

15 June 2017

**TO:** DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM

**ATTENTION:** VALUER-GENERAL: OFFICE OF THE VALUER-GENERAL

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**COMMENT ON THE PROPOSED REGULATIONS IN TERMS OF THE PROPERTY VALUATION ACT, 2014 (ACT NO 17 OF 2014) AS PUBLISHED IN THE GOVERNMENT GAZETTE 40793, NOTICE NO 365 ON 21 APRIL 2017**

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## 1. Purpose and overview

This document comprises the public comment from the business rights watchdog AfriBusiness and pertains to the proposed Regulations in terms of the Property Valuation Act, 2014 (Act No 17 of 2014) (hereinafter referred to as “the Regulations”). The purpose of this submission is to focus your attention on some constitutional challenges and objections that we believe will arise if the proposed Regulations is signed into law. AfriBusiness therefore we appeal to you to reconsider same based on the grounds set out below.

The Regulations in its current form appears to be inconsistent with the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as “the Constitution”). If passed into law or given effect, the Regulations will have dire economic and social consequences. Our intention is to comment on the Regulations and relevant sections thereof chronologically. Although we focus on specific aspects mentioned herein, it should be noted that we object to the Regulations in its entirety.

## 2. Preamble: Who is AfriBusiness?

AfriBusiness is an inclusive, not-for-profit business rights watchdog that was established in 2011 by senior business individuals to act on behalf of the Afrikaans business community. On the date of these comments we had over 11 000 members, comprising companies as well as private individuals.

Our members play an increasing role as entrepreneurs, financiers and job creators in South Africa. They have given us the mandate to protect and promote the values enshrined in the Constitution on their behalf, to fight corruption and to create a sound business platform for all to prosper in South Africa. It is against this background that we raise the following concerns pertaining to the Regulations.

## 3. General remarks

It appears that the draft Regulations are not in line with the constitutional prescriptions for the determination of compensation payable in terms of the factors listed in the sub-paragraphs to section 25(3) of the Constitution. It appears that the Regulations aim to introduce additional

factors that cannot be considered as being in line with the Constitution. The Regulations in its current form will not pass constitutional muster. It furthermore appears that the draft regulations intend to introduce a tick-box approach.

This is contrary to the right of administrative action as contemplated in Section 33 of the Constitution. It is of further importance that section 25(2)(b) dictates that the amount of compensation in the event of expropriation must either be agreed to or must be approved by **a Court**. It is furthermore submitted that the Valuer-General cannot conduct these valuations as final adjudicator and especially not by following a tick-box approach. It is submitted that a Court of law will not be bound by the Regulations and will rather focus on the factors as listed in section 25(3) of the Constitution.

It is of great concern that the draft Regulations attempt to reduce the compensation payable in instances where land/property was acquired under conditions that were not normal market-related conditions. One has to bear in mind that the various financial institutions such as the Land Bank and other commercial banks who lending funds to landowners usually register bonds over the land as security. Should a landowner then default on the loan, the property is sold in execution.

Prospective buyers and/or investors will however not be willing to risk purchasing land on execution sales, as this will reduce the value of any compensation possibly payable to them in future if the land ends up being expropriated. This severely restricts the value of the security to the various financial institutions, which will inevitably result in these institutions not making financing readily available. This will lead to a decrease in economic growth to the detriment of the agricultural sector and South Africa in general.

We will now deal with the various portions of the draft regulations that are deemed important to address *ad seriatim*.

## 4. Section 1 – Definitions

### 4.1 “Acquisition benefits”

This definition is troubling to say the least. We have already addressed the concern of land being bought in execution, for example. Further difficulties will arise if land is inherited. It is also possible that land is bought at a reduced price from a seller who suffers financial hardship at the time. This does not affect the actual value of the land and the potential thereof. If this definition is allowed to influence the quantum of a valuation, it will be severely detrimental to the economy – especially the agricultural sector and the banking industry.

### 4.2 “Current use value”

This definition dictates that cash inflows and other benefits should be taken into account in the valuation process, which is not in line with economic realities. Occasionally, landowners suffer economic difficulties or experience natural disasters such as drought, which severely reduce the economic activities on and/or turnover of the land. If, for example, expropriation occurs during such a negative economic period, it is submitted that it would be extremely unfair and inconsistent with the Constitution to let such factors reduce the compensation amount payable.

### 4.3 “Highest and best value”

It is submitted that it will be appropriate to always consider the potential of any piece of land or property that is subject to expropriation.

### 4.4 “Net present value”

This is defined as the net cash inflows or other benefits and outflows, but the time frames of these cash flows are not defined. Although it is generally accepted in the profession to be perpetual income and expenses, it may be incorrectly interpreted and should be more comprehensively defined according to tried and tested economic principles.

It is further contended that it is inappropriate to have regard to the “*net present value*” in light of the complaint already raised above that one cannot consider activities conducted on land at any point in time to determine the compensation. There are realities such as drought and economic factors that may affect economic activities on land. One must also bear in mind that some enterprises may be in a start-up phase, i.e. is still growing and emerging into full production.

It also often occurs that land or property is acquired with the purpose of rezoning it for different purposes. During these periods the land may often be left vacant without any economic activity. It would be unfair to penalise landowners who are in the process of rezoning and temporarily do not conduct economic activities.

#### 4.5     “*Valuation certificate*”

It is troubling that this definition is limited to the particulars contained in the definition. Landowners who wish to object to a valuation by the Valuator-General will only be furnished with the valuation certificate. It contains extremely limited information, which makes it very difficult to respond in a meaningful manner.

### 5.       Section 2 – Powers of the Valuer-General

It is inappropriate to create powers for the Valuer-General in a set of regulations – such powers should rather be created in terms of an Act of Parliament. It is also submitted that an ulterior motive exists for the compiling of a list of information or a database in the light of the proposed Regulation of Agricultural Land Holdings Bill that was recently opened to public comment. AfriBusiness pointed out in our commentary on that Bill that any land could basically be expropriated.

If such a database is compiled, it may enable the Department of Rural Development and Land Reform and/or the Valuator-General to identify properties which can be acquired at very low prices – and these property owners may be intimidated into selling their properties. It is also submitted that the prescribed information – for example financing terms, financial statements, tenancy details, leasing costs, etc. – constitutes protected information. The constitutional right to privacy as contemplated in Section 14 of the Constitution will be violated if owners are

compelled to provide the details listed in the sub-paragraphs to section 2(1)(e). Once again, the Regulations prove to be inconsistent with the Constitution. It is further submitted that the Regulations in this instance go far beyond the scope and intent of the Property Valuation Act, 2014 (Act No 17 of 2014).

## 6. Section 3 – Protection of information

It is stated that information will be disclosed due to the keeping of a public register. It also appears that only the information that was obtained “*in the process of conducting such valuation*” (own emphasis) will be protected. The final findings and/or compiled information therefore does not appear to be protected. This violates the constitutional rights to privacy. There also does not seem to be any reference to the Protection of Personal Information Act, 2013 (Act No 7 of 2013) as to how information will be protected after it has been collected, especially in terms of documents and other material with private personal information about the identities of affected individuals.

## 7. Section 4 – Valuation practices, methods, standards and procedures

It is troublesome that this section states that all valuations must be conducted in accordance with generally-recognised valuation practices and methods, without providing a definition in this regard as to what these practices and methods constitute. It is submitted that this is not a matter of discretion and “generally-recognised” practices should be fully described. Sub-paragraph 4 is vague about the notice to be delivered to the concerned owner. It is also unclear who will be able to provide counter valuations, and whether or not there are any set and sound principles to be used by all.

It is a reality that various landowners may not reside on their immovable properties or reside only on some of these immovable properties that they may possibly own. Furthermore, a period of seven (7) days is insufficient for an owner to obtain his/her own legal advice in terms of a valuation.

The Regulations also appear to create a right for the Valuer-General to simply enter the affected property. It is a reality that crime is a huge problem, especially in the rural areas of South Africa. Landowners can therefore not be expected to simply allow individuals to enter their property unannounced and/or without permission. It also remains a mystery as to how

the boundaries of these property will be determined and/or inspected by an outsider and/or how the individual will navigate on the land without the assistance of the landowner.

## 8. Section 5 – Procedures for valuations of property identified for purposes of land reform

The procedures of valuations and the criteria have already been criticized. It has already been mentioned that the “*current use value*” is a draconic measure that is not in line with current economic realities. It is further unclear which acquisition benefits will qualify for consideration and which won’t. Once again, the factors listed in sub-section (d) are inconsistent with the factors listed in section 25(3) of the Constitution.

Under Sub-section 5(1)(d)(v) the date of valuation would be in conflict with the effective date of valuation. How will this adjustment be performed for the time difference, as it is not only time value of money that should be considered, but also the change in value due to growth of crops, timber, etc.? Another matter for consideration is how compensation will be determined, given the difference in the actual compensation date, in relation to the valuation date and also the effective date of valuation.

Furthermore, it is worrisome that Sub-section (e) dictates that previous transactions by the State can be taken into account in determining market value. Thus, if the State has already paid a less than market-related value for a property in any specific area, this will further reduce the price of a subject property.

How will prices/compensation that was paid by the State be used as evidence, as these prices, according to the suggested method of valuation, will not necessarily be at market value? Will this take into consideration the level of adjustment between market value and “*just and equitable*” value of such a comparable property, or does this assume an open market situation? How will such an adjustment be calculated, on what information will it be based, and how will such information be obtained? It is recommended to include a clause that deals specifically with these issues.

It is further unclear how the Regulations will be set to align with the Regulation of Agricultural Land Holdings Bill as it creates the possibility of arable land to be expropriated. We contend

that the proposed Bill and the Regulations will be inconsistent with each other, and may amount to prejudice and unfairness to the extent of unlawful expropriation.

## **9. Section 6 – Determination of the value of the subject property**

This is the most troublesome section of the Regulations and is without doubt inconsistent with section 25(3) of the Constitution. The prescribed formulae are nonsensical and completely unaligned with market principles. It makes no sense to add the “current use value” and “market value” together and then divide this figure by two?

## **10. Section 7 – Directives for the valuation of subject property**

We submit that it is impermissible to dictate that all valuations in terms of the Property Valuation Act, 2014 (Act No 17 of 2014) will be conducted subject to directives. The Regulations already contain prescriptions in this regard. If any further “directives” are to be issued, these must be made subject to public input.

## **11. Section 8 – Valuation reports**

Although this section appears to be comprehensive as to the detail that should be contained in the valuation report, it nevertheless is not in line with Section 25(3) of the Constitution.

## **12. Section 9 – Representations by owner or persons in charge of property**

It is of concern that only the valuation certificate will be provided to an owner for comment. The full valuation report, which should give a more detailed explanation of the factors considered, will not be made available to the owner. This is once again inconsistent with the provisions of Section 33 of the Constitution. It is furthermore submitted that a period of thirty (30) days within which to make representations is insufficient if the owner wants to obtain legal advice and/or a valuator of his/her own, in essence disregarding the *audi alteram partem* principle.

## 13. Specific questions requiring your attention

We request answers to the following questions which seem not to be addressed in the Regulations:

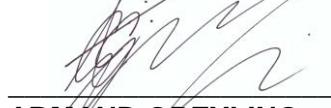
1. What is the process in case of properties with shared rights?
2. What is the process in case of properties where specific rebates apply, for example "melmouth cane growers rebate"?
3. What occurs when a property is subject to a lease, either over the short or the long term ("Huur gaat voor koop")?
4. What is the process in case of properties that have been subdivided (proportional benefit rebate)?
5. What is the assumption of responsibility for obtaining data regarding use, for example financial statements, etc. (time/accuracy/queries)?

## 14. Conclusion

We submit that the Regulations are draconic and inconsistent with the Constitution. These draft Regulations will be open to abuse if enacted. It is submitted that the draft Regulations in current form cannot and should not be enacted, but rather repealed and/or reviewed in its entirety. It is furthermore submitted that the timeframes within which public participation is to take place is insufficient, if regard is given to the importance of the regulations and its effect on the country as a whole. A further 30 to 60 days would suffice as a justifiable extension period considering the above-mentioned. Kindly inform us of any further participatory events in this regard.

We trust that you will consider our submissions favourably and kindly request that you will inform us of the outcome of your decision once it has been made.

Yours truly,



**ARMAND GREYLING**  
LAW AND POLICY ANALYST  
AFRIBUSINESS