construction activities within the road reserve than to the eventual conveyance of services.

Once the service has been installed, the road authority concerned becomes the owner of the service. Wayleaves can therefore not be used to protect services in favour of the service provider. The granting of wayleaves, however, is a suitable method when the intention is to transfer the service to the road authority such as when a private developer installs an external service that will be taken over by a municipality or where a property owner connects to the service within the road reserve.

## **2.4 Building lines**

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Building lines are prescribed for aesthetic, architectural or town planning purposes and are not intended as the reservation of land for the installation of services. It is therefore a misconception that services can arbitrarily be laid within the building line. The area within the building line belongs to the land owner and does not give the authority any rights of use. If services are to be installed on any land not owned by the service provider, ownership or a servitude must be obtained.

It should also be noted that building lines should not be prescribed with the purpose of providing for future road widening. Where such widening is possible, a wider road reserve should be acquired or a servitude registered for such road widening.

## **2.5 Right of Way**

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A right of way over land is usually obtained for vehicle or pedestrian travel purposes and is not a suitable method for accommodating services in a road reserve. The right of way can be obtained by means of a private treaty or agreement or a servitude.

## **2.6 Expropriation**

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Expropriation is a method of obtaining ownership of a property or registering a servitude and is the means by which government (national, provincial and municipal) acquires land from an unwilling seller. In the normal course of events, government will acquire land or servitudes by negotiation with the land owner. Should such negotiation fail, the government can force the transaction by expropriating the property. This, however, is not a situation applicable to the accommodation of services in the road reserve.

## **2.7 Servitudes**

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A servitude is a right of use of land that is registered in favour of a person or body (the service provider) which is not the owner of the land. The owner of the land on which a servitude is registered cannot unilaterally terminate the servitude or transfer the land free from the servitude without the consent of the service provider.

Registration of a servitude does not mean that ownership in the service is retained by the service provider but only provides a limited right in terms of which the dominium (full ownership) of the land is made subject to the creation of a common law right in favour of the service provider to use a portion of land for a specific purpose. Upon registration of a servitude, certain subsidiary rights and obligations relevant to the existence of such a servitude are prescribed either by the common law or in terms of an agreement, referred to as a "notarial deed of servitude". The common law and/or a notarial deed of servitude determine the way in which rights accruing from registration of such a servitude may be exercised, the duty to maintain the servitude area, and financial arrangements relevant to the installation of such a servitude.

The granting of a servitude over public land constitutes a form of alienation and the procedures provided in the State Land Disposal Act (Act 48 of 1961), Government Immovable Asset Management Act, 19 of 2007, Public Finance Management Act (for National and Provincial Roads) or the Municipal Finance Management Act (for Municipal Roads) may have to be followed for the registration of a servitude.

### 2.8 Multiple service providers

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A servitude on a particular portion of land may be granted in favour of more than one service provider (similar to a servitude road serving more than one property). The sharing of the same servitude by different service providers can be considered where it is physically possible and practical to install more than one service within the same portion of land. This option would normally only be considered where use can be made of service ducts in which the services can be installed.

### 2.9 Servitudes in new townships

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It is standard practice for municipalities to provide servitudes along some of the boundaries of erven in new townships for services. This practice allows provision of services outside road reserves.

In all new townships, particular attention must be given to service networks to avoid the need to unnecessarily install services in road reserves. It is, however, accepted that in many cases, the road reserve is the optimum position for the installation of services, particularly along the lower-order roads.

### 2.10 Legislation and services

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Servitudes are not required when ownership in a service is defined in terms of an act, such as the Electricity Regulation Act. The installation, protection, maintenance and eventual removal of such services are dealt with by way of legislation and such legislation affords the rights and protection that normally accrue from a servitude.

A complicated legal situation arises where, for example, a service provider, wishes to install and retain ownership of infrastructure within a public road reserve in terms of National or Provincial legislation and the applicable authority refuses to agree thereto or fails to co-operate with the service provider.

In terms of the schedules to the South African Constitution, Provincial Governments enjoy executive authority over Provincial roads whilst Municipalities enjoy executive authority over Municipal roads. Where a roads authority refuses to agree to the installation of a service, the question arises whether the relevant service provider may proceed with the installation of the service without the consent, authority or agreement from the relevant roads authority.

The following are two specific examples of national legislation:

- a) The Electricity Regulation Act 4 of 2006 (previously Eskom Act). Section 25 prescribes that a service provider (licensee) may install services “*over, in or along*

*roads or streets and associated infrastructure*". Such installation, however, is subject to the right of supervision and in accordance with the plans, routes and specifications of the authority or person in control of that street, except in cases of emergency or where the authority concerned fails or refuses to co-operate with the licensee. The section also stipulates that the service provider must comply with any laws or by-laws that may be applicable.

- b) The Electronic Communications Act 36 of 2005, Section 22 allows a service provider (licensee) to "*a) enter upon any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic and b) construct and maintain an electronic communications network or electronic communications facilities upon, under, over, along or across any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic*". In taking such action "*due regard must be had to applicable law and the environmental policy of the Republic*".

Section 24 of the Act, however, allows the service provider (licensee) "*after providing thirty (30) days prior written notice to the local authority or person owning or responsible for the care and maintenance of any street, road or footpath—*

- (a) construct and maintain in the manner specified in that notice any pipes, tunnels or tubes required for electronic communications network facilities under any such street, road or footpath;*
- (b) alter or remove any pipes, tunnels or tubes required for electronic communications network facilities under any such street, road or footpath and may for such purposes break or open up any street, road or footpath; and*
- (c) alter the position of any pipe, not being a sewer drain or main, for the supply of water, gas or electricity."*

From the above examples it appears that the service provider should attempt, as a matter of principle, to obtain the consent from the applicable roads authority before installing the services, but, in extraordinary circumstances, may proceed without such authority. Should any conflict arise pertaining to the afore-going, the Constitutional principles relevant to cooperative governance (Sections 41 and 146 of the Constitution) and other relevant Acts dealing with conflicts and the resolution of disputes relevant thereto, will have to be applied.

### 2.11 Different spheres of government

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Complex legal issues often arise in circumstances where, for example, a Municipality wishes to install services within a Provincial or National road reserve and the applicable roads authority refuses to grant its consent for the installation of such services.

Various factors and legal principles will play a role when consideration is given to the question as to whether it is competent for one sphere of Government to refuse to grant consent to another to enable such other sphere to perform its constitutional and/or statutory obligations:

Section 41(1) of the Constitution prescribes that “*all organs or state within each sphere must exercise their powers to perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere*”. The section, however, also prescribes each sphere must “*secure the well-being of the people of the Republic*” and to “*co-operate with one another in mutual trust and good faith by assisting and supporting one another*”. Municipalities, in particular, have a responsibility of providing services and other spheres of government should co-operate with municipalities to assist them to fulfil their obligations.

### **2.12 Liability**

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Road authorities have a duty of care and an obligation to ensure that the roads are safe and are capable of use by the general public without any undue risk. Should a roads authority fail to comply with this principle, it may be held liable for damages caused to users of the road. It is therefore essential that roads authorities apply formal procedures (wayleave applications) to regulate and control any construction with road reserves.

Roads authorities must ensure that when granting a wayleave in terms of “an agreement” with a third party, the terms and conditions subject to which such a wayleave is granted, are clearly stipulated and that the interests of the general public (users of the road) are protected and that the installer of the services assume full responsibility for compliance with all safety standards and requirements during the installation process and assumes liability for any risk and indemnify the relevant roads authority against any claim that may arise during or as a result of the installation process. This also applies to a situation where consent is granted to a service provider in terms of the Electronic Communications Act or the Electricity Regulation Act.

### **2.13 Compensation for servitudes**

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A road authority (or private owner) is entitled to be compensated for granting a servitude to any private or public body. The compensation must cover all direct and indirect costs, including the loss in value of the land.

The compensation should be in the form of both a once-off amount and an annual rental. The once-off amount must cover all costs involved when the service is initially installed (including the value of the land). The annual rental must cover the annual cost incurred by the municipality to manage and control services.

The value of the land in a road reserve, once the road has been proclaimed, could be considered to be minimal and the registration of a servitude does not necessary diminish the value of such land.

## 3 Accommodation of Services and Servitudes

### 3.1 Introduction

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This chapter provides general technical guidance on the accommodation of services and how servitudes can be accommodated in a road reserve.

### 3.2 Roads on which services can be accommodated

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There are certain conditions under which services cannot be accommodated in a road reserve with the result that servitudes should not be allowed on such roads. These conditions are:

- **Freeways.** Traffic speeds and volumes are normally very high on freeways. The installation and maintenance of services on such roads could be dangerous and disruptive to traffic and should therefore not be allowed unless provision can be made for alternative access to the servitude.
- **Narrow road reserves.** In situations where road reserves are narrow and the possibility exists that the road will have to be widened in future, services should not be allowed unless provision can be made for the required road widening.

In deciding whether a road reserve width can accommodate services, the following factors must be taken into account:

- **Roadway and median width.** The expected future roadway and median width, depending on the number of lanes that may be required. Provision must also be made for elements such as kerbs, auxiliary lanes, public transport, cuts and fills, drainage structures, etc.
- **Trees.** On roads where trees are required, allowance should be made for the minimum clear distances between the trees and the roadway provided in accordance to road safety requirements.
- **Pedestrian sidewalk.** Where required, provision must be made to accommodate a paved pedestrian walkway as well as a pedestrian buffer strip between the walkway and the roadway. The walkway should preferably be provided between the trees and the road reserve boundary.
- **Parking.** Where required (such as on residential streets), provision should be made for overflow parking on the road verges.
- **Services.** Existing services or services to be provided by the road authority must be taken into account in determining available space.

A verge width of 2.5 m on either side of the roadway (5.0 m total) is the absolute minimum required to accommodate municipal services in a road reserve.

### 3.3 Services that can be accommodated

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Road reserves are generally suitable to accommodate services that are provided in the form of pipes or cables, either underground or overhead. Such services may include, for example, stormwater, water, sanitation, electricity and communication cables.

Road reserves, however, are not suitable for accommodating structures that are not in the form of pipes or cables, except where such structures are very small (less than 0.5m wide) and where the structures can be installed directly adjacent to the road reserve boundary. Larger structures should not be allowed either above or below ground and should be located outside the road reserve. Alternatively, the road reserve could be widened locally to accommodate the structure. Examples of such larger structures include:

- Pump stations for water or sanitation;
- Electrical transformers and towers; and
- Communication interchanges and towers.

### 3.4 Servitude location

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Services and particularly service servitudes should preferably be installed or provided adjacent to the road reserve boundaries to accommodate future possible widening of the road (where sufficient road reserve exists). This requirement, however, does not apply to services that can be accommodated by means of underground service ducts (or sleeves) that will not affect future road widening.

Services can be installed a) underground, b) on the surface or c) overhead. Surface level servitudes would make the land useless for the road authority and should therefore not be granted. Both underground and overhead services can, however, be accommodated as follows:

- **Overhead services.** Services that can be provided overhead are usually limited to electricity and telephone. Such services must allow use of the servitude below the service for other purposes. Special care must be given to the location and design of poles that support overhead services.
- **Underground services.** Underground services (such as cables and small diameter pipes) should preferably be placed in service ducts (or sleeves) where it is possible to install and maintain the services in such ducts. Large diameter piped services such as water, sewerage and stormwater are normally not installed in service ducts. Where piped services (such as water or sewerage) that may require maintenance cross a road reserve, service culverts should be used to allow access to the pipe for maintenance purposes. Small diameter pipes such as erf connection water pipes should be install in ducts.

Where a service duct (or sleeve) cannot be used, the service provider must accept that the servitude may also be used for other purposes. The notarial deed will indicate which other structures or services may be allowed in the servitude. The service provider will also be responsible for any damage to the other structures and services that may be caused during the installation or maintenance of the service.

Trenchless methods should be used to install all transverse services and service ducts under existing roads, structures and other services, unless otherwise agreed to by the road authority.

A technical investigation must be undertaken to determine the required depth of the underground services. The services (or service ducts) must be installed at a location or depth where they would not interfere with the road pavement, structures or other services (now and in future). The standards and specifications of the municipality must be applied in the design of each service in the road reserve.

More information on the accommodation of services within road reserves is provided in Appendix B.

### 3.5 Relocation of Services and Service Servitudes

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Provision must be made in the notarial deed of a servitude for the relocation of the services or of the servitude itself. Such relocation may be required in situations such as the following:

- Road improvements.
- Relocation of the road or the road reserve.
- Road closures.

In situations where the services must be relocated, the service provider should be responsible for the cost of such relocation. The road authority cannot be held responsible for the risk that a service may have to be relocated in future for purposes of road provision.

In cases where the relocation of a road is required in terms of future road planning, it is preferred that the services should be installed according to the future road planning to avoid fruitless expenditure. It is ideal if the road authority could obtain the road reserve required for the future road as soon as possible to allow the services to be installed in the future position.

According to the Electronic Communications Act (Act 36 of 2005), "*the cost of the alteration or removal must be borne by that local authority or person*". This is an issue that should be addressed based on the Constitutional principles relevant to cooperative governance and the resolution of disputes will have to be applied.

### **3.6 Services and servitude database**

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It is of utmost importance that a database should be maintained showing the precise location of all services and servitudes. The information should preferably be mapped using a Graphical Information System (GIS).

An effective method of maintaining the database is to include conditions for the updating of the database in Wayleave applications and in the submission of as-built drawings. The service provider must be made responsible for providing information to the road authority in the required format. The positions of the servitudes must be determined by a qualified land surveyor.

## 4 Recommendations

### 4.1 Recommendations

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It is recommended that:

- a) All road reserves are owned by the road authority;
- b) All services in road reserves owned by the same authority as the service provider require no further protection;
- c) All services provided in a road reserve owned by an authority which is not the service provider should be protected by servitudes;
- d) Wayleaves be obtained for the construction of all services within the road reserve regardless of whether the service provider authority is the same as the road authority or not.

## Appendix A: Legal Viewpoint

### A.1 The Common Law

The following common law principles apply:

- e) Once a service, such as a water pipeline, has been installed in the immovable property belonging to another, the owner of such immovable property also becomes the owner of the service. It is therefore incorrect, from a legal point of view, to divorce ownership of services (once installed) from ownership of land.
- f) It stands to be noted that the aforesaid common law position can be amended or adjusted by way of legislation. In this regard and for example, Section 24 of the Electricity Regulation Act, 4 of 2006 (hereinafter referred to as the "Electricity Regulation Act"), dictates that "(1) Any asset belonging to a licensee that is lawfully constructed, erected, used, placed, installed or affixed to any land or premises not belonging to that licensee, remains the property of that licensee notwithstanding the fact that such an asset may be of a fixed or permanent nature."

Due to the fact that the party who installs a service parts with ownership in the service upon completion of the installation thereof, a practice has developed to protect such a service by the registration of a servitude. A servitude can be registered in favour of a dominant tenement over a subservient tenement (a so-called "*praedial servitude*") or in favour of a person, entity or public body (a so-called "*personal servitude*"). Some servitudes are also registered in favour of "*the general public*".

Registration of a servitude does not mean that ownership in a service be retained by the party who installed same. A servitude is a limited real right in terms of which the dominium (full ownership) of a portion of land is made subject to (limited) by the creation of a common law right in favour of a third party or dominant tenement to use a portion of land, normally clearly described, for a specific purpose, such as the conveyance of services. Upon registration of a servitude, certain subsidiary rights and obligations relevant to the existence of such a servitude are prescribed either by the common law or in terms of an agreement, commonly referred to as a "*notarial deed of servitude*". The common law and/or a notarial deed of servitude determine the way in which rights accruing from registration of such a servitude may be exercised, the duty to maintain the servitude area, services and financial arrangements relevant to the installation of such a servitude.

Registration of a servitude constitutes an encumbrance upon immovable property and a partial alienation of the rights that an owner of property enjoys in and to such property.

A servitude survives transfer of property from one party to another and is binding upon successors in title of immovable property.

Ownership in movable property, such as electrical cables, water pipes and the like, pass from the owner thereof to the owner of immovable property upon permanent attachment thereof to the immovable property, i.e. completion of installation.

As a general rule, ownership in immovable property passes from one party to another upon registration thereof in the applicable deeds office. There are however, certain statutory exemptions dealt with hereunder.

Arrangements pertaining to the installation and conveyance of services can also be dealt with by way of normal agreements, which create personal rights and obligations for parties to such an agreement. A typical example is a so-called “*way leave*” agreement entered into between a private entity and a public authority. These agreements, due to the personal nature thereof, are not binding on successors in title, save for as far as any statutory provisions to the contrary may apply.

As will be further discussed hereunder, services installed within public places, such as parks, public open space and streets, are, as a general rule, taken over by a Municipality and renders the question whether the services should be protected by a servitude, irrelevant (unless the service belongs to another entity such as Telkom). However, in some instances, ownership of a service is, by law, retained by a specific service provider (see, for example, A.1.2 above). Where ownership is retained by a licensee, for example Eskom, in terms of the Electricity Regulation Act, it is not necessary to protect the said services where same has been installed in the road reserve of a public road, by way of a servitude. The reason for the foregoing is that the installation, protection, maintenance and eventual removal of such services (which are normally dealt with by way of a notarial deed of servitude where such service is to be installed over private land), are all dealt with by way of legislation and such legislation affords the rights and protection that normally accrue from a servitude.

### **A.2 Ownership of National, Provincial and Municipal Road Reserves, Proclamation, Declaration, Expropriation and Zoning of Roads**

As a general rule, **full ownership** in National Road Reserves vest in SANRAL, pursuant to either an expropriation of that land or an agreement of sale and transfer of the land to SANRAL.

“*Ownership*” in Provincial and Municipal Roads differ. In some parts of the old Transvaal Province, Provincial Roads and Municipal Roads are mere servitudes registered over private property in favour the applicable sphere of Government. In other parts, full ownership is acquired by Provincial Government or Local Government, either in terms of a private treaty, subdivision and eventual registration in the Deeds Office into the name of the applicable Provincial Government or upon expropriation thereof.

A clear distinction must be drawn between expropriation of land and proclamation of a road where only the right to use a specific portion of land is “*taken*” by a Government Institution. Where land is expropriated, ownership of a property passes to the applicable authority upon the date of expropriation whilst, where a road is proclaimed, the right to use the portion of land for the purposes of a road, accrues in favour of Province from the day upon which that right was proclaimed. Municipalities also enjoy the powers to

expropriate either land or a servitude (no right to proclaim or declare a road exists in favour of a Municipality).

Where a right has been proclaimed, only the bare dominium (i.e. merely the ownership) of the property remains vested in the hands of the original owner and a “*statutory servitude*” is created in favour of the applicable public body, i.e. proclamation / declaration is equivalent to “rights to use” but not ownership.

With regard to land affected by or required for road reserves of national roads, SANRAL will not acquire or expropriate only the “*rights to use*” such land and always acquire or expropriate full ownership of the affected property.

The *modus operandi* applied by Provincial Governments differs (even within the jurisdictional areas of some Municipalities) and can take one or more of the following forms:

- a) Private treaty for the acquisition of either a servitude or full ownership.
- b) Expropriation of property (i.e. ownership) or only a right to use (i.e. a so-called “*servitude*”) pursuant to the declaration of a road (for example in terms of the 1957 Roads Ordinance where it still applies to the “*old Transvaal*” Provinces or proclamation in terms of the Gauteng Transport Infrastructure Act (GTIA), in Gauteng).
- c) In new townships and developments, a clear designation in a Layout Plan of areas that will be either Municipal or Provincial Roads. Upon proclamation of a township, Municipal Roads will automatically be transferred to a Municipality, whilst roads, designated within the boundaries of a township as Provincial Roads, must be physically transferred to Provincial Government.

A peculiar situation has developed in the Gauteng Province where, in terms of the Gauteng Transport Infrastructure Act, after publication of the route of a provincial road or the preliminary design thereof in the provincial gazette, permission of the MEC is required before any services may be installed that could affect future planned roads, even without the proclamation or expropriation of the road reserve.

The difference between proclamation, declaration and expropriation depends on the wording and intent of the applicable legislation. In most cases, however, the effect of the aforesaid legal action is the expropriation of either a right to use or full ownership.

As far as “*zoning*” of roads is concerned, a clear distinction must be drawn between the urban and rural scenarios:

- a) In general, roads in rural areas are not “*zoned*” and not incorporated into a town planning scheme with a specific zoning attached thereto. Roads will, where land was expropriated, merely be a portion of farm land where dominion normally vests in either Provincial Government or SANRAL. The use, rights and obligations of all parties concerned, relevant to the applicable road, are determined by the applicable roads legislation.
- b) In the urban setup (proclaimed townships), three different scenarios present themselves:
  - i) A portion of farm land (in the middle of a proclaimed township), belonging to the applicable organ of state, without a zoning;

- ii) A portion of farm land belonging to the original owner of the portion of land, subject to a servitude in favour of the applicable Provincial or Municipal authority or in favour of the general public, with or without a zoning;
- iii) A clearly defined portion of land (an “erf” in a proclaimed township) where ownership vests in either the Municipality, Provincial Government or SANRAL, normally zoned “Special” for a public, provincial or national road.

Public authorities must, under all circumstances (other than township transfer) pay for land and servitudes acquired, failing which, it will be inconsistent with Section 25 of our Constitution that prohibits “...*arbitrary deprivation of land*”.

### A.3 Comment on Ownership and Servitudes

From the above it is clear that a totally disjointed, fragmented and inconsistent approach and practices towards the “*creation*” and zoning of roads have developed in our country.

With the establishment of so-called “*wall to wall*” Municipalities and the intention to establish town planning or land use management schemes for **entire** Municipal areas, a unique opportunity to achieve uniformity has presented itself.

The following is proposed:

- a) That full ownership (not only “*rights to use*”) in all roads be transferred to the applicable authority and be reflected as such in the asset registers of the applicable authorities. Portions of land that are subject to permanent statutory “*rights to use*” for roads are worthless in the hands of the owner of the bare dominium and no financial consideration should (under normal circumstances) be applicable.
- b) That roads be incorporated into the Town Planning or Land Use Management Schemes of the applicable Municipality and, irrespective of whether same are to be found in urban or rural areas, be properly zoned as either National, Provincial or Municipal Roads, subject to the provisions of the applicable legislation.
- c) That the retention of “*farm portions*” incorporated within or abutting onto proclaimed townships and used as roads, be discouraged and that such roads form erven (part and parcel) of townships and be properly zoned.

Authorities should acquire the road reserves of planned future road as soon as possible to allow the co-ordinated development of land and installation of services.

### A.4 Services in Road Reserves and the Protection Thereof

As a starting point, regard must be had to the common law position pertaining to the ownership of services, referred to above.

The practical effect will be that where a road is, for example, owned by Provincial Government, services installed within the area of land **owned** by Provincial Government, such services will become the property of the said authority.

Due to the fact that the granting of a servitude over a public land will constitute a form of alienation, the cumbersome procedures contemplated in the State Land Disposal Act (Act 48 of 1961), Government Immovable Asset Management Act, 19 of 2007, Public Finance Management Act (for National and Provincial Roads) or the Municipal Finance Management Act (for Municipal Roads) will have to be followed before a servitude in favour of a private operator or entity is registered.

It is irrelevant in law whether the applicable service runs parallel within the reserve or merely across the same. From a technical point of view, however, the implications may be different.

As far as could be established, all applicable legislation makes provision for the installation of services by a third party service provider within road reserves. Strict requirements are prescribed in, *inter alia*, the SANRAL Act (Section 48) and the GTIA (Section 46). As an example, Section 46 of the GTIA determines, *inter alia*, the following:

- a) No person may without the MEC's written consent lay or establish "...a structure or other object on, over or below the surface of a Provincial road or railway line or a building restriction area...";
- b) The MEC may, when giving permission, prescribe specifications, the manner of installation, post installation obligations pertaining to maintenance, etc. ;
- c) Any obligations must, upon the request of the MEC, be noted by the Registrar of Deeds against the title deed of the land concerned;
- d) Costs to be paid by the person to whom permission has been given may be prescribed:
  - iv) Rental may be charged;
  - v) Inspection fees may be levied;
- e) Rights and duties pertaining to emergency maintenance or the removal or shifting of an applicable object if such object "*causes a dangerous situation*" may be prescribed.

The provision of Section 48 of the SANRAL Act affords similar powers to those listed above to that authority.

In general:

- a) A basic right to apply to the applicable authority exists.
- b) The relevant authority enjoys a discretion as to whether an application should be approved or not and such discretion will be exercised in terms of the principles, objectives and philosophies that underpin the applicable piece of legislation.
- c) Should an application be approved, the applicable authority has a wide discretion pertaining to the conditions, fees and rental.

In practice, public bodies are not keen to allow private service providers to establish services within the applicable road reserves. However, due to practical constraints, especially in urban areas, no other option exists. For example, the Gauteng Department

of Roads and Transport is currently (2009) involved in discussions with MTN pertaining to the installation of certain fibre optic cables within the Gautrans Road Reserves in the Sandton area.

A complicated legal situation arises where, for example, a service provider, such as Eskom or Telkom, wishes to install and retain ownership of infrastructure within a public road reserve and the applicable authority refuses to agree thereto, alternatively, fails to co-operate with the said service provider / licensee. The rights of the service provider have been created by way of National legislation whilst, in the case of Provincial and Municipal roads, the rights and authority enjoyed by the relevant roads authority are catered for in terms of Provincial legislation. In terms of the schedules to our Constitution, Provincial Governments enjoy executive authority over Provincial roads whilst Municipalities enjoy executive authority over Municipal roads. Where a roads authority refuses to agree to the installation of a service, the question arises whether the relevant service provider licensee may proceed with the installation of the said service without the consent, authority or agreement from the relevant roads authority. The following legal principles will apply to the abovementioned situation:

- a) As far as the supply of electricity by a licensee, such as Eskom, is concerned, Section 24 of the Electricity Regulation Act is clear for as far as it prescribes that, where services are to be installed *“over, in or along roads or streets and associated infrastructure”* such activity must be undertaken subject to the right of supervision and in accordance with the plans, routes and specifications of the authority or person in control of that street *“...except in cases of emergency or where the authority concerned fails or refuses to cooperate with the licensee”*;
- b) In terms of the Electronic Communications Act *“carte blanche”* is granted to a licensee to enter upon any land and to *“construct and maintain an electronic communications network or electronic communications facilities upon, under, over, along or across any land, including any street, road, footpath or land reserve for public purposes...”*;
- c) Section 24 of the Electronic Communications Act gives a licensee the right to, after providing 30 days prior written notice, construct pipes under streets (without any prior consultation with a Municipality);
- d) Section 22(2) of the Electronic Communications Act, forces the licensee to have *“due regard”* to *“applicable law and the environmental policy of the republic”* when installing an electronic communications network;
- e) In terms of Section 21(2) of the Electronic Communications Act, the National Minister is under a legal obligation to provide guidelines to licensees for obtaining the necessary permit, authorization, approval or under governmental authority and also for resolving disputes between a licensee and the owner of land.

From all the above examples it appears that a licensee must, as a matter of principle, obtain the consent from the applicable roads authority before installing the services (consistent with the provisions of the roads legislation referred to above), but, in extraordinary circumstances, may proceed without such authority. Should any conflict arise pertaining to the afore-going, the Constitutional principles relevant to cooperative governance (Section 41 of the Constitution) and Section 146 of the Constitution, dealing

with conflicts between National and Provincial legislation and the resolution of disputes relevant thereto, will have to be applied.

Where services are installed in road reserves, they are normally not protected by servitudes but rather by statutory provisions and prescriptions.

As far as Municipalities are concerned, the situation is more complex. Firstly, it must be kept in mind, as a general rule, that all "*external services*" and, in most instances, "*internal services*" are, after establishment of a township, in any event taken over by Council. The aforesaid has the effect that one will have to deal with Municipal Services in Municipal Road Reserves. As far as other service providers, such as Telkom, cell phone operators, Eskom and the like are concerned (where services are not taken over by Council) regard must be had to the provisions of the applicable Act, such as the Electronic Communications Act, Electricity Regulation Act and the like. Where private services are not protected in terms of the aforementioned legislation, services may indeed be protected by way of a servitude in favour of the service provider. In view thereof that the registration of a servitude constitutes a form of "*alienation*" of Municipal land, due care must be taken to ensure compliance with the Municipal Finance Management Act and applicable Local Government Ordinance.

In this regard and for example, the Local Government Ordinance that still applies in the old Transvaal Province determines the following:

- a) That the applicable Municipality shall have the control and management of all roads, streets and thoroughfares. Permission must be obtained by any person who wishes to excavate any soil, sand or gravel;
- b) A Municipality may grant a servitude on "*town lands or any other land of which Council is the owner*".

It has become common practice that, within a Municipal area and as far as Municipal Roads are concerned, services that are not taken over by Council and not protected by legislation are protected by servitudes.

Complex legal issues often arise in circumstances where, for example, a Municipality wishes to install services within a Provincial or National road reserve and the applicable roads authority refuses to grant its consent for the installation of such services.

The following factors and legal principles will play a role when consideration is given to the question as to whether it is competent for one sphere of Government to refuse to grant consent to another to enable such other sphere to perform its constitutional and/or statutory obligations:

Section 41(1) of the Constitution prescribes that "*all organs or state within each sphere must exercise their powers to perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere*". In this regard it is important to note that, in terms of our Constitution, Municipal services such as water and sanitation, are listed as executive Municipal competencies whilst, Provincial roads is specified as an area of exclusive Provincial competence.

The Gauteng Transport Infrastructure Act requires that preliminary design of a road must be carried out with due regard to holders of registered rights, existing or future services, as well as the interests and functions of municipalities and service providers.

In the Transvaal Province, Sections 84 and 142 of the Local Government Ordinance empowers a Municipality to, in its discretion, lay pipes, wire and sewerage works within public places and private property. Section 73 of the Municipal Systems Act, Act 23 of 2000, confers a duty upon a Municipality to “...ensure that all members of the local community have access to at least a minimum level of basic Municipal services.” Conversely, Section 46 of the GTIA purports to prescribe that the aforesaid cannot be complied with without the written consent of the Provincial MEC for roads.

Section 44(2) of the Constitution empowers National Parliament to pass legislation with regard to a matter falling within the exclusive Provincial competence, contemplated in Schedule 5 of the Constitution, when it is necessary to, inter alia, “...establish minimum standards required for the rendering of services”. For as far as National legislation, accordingly, authorizes a services provider, whether it is a Municipality, Eskom, Telkom or any other service provider, to install services within road reserves or other public places, such National legislation shall prevail over Provincial legislation where it determines that the written authorization from the MEC (or Municipality) has to be obtained first. It is, however, important to note that, save for the general provisions pertaining to a duty to deliver services, referred to in Section 73 of the Municipal Systems Act, no express National legislation exists in terms whereof a Municipality is empowered to install services wherever it may be necessary. In the Gauteng Province the Local Government Ordinance of 1939 is inconsistent with the GTIA for as far as the GTIA, prescribes that authorization has to be obtained from the MEC. In this regard, the GTIA is “later legislation” and, for as far as any provisions thereof may be inconsistent with the provisions of the earlier Local Government Ordinance, such later provisions supersede the earlier provisions that are inconsistent with the later Provincial legislation.

### A.5 Wayleave

Wayleaves are nothing more than agreements between third parties and authorities pertaining to the **installation** of services within Municipal, Provincial or National Road Reserves. With specific reference to Provincial and National Roads, the granting of a way leave is regulated in terms of the statutory consent contemplated in, for example, Section 46 of the GTIA and Section 48 of the SANRAL Act.

As far as Municipalities are concerned, a wayleave is normally granted to a private developer for the installation of an external service to link his township to the Municipal services. In essence, the wayleave relates more to the actual construction activities on Council land than the eventual conveyance of services. As stated above, link services or external services (water, sewerage, electricity and roads) are, due to the fact that they are situated outside the boundary of the township, normally taken over by a Municipality. Accordingly, from a Municipal perspective, a wayleave is a **temporary** consent from Council for the actual construction activities necessary for the installation of external services within a Municipal Road Reserve. Due to the fact that Council will take the service over, there is no question of registration of the servitude or the levying of any long term rent. Council may, however, charge a fee for the granting of a wayleave, subject thereto that such a fee has been incorporated in the fee tariff of the Municipality and published as a by-law.

## A.6 Other Considerations

A servitude can be registered over the same land for two different purposes. It is common to find servitudes registered over private land in favour of Council for the “*conveyance of Municipal services, emergency vehicles and refuse removal*”.

As stated above, a distinction must be drawn between a way leave (granting of consent by an authority for the physical construction and installation of services) and the statutory consent granted by SANRAL or an MEC for the long term accommodation of services in a road reserve. A way leave granted by Municipality is a temporary measure that will apply until such time as the service is taken over by Council – it must be kept in mind that, in some instances, a maintenance period will apply after the “*taking over*” of the service by Council during which period a further way leave may be required by the installer of the services, if not covered by either the original way leave approval or a services agreement, should construction activities be performed to access the particular service.

As far as telecommunication cables are concerned, it must be kept in mind that the installation of services such as telecommunication services, electrical reticulation and the status of such services are determined in terms of, *inter alia*, the Electronic Communications and Electricity Regulation Acts.

## A.7 Liability

As stated above, Municipalities enjoy executive constitutional authority over Municipal roads whilst Provincial Governments enjoy authority over Provincial Roads and National Government (SANRAL) over National roads. The aforesaid authority includes a duty of care and an obligation bestowed upon the relevant authority to ensure that the roads are safe and are capable of use by the general public without any undue risk. Should a roads authority fail to comply with the aforesaid principle, it may be held liable for damages caused to users of the road.

Roads authorities must ensure that when granting a wayleave in terms of “an agreement” with a third party, it is incumbent upon the roads authorities to ensure that the terms and conditions subject to which such a wayleave is granted, are clearly stipulated and that the interests of the general public (users of the road) are protected and that the installer of the services assume full responsibility for compliance with all safety standards and requirements during the installation process and assumes liability for any risk and indemnify the relevant roads authority against any claim that may arise during or as a result of the installation process. The aforesaid will also apply to a situation where consent is granted by a roads authority to a licensee in terms of either the Electronic Communications Act or the Electricity Regulation Act.

Liability to a road authority will only arise if a third party can show that a road authority was negligent. In order to avoid liability, it is incumbent upon the roads authority to ensure that all the applicable contractual obligations are placed on the installer of the services

and that proper supervision by a roads authority during the installation process, takes place.

In terms of, for example, the Electricity Regulation Act (Section 25) it is stipulated that, in civil proceedings against a licensee arising out of damage or injury caused by the transmission or distribution of electricity, such damage or injury will be deemed to have been caused by the negligence of the licensee.

## Appendix B: Typical accommodation of services in road reserves

The following information is provided as guidelines for the accommodation of services in road reserves and road authorities are not constrained to comply with these guidelines. Requirements may be different at different locations and a technical investigation should be undertaken to establish the optimum accommodation of the services.

Service	Type	Typical accommodation
Stormwater		Generally underground in urban areas, surface in rural areas. Within road reserve.
Watercourse, rivers, dams, irrigation pipes		Not in road reserve
Water supply	Potable bulk (municipality or service provider)	Not normally in road reserve
	Potable distribution (municipality)	Underground, adjacent or near to low side of road reserve. 0.7 m wide, 1.0 m deep
	Fire hydrant	Maximum 1.5 m from reserve boundary (low side)
Sewerage (waste water)	Bulk (municipality)	Not normally in road reserve
	Distribution (municipality)	On low or high side, adjacent or near to road reserve boundary. 1.0 m wide, minimum 1.5 m, preferably 3.5 m deep
Electricity	High voltage (>22kV) (Eskom)	Generally overhead but sometimes underground in oil cooled pipelines. Outside road reserve. 7.5 m minimum vertical clearance when crossing road.
	Low voltage urban (<22kV)	Underground or overhead in road reserve.
	Low voltage rural (<22kV)	Generally overhead outside road reserve
	Distribution (municipal)	Generally underground, adjacent or near to the high side boundary within the road reserve, or overhead in same location. 1.0 m wide,
Telephone and telecommunications	Rural	Overhead within the road reserve, adjacent or near to the boundary. Within a sleeve at least 1,0 m deep if underground with warning tape 0.5 m deep. Poles to be outside road reserve when crossing the road, with cables minimum 6,5 m clearance (7,5 m for super load routes)
	Urban	Underground, adjacent or near to the low side of road reserve boundary.
Gas or Steam		Underground pipe within or outside road reserve
Oil or fuel		Normally outside road reserve