

DLA HANDBOOK ON PROPERTY VALUATION

May 2000

Version 1

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Preface

The aim of this Handbook is to provide a reference resource for professional valuers who perform valuations for the Department of Land Affairs (DLA), as well as for the PDLA staff who commission and interpret these valuations on a day-to-day basis. It is hoped that the Handbook will therefore promote an all-around better understanding of what is expected of professional valuations that are conducted in connection with the Land Reform Programme.

The Handbook seeks to be comprehensive, by providing guidelines as to how valuations are to be conducted for each of the DLA's main land reform programme areas, that is, redistribution, tenure reform, labour tenants, and restitution, although at this point in time the coverage of restitution is incomplete, pending further policy developments. Moreover, where appropriate, we attempt to specify variations within these main programme areas (e.g. private land versus state land, etc.), and summarize the underlying legal issues, especially in respect of the applications of the Constitution's property clause.

The Handbook is organized as follows. Chapter 1 consists of a standard terms of reference for professional valuations, including guidelines for valuation reports. These terms of reference are meant only as a guide, in the sense that they will have to be adapted to the specific circumstances at hand. Each provincial office or each DLA staff member can adapt the standard terms of reference as required. Chapter 2 serves to explain in summary form the policies under which valuations for the DLA are undertaken, mainly in terms of the specific pieces of legislation according to which these policies are pursued. Chapter 3 summarizes the general principles that valuers need to take into account when valuing land at the request of the DLA. The emphasis of this chapter is on the interpretation of the property clause of the Constitution, which stipulates the factors to be taken into account in determining a just and equitable compensation in the context of expropriation. Chapter 4 presents more specific, practical guidelines bearing on the different circumstances for which valuations are required, while the Appendix provides additional reference material that may be of use.

This is the first version of the Handbook, but hopefully not the last. While the Handbook has already benefitted from comments from both inside and outside of the DLA, it will no doubt benefit from further feedback. Moreover, as policy evolves, and court judgements refine our understanding of the application of the Constitution's property clause, etc., the Handbook will need to be revised. We invite anyone with comments on the Handbook, whether in terms of content or presentation, to submit them to the Director: Redistribution Policy and Systems, Department of Land Affairs, Private Bag x833, Pretoria 0001.

1 Standard Terms of Reference for Professional Valuations

This chapter sets out the main requirements to be included in a terms of reference for professional valuations. The terms of reference will determine the quality of the valuation report furnished to DLA. The valuer depends on clear instructions and specifications regarding what the planner wants to be valued and what type of report is needed.

DLA requires that an independent valuer who is registered with the Council of Valuers must endorse the valuation. Care must be taken not to mistake this Council with the SA Institute of Valuers. The Institute is a voluntary body whereas the Council for Valuers is a body set up in terms of the Values Act, 1982 (Act No. 23). An exception to the above is where the valuation is of state land in the context of state land disposal. In this situation, the valuation can be undertaken by the provincial department of agriculture.

The general policy of the DLA is that all valuations are to estimate fair market value using the comparable sales method, except when this is not practicable, or for particular types of land. Where a valuer deems that market value cannot be estimated because it is not practicable to do so, she will be expected to explain the specific circumstances that make it impracticable. For cases involving rural land, the alternative to market value will normally be productive value, while for cases involving urban land, the alternative will normally be replacement value. (This is discussed more in later chapters.)

The planner should see him/herself as the administrative appraiser, who needs to analyse the valuation report. Reviewing/appraising the report is good business practice as a form of quality control and risk assessment. The report should not be appraised in terms of right versus wrong, but rather in terms of reasonable versus unreasonable.

Project/property description

The terms of reference should contain basic information about the project and the property:

- Γ Project name;
- Γ Location (including magisterial district);
- Γ Project reference number;
- Γ Project officer;
- Γ Accurate legal description of the property and the name of owner and contact number;
- Γ Brief history of the project, goal of project and whether any negotiations have taken place with the current property owner;
- Γ The rationale behind the valuation (e.g. to help DLA negotiate a fair price).

Instruction to the valuer/statement of work

The valuer should be instructed to:

- Γ State the extent of the process of collecting, confirming, and reporting data.
- Γ Collect, verify, analyse and reconcile data as are available in support of his/her conclusion.
- Γ Include and explain all calculations showing how data (e.g. comparables) have been applied. Applicability of comparables, reasons for acceptance or rejection of data and final adjustments must be included.
- Γ Describe the information considered, the procedures followed, and the reasoning that supports the analyses, opinions and conclusions.
- Γ Include an inventory of equipment (e.g. pumps, irrigation equipment, watering points) and improvements (e.g. structures); however, note that component values must be included by way of showing influences on the overall value, rather than applied in terms of a >summation of components= approach¹

Where comparable sales are being used to estimated market value (this should be most of the time), a minimum of 5 selected sales should be used, though 10 would be better. The valuer should be instructed to:

- Ξ Indicate of the scope of the deeds search in terms of radius and time frame - a deeds search may extend over a 20-30 km radius and go back 3-5 years;
- Ξ Include a list of all comparable sales, and not only selected sales with which subject property has been compared;
- Ξ Explain why certain sales were excluded from further analysis;
- Ξ Indicate how market data were interpreted, adjusted and applied; and
- Ξ Provide the date and price of the subject property=s most recent sale.

Implementation schedule

The terms of reference should specify the time frames and provide a date for submission of the valuation report to DLA. If the valuer will be expected to present the findings at the Provincial Projects Approval Committee meeting or any other meeting, this must be indicated.

Tendering procedures

The terms of reference should explain the provincial office=s procurement system and tendering procedures, which will include the criteria used to evaluate the valuer=s tender. The valuer should be provided with the necessary copies of the tender documents (ST8 & ST12). As part of his/her tender, the valuer will be expected to specify his/her expenses, inclusive of VAT, administration and transport costs, and be based on a breakdown of activities.

¹ That is, a property value is not to be construed as simply the sum of the values of its separate components, e.g. dwellings, outbuildings, grazing land, arable land, etc.

Alternatives to market value

The terms of references may have to leave space for alternatives to market valuation. In these cases, terms of reference should require the valuer to approach the DLA at the outset to explain why market valuation is not practicable. It is not acceptable practice for the valuer to inform the DLA that something other than market value was estimated, only upon submitting the valuation report.

It should be stated that where productive value is used, the end result be reported twice, on the basis of both 5% and 10% capitalization rates. Secondly, the valuation report should justify what type of >highest and best use= (i.e. in terms of productive activities) was employed as the basis of determining productive value. In general, highest and best use should be consistent with the aims of the project.

Valuation reports

The terms of references should specify what is expected from valuation reports. Generally, the valuation report should include the following:

Introduction:

The client=s brief and purpose of the valuation
Definition of value used
Valuation approach
The date(s) of valuation
The date of inspection of the subject property
Effective date of valuation

Title deed information:

Title deed
Full description of property in terms of deed
Registered owner
Surveyor diagram of property
Area of property
Area required for purpose of valuation
Date of acquisition by present owner and
Purchase price
Bonds
Servitudes
Mineral rights (if applicable)

Physical description:

Situation
Nature of surrounding neighbourhood/area
Distances from important points
Availability of services and amenities

Historical background, applicable
Features of property, incl. dimensions, frontage contours, soil types, surface drainage, etc.
Climatic conditions and water supply, if applicable
Buildings and other improvements
Water supply and water rights

Description of agriculture on the property:

Productive capacity and income potential - carrying capacity, soil fertility and irrigation
Farm budget (income and expenditure data)

Establishment of comparables:

Market identification of property - potential and highest and best use
Market conditions
Comparable factors
Comparable properties

Application of comparables:

Method of valuation
Effective valuation together with motivation - include all calculations showing how comparables have been applied. Asking prices, applicability of comparable, acceptance of data, capitalization rates, final adjustments

Conclusion and Certificate of Value

The conclusion consists of the valuer's final judgement as to the value of the subject property. The Certificate of Value (or Valuer's Certificate, Valuation Certificate, etc.) is a statement to the effect that the valuer has reached her or his conclusion on the basis of considering all relevant factors, subject to stated assumptions and limiting conditions, and without prejudice due to any present or contemplated interest in the properties or the outcome of the valuation.

Finally, the organisation of the valuation report should be as follows:

Title page
Table of contents
Instruction
Purpose of valuation
Date of inspection
Effective date of valuation
Statement of limiting conditions
Certificate of value
Annexures
Location map of subject property and comparable properties
Diagram of subject property
Copy of relevant title deed
Copies of all the relevant documents

Photographs

Note: it may not be necessary to include all the above. Planners need to go through the list and confirm what is needed for the specific valuation at hand.

2 Summary of Relevant Land Reform Policies and Legislation

There are five circumstances in which the DLA may approach a valuer to assess the value of land:

- under Act 126;
- under the Restitution Act;
- under the Labour Tenants Act;
- under the ESTA; and
- in connection with the disposal of state land

Each of these five circumstances will be discussed in turn.

2.1 Valuation of land under Act 126

Act 126 (the Provision of Land and Assistance Act 126 of 1993) is the main statutory vehicle through which the DLA's land redistribution programme is currently being implemented. At present, redistribution policy is premised on a willing seller/willing buyer model. In accordance with this model, officials in the Department's provincial offices (APDLAs) may approach professional valuers to assess the value of agricultural land in order to establish a framework for negotiations between the PDLA and the owner of the land.

Expropriation of land is possible under Act 126, but according to current policy should be used as an option of last resort only. Section 12 of the Act provides that:

(1) Without derogating from the powers that a Minister may exercise under the Expropriation Act, 1975 (Act 63 of 1975), the Minister [of Land Affairs] may for the purposes of this Act, exercise equivalent powers to the powers that such other Minister may exercise under the Expropriation Act, 1975.

(2) Ψ.

(3) In the event of expropriation, compensation shall be paid as prescribed by the Constitution, with due regard to the provisions of section 12 (3), (4) and (5) of the Expropriation Act, 1975.

(4) Any right in land which derives from the provisions of this Act will be capable of expropriation in accordance with the provisions of any applicable legislation.

Where resort is had to section 12, a valuer will be requested to assess the value of land for the purposes of making an offer of compensation to the owner as provided for in the Expropriation Act, read with section 25 of the Constitution.

2.2 Valuation of land under the Restitution Act

In terms of section 35(5A) of the Restitution of Land Rights Act 22 of 1994 (Athe Restitution Act≡), the Minister of Land Affairs:

has the power pursuant to an order of the [Land Claims Court] under section 35 (1) or an agreement in terms of section 42D, to expropriate land, a portion of land or a right in land in order to restore or award it to a claimant, mutatis mutandis in accordance with the Expropriation Act, 1975 (Act 63 of 1975), and may perform the functions of the Minister of Public Works in terms of that Act: Provided that the owner of such land, portion of land or right in land shall be entitled to just and equitable compensation, determined either by agreement or by the Court as prescribed by the Constitution, with due regard to the provisions of section 12 (3), (4) and (5) of the Expropriation Act, 1975: Provided further that the rules of the Court made under section 32 shall govern the procedure of the Court in the determination of such compensation.

Practically, what this means is that valuers may be approached by the DLA to value land under the Restitution Act in one of two circumstances:

- X pursuant to an order by the Land Claims Court that land be expropriated by the state and restored to a restitution claimant; or
- X for the purposes of facilitating an agreement between affected parties on the way in which a restitution claim should be settled.

In addition, the DLA makes use of valuers in the implementation of section 2(2) of the Restitution Act, which requires the Commission on Restitution of Land Rights (part of the DLA) to reject claims where just and equitable compensation in accordance with section 25(3) of the Constitution was paid to the claimant at the time of the dispossession. This exercise involves an historical valuation of what the land was worth at the time of the dispossession, compared to what the claimants were actually paid in compensation.

2.3 Valuation of land under the Labour Tenants Act

Chapter III of the Land Reform (Labour Tenants) Act 3 of 1996 (Athe Labour Tenants Act≡) gives people who qualify as labour tenants the right to apply for the land that they are entitled to occupy in terms of the Act, land that their family occupied or used in the five years prior to the commencement of the Act, alternative rights in land in the vicinity of the land they are currently occupying, and ancillary servitudes. Upon being notified of such an application, the owner of the land may admit that the applicant is a labour tenant, and propose a means by which the claim may be settled. Typically, this means that the owner, the applicant and the DLA will enter into a tripartite agreement providing for the valuation of the land by a valuer appointed by the responsible PDLA. The applicable legislative provision in this instance is section 23(1) of the Labour Tenants Act, which provides that:

The owner of affected land or any other person whose rights are affected shall be entitled

to just and equitable compensation as prescribed by the Constitution for the acquisition by the applicant of land or a right in land.

2.4 Valuation of land under the ESTA

Section 4 of the Extension of Security of Tenure Act 62 of 1997 (Athe ESTA≡) provides for the release of government subsidies to fund the establishment of Aon-site≡ and Aoff-site≡ developments. A development under the ESTA is akin to a redistribution project under Act 126. The policy of willing seller/willing buyer accordingly applies, and the role of valuers will be similar to that described in 2.1 above. Where expropriation is used as a last resort, valuers may be required to value land in order to guide the Minister in making an offer of compensation to the landowner. The applicable provision in this instance is section 26 of the ESTA, which provides that:

(1) Without derogating from the powers that a Minister may exercise under the Expropriation Act, 1975 (Act 63 of 1975), the Minister [of Land Affairs] may for the purposes of any development in terms of this Act, exercise equivalent powers to the powers that such other Minister may exercise under the Expropriation Act, 1975.

(2) Ψ.

(3) In the event of expropriation, compensation shall be paid as prescribed by the Constitution, with due regard to the provisions of section 12 (3), (4) and (5) of the Expropriation Act, 1975.

(4) Any right in land which derives from the provisions of this Act will be capable of expropriation in accordance with the provisions of any applicable legislation.

2.5 Valuation of land in connection with state land disposal

The disposal of state land to land reform beneficiaries differs, of course, from the acquisition of land on the open market or through expropriation. State land must nevertheless be valued before it is transferred, for two reasons: in order to assess the financial contribution, if any, that the land reform beneficiaries should make; and for accounting purposes, i.e. to determine how much state resources have been >spent= in terms of the transfer of that land. Valuers will accordingly be called on to assist the DLA in this regard.

3 General Principles and the Interpretation of 25(3) of the Constitution

3.1 Introduction

Where land is transferred according to the willing buyer/willing seller model, the DLA is essentially in the position of a private buyer. The valuation of land acquired in this way should accordingly be aimed at assessing the reasonable market value of the land according to established valuation methods. However, the DLA must not assume that just because a seller's asking price falls within the value estimated by the valuer, therefore the property is a >good buy=. Most notably, the estimated market value may reflect aspects of the property that truly enhance its value, but which the DLA would not necessarily wish to assist people to purchase. For instance, tennis courts and large, beautiful houses may indeed enhance the market value of properties in certain locations, but it is doubtful that DLA can justify the acquisition of such properties in the name of land reform, except under certain circumstance. In other cases, the existence of a tennis court may be judged to have little bearing on the market value of the property, in which case it is not an issue.

In certain circumstances, estimating reasonable market value is not practicable. In these cases, the valuer will be expected to state why market value cannot be estimated, and then, for cases involving rural land, the alternative will normally be productive value, while for cases involving urban land, the alternative will normally be replacement value. Terms of reference must be written in such a manner that valuers do not undertake these alternatives without the express consent of the DLA.

Since the basis on which state land should be valued prior to transfer to land reform beneficiaries is currently under discussion within the DLA, no guidance is given to valuers at this stage, except to say that it is likely that state land will be valued according to its productive value.

The following sections of this chapter apply to the remaining situations in which the DLA may call on valuers to assess the value of land for the purposes of land reform, viz. situations where land is expropriated, either directly (by the Minister of Land Affairs, using the procedures laid down in the Expropriation Act) or indirectly (judicial expropriation by the Land Claims Court in terms of the Restitution Act or the Labour Tenants Act). What connects these situations is the fact that valuers will have to take into account the compensation standard contained in section 25(3) of the Constitution. The constitutional compensation standard has recently been the subject of two judgments by the Land Claims Court. The primary purpose of the guidelines that follow is to convey to valuers the DLA's understanding of the principles enunciated in these judgments in order to assist them when valuing land under the affected components of the land reform programme. The affected components are:

- ∃ valuation of land for all purposes connected with the Restitution Act, including historical land valuation;
- ∃ valuation of land for all purposes connected with the Labour Tenants Act; and
- ∃ valuation of land where land is expropriated in terms of Act 126 or the ESTA.

Where the requested valuation falls under one of these headings, the following general principles apply:

- N the valuation must be conducted in two stages, the first aimed at assessing the market value of the land, the second aimed at calculating the just and equitable compensation that the state must pay for the land;
- N the Pointe Gourde principle must be applied during the first stage of the valuation process;
- N the comparable sales method is the preferred method for assessing market value during the first stage of the valuation process; and
- N constitutional factors other than market value must be factored in only at the second stage of the valuation process.

Each of these principles is elaborated upon below.

3.2 Valuation as a two-step process

According to the Land Claims Court, valuation of land expropriated by the state in pursuance of land reform (whether directly or indirectly) must now be seen as a two-stage process. In the first stage, the valuer is required to assess the market value (AMV \cong) of the land in accordance with established valuation principles, i.e. principles of assessment derived from court cases decided under the Expropriation Act 63 of 1975 and its predecessors, and also foreign precedents where applicable. In the second stage, the valuer is required to adjust the MV according to the impact of the non-MV factors listed in section 25(3) of the Constitution. Section 25(3) reads:

The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including B

- (a) the current use of the property;
- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.

The final figure that must be presented to the DLA by the valuer in the circumstances identified above is thus, not the MV of the land, but rather a figure corresponding to the just and equitable compensation that the valuer concludes the state is obliged to pay. In arriving at this figure, the valuer must adjust the MV assessed according to established valuation methods by factoring in the issues listed in paragraphs (a), (b), (d) and (e) of section 25(3).

3.3 Confirmation that the Pointe Gourde principle applies

In both of its recent judgments, the Land Claims Court confirmed that the Constitution has not excluded the operation of the so-called *Point Gourde* principle. In terms of this principle, the effect on MV of the expropriatory scheme under which the expropriation takes place must be disregarded by the valuer when assessing the MV of the land. For example, where the expropriation occurs pursuant to an application under Chapter III of the Labour Tenants Act, the fact that the value of the land may have depreciated as a result of the enactment of this Act must be disregarded by the valuer when assessing the MV of the land during the first stage of the valuation process. Similarly, the fact that the gazetting of a restitution claim or the enactment of the ESTA may have reduced the value of land being expropriated in terms of the Restitution Act or the ESTA respectively must be disregarded during the first stage. The effect on MV of the expropriatory scheme will, however, be relevant to the second stage of the valuation process, i.e. the assessment of the impact of the non-MV factors listed in section 25(3).

3.4 Comparable sales method preferred

Both Land Claims Court judgments also confirmed that the preferred method for assessing the MV of land is the so-called *comparable sales* method, i.e. valuers must make their assessment of MV by looking at the prices paid for land in recent open market transactions in the vicinity of the land being valued, disregarding transactions that are not sufficiently comparable, and taking into account any adjustments that need to be made in order to render the figures obtained from the comparable transactions more meaningful. The selection of comparable transactions, the Land Claims Court held, should be guided by issues such as the time of the sale, the presence or absence of improvements, and the general location of the land, its productivity and size, as indicated in the standard terms of reference above. The usual cautionary principle with regard to sales to an expropriating authority applies, i.e. such sales may be used for comparison, but the valuer should adjust for the fact that such sales are not open market transactions.

Neither of the two Land Claims Court judgments indicated what valuation method should be used where the comparable sales method is impractical owing to a shortage of comparable sales. In such cases, valuers are advised to use one of the other accepted valuation methods, i.e. either the income method (aimed at ascertaining the land's productive value) or the cost method (replacement value).

3.5 Impact of constitutional factors other than market value

Having assessed the MV of the land according to established valuation principles, the valuer should adjust the figure obtained upwards or downwards according to the impact of the non-MV factors listed in section 25(3) of the Constitution. In so doing, care should be taken not to replicate adjustments made during the first stage of the valuation process. Guidelines for the interpretation of these other factors are provided below.

3.5.1 Interpretation of *current use*

The first non-MV factor, A the current use of the property \cong , is easily confused with a factor typically considered in the assessment of MV, viz. the value of the land to the owner given its hypothetical >highest and best use=. What is required during the second step of the valuation process is not a repetition of this assessment, but rather a fresh assessment, the aim being to decide whether the MV of the land should be adjusted in order to account for the current use of the property. The difference lies in the fact that the second stage is aimed at calculating, not MV, but just and equitable compensation.

As far as the DLA is concerned, the kinds of A current use \cong that valuers should factor in during the second stage of the valuation process are the use of the land by land reform beneficiaries connected to the scheme of expropriation and falling into one of the following three categories:

restitution claimants;
ESTA occupiers; or
labour tenants.

None of these rights will ordinarily be reflected in the Deeds Registry, apart from the rights of restitution claimants whose claims were noted against the title deed of the property before the amendment to section 11(6) of the Restitution Act in terms of Act 78 of 1996. Nevertheless, in accordance with the Appellate Division decision in *Estate Marks v Pretoria City Council* 1969 (2) SA 227 (A), the impact of these rights on the value of the property must be taken into account during the first stage of the valuation process, unless the Pointe Gourde principle applies. For example, where land is expropriated under the ESTA, the presence of restitution claimants on the land should be factored into the assessment of MV during the first stage, since the impact their presence on the land has on MV is unconnected to the particular scheme of expropriation. The presence of ESTA occupiers on the land should, however, be factored in only at the second stage where land is expropriated under the ESTA. Similarly, the presence of labour tenants or restitution claimants should be factored in at the second stage where land is expropriated under the Labour Tenants Act or the Restitution Act respectively.

According to the Land Claims Court, where the presence of land reform beneficiaries connected to the scheme of expropriation makes the land effectively useless for any purpose other than land reform, then just and equitable compensation should exceed MV so as to compensate the owner for the opportunity or actual cost incurred. For example, suppose the land is occupied by labour tenants who cease to provide labour to the owner because, under the Labour Tenants Act, they can no longer be compelled to do so. In that case, as in *Khumalo v. Potgieter*, the second-stage adjustment to MV should compensate the land owner for the fact that he/she is paying an >implicit wage= (in terms of providing land to the tenants) without deriving those labour services. One measure of the cost to the land owner in such a case is the actual wage he or she would have had to pay to secure the labour services to make up for those that were no longer forthcoming.

3.5.2 Interpretation of A the history of the acquisition and use of the property \cong

In the two cases decided by the Land Claims Court, the second constitutional factor B A the

history of the acquisition and use of the property. B is understood as referring to the question whether the current owner of the land, when buying the property, did so after the statute governing the scheme of expropriation had been enacted. If the valuer finds this to have been the case, paragraph (b) of section 25(3) means that in the second stage, one must reverse the effect of having observed the *Pointe Gourde* principle in the first stage. In effect, this means that in such situations, the *Pointe Gourde* principle is not applied at all: there is no rationale for hypothesizing away the effect of the scheme on MV, either because the scheme had already had its effect on MV prior to the present owner's decision to purchase it, or because that effect could have been anticipated by the present owner before making the purchase.

3.5.3 Interpretation of the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property

The third non-MV factor B is the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property. B was not addressed in either of the two Land Claims Court judgments. However, the DLA has adopted a policy of taking into account three specific kinds of state investment and subsidy, viz. acquisition subsidy whereby the present owner purchased the property from the state at below its true market value; reduced interest loans that were made available for the acquisition of the land; and infrastructure subsidies (mainly fencing subsidies). These subsidies should be taken in account only where they were enjoyed by the present owner.

The acquisition subsidy is an implicit subsidy in the sense that it was not a particular amount of cash which was handed over, but rather was the difference between what the present owner did pay and what he or she should have paid for the land, where the latter is understood to mean the presumed historical value of the property at the time of acquisition. In order to ascertain the acquisition subsidy, therefore, an historical valuation is required. Historical valuations are difficult in the best of circumstances. In the rural context, and particularly where land was made cheap to white farmers by means of dispossession, it is often impossible to reconstruct a sense of what the market may have looked like, or indeed there may not have been a functioning market at all. Another scenario is that land made available for white settlers benefitted from investments in irrigation infrastructure at the same time, dramatically altering the nature of any local land market that may have pre-existed. In all of these situations, where an historical market value cannot reasonably be estimated, the historical valuation should seek to establish the historical productive value of the property.

The second type of subsidy that should be taken into account is the interest rate subsidy. Interest rate subsidies can be determined relative to prevailing mortgage lending rates of the Land and Agriculture Bank for the corresponding years (see appendix A2). Information on interest rate subsidies can be obtained from the National Department of Agriculture, Directorate Debt Management (see appendix A3 for information on how to submit request). Care should be taken to calculate the present value of the interest rate subsidy correctly (see appendix A1 for an example).

In principle, all infrastructure subsidies that may have made a positive contribution to the value of the land, should be included. This would include, *inter alia*, farm worker housing subsidies,

borehole subsidies, fencing subsidies, etc. In practice, it is difficult to obtain information about many past subsidies, nor is it always clear to what extent the subsidy did in fact contribute positively to the property's value. Borehole subsidies, for example, may have offset the cost to a property owner of drilling a borehole, but if that borehole turned out to be dry (reputedly the case more than 40%) of the time, certainly no benefit could have been capitalized into the value of the property. Farm worker housing subsidies present a different issue. Some 20 000 farm worker housing subsidies were disbursed in the 1980s and early 1990s. Meanwhile, for the past few decades, commercial farmers have been eligible for tax deductions for capital expenditure on employee housing. Other than tax returns, no records exist of these deductions though they probably number in the hundreds of thousands.

For the most part, infrastructure subsidies will generally be taken to mean subsidies for fencing, although the DLA will exercise discretion in taking into account any other state subsidy it considers of relevance in a particular case. Information on fencing subsidies must generally be sought from the closest agricultural office. However, depending on the state of these records, information may be difficult to obtain. Farmers themselves often have records of such subsidies received, but are not apt to volunteer that information under these circumstances. Again, the DLA must use its discretion to determine whether information on infrastructure should be sought in particular cases.

The value of past subsidies should be translated into present-day values by means of adjusting for inflation. This can be done using an index. The question is, what index should one use? There are two main options. One can either use the consumer price index (cpi), or one can use a land price index (lpi). The advantages of the consumer price index are that it goes back quite far in time, and that it translates into today's terms the value of a past subsidy without reference to the particular use to which that subsidy was put. The argument in favour of the land price index is that, to the extent a subsidy made land acquisition more affordable to the present owner, the land price index provides a measure for how land in general has appreciated over time. Land owners may also favour using the land price index because, since land has generally appreciated slower than the rate of consumer inflation, less money will be subtracted from market value. Sometimes this difference can be extreme. Suppose for example a property acquired in 1970, for which the owner only paid R600 000, although it was in fact worth R1 million. If the value of the property rose more or less in line with the general appreciation of land prices, it would today be worth around R8.5 million. However, if the acquisition subsidy of R400 000 were translated into today's terms using the cpi, then it would amount to R8.6 million - the expropriatee would be owing the state R100 000. This would not widely be considered consistent with the idea of just and equitable compensation.

At the risk of adding to the complexity, therefore, DLA allows either the cpi or the lpi to update the value of the acquisition subsidy, but will allow only the cpi for the interest rate and infrastructure subsidies. The formula below then represents the present value sum of all three types of subsidies:

$$\text{Sum of subsidies} = (B \div A) \times k_0 + E_1 \times k_1 + E_2 \times k_2 + E_3 \times k_3 + \dots,$$

where

B is the true market (or productive) value of the property at the time of acquisition;
 A is the actual price paid at the time of acquisition;
 k_0 is the inflation factor related to land acquisition, based on the cpi *or* on the land price index;
 $E_1, E_2, E_3, \text{ etc.}$, are the historical values of interest rate subsidies and infrastructure subsidies received; and
 $k_1, k_2, k_3, \text{ etc.}$, are the corresponding inflation factors for these subsidies, based on the cpi.

Note that the term $(B-A)$ represents the >acquisition subsidy=.

3.5.4 Interpretation of A the purpose of the expropriation=

The impact of the fourth and final non-MV constitutional factor B A the purpose of the expropriation= B is at this stage uncertain. In the first of its two judgments, the Land Claims Court remarked, without deciding, that this factor may simply have been intended as a reference to the Pointe Gourde principle. If this is correct, it would add nothing to the second stage of the constitutional compensation inquiry, since any influence this factor might have had would already have been factored in during the first stage. The DLA accordingly offers no guidelines in respect of this factor.

3.5.5 Summary of the four non-MV factors of 25(3)

The impact of the four non-MV factors may be summarized as follows:

- ⊖ The factor relating to the A current use of the property= requires the valuer to investigate whether the land is occupied by land reform beneficiaries who are connected to the expropriatory scheme being used. If so, the MV assessed during the first stage of the valuation process must be adjusted upwards. Where the land is occupied by land reform beneficiaries who are not connected to the expropriatory scheme being used, the impact of their presence on the land should be taken into account in the assessment of MV.
- ⊖ Where the land is occupied by land reform beneficiaries who are connected to the expropriatory scheme, and an investigation into the history of the acquisition and use of the land indicates that the land was acquired after the expropriatory scheme came into force, the MV must be adjusted downwards.
- ⊖ Where state assistance in the form of implicit acquisition subsidies, interest rate subsidies, or infrastructure subsidies were used in the acquisition or beneficial capital improvement of the land, the MV must be adjusted downwards according to the formula suggested above.
- ⊖ At this stage, the constitutional factor relating to A the purpose of the expropriation=

should be treated as a restatement of the Pointe Gourde principle applied during the first stage of the valuation process.

4 Guidelines Per Type of Land Reform Activity

The purpose of this chapter is provide practical guidelines that valuers and DLA staff can refer to in connection with the large variety of different land reform scenarios for which a valuation may be required.

4.1 Redistribution and tenure reform

4.1.1 Willing buyer/willing seller projects

Purpose of valuation

The primary purpose of the valuation is to ensure that sellers are not overpaid for their land. This implies that state resources deployed on behalf of beneficiaries, are used efficiently. We also include here valuation of land for redistribution projects that arise as part of the tenure reform programme, e.g. from the need to accommodate those with over-lapping tenure claims.

It should not be assumed that just because a seller's asking price falls within the value estimated by the valuer, that the property is a >good buy=. Most notably, the estimated market value may reflect aspects of the property that truly enhance its value, but which the DLA has no business assisting people to purchase. For instance, tennis courts and large, beautiful houses may indeed enhance the market value of properties in certain locations, but it is doubtful that DLA can justify the acquisition of such properties. In other cases, the existence of a tennis court may be judged to have no bearing on the market value of the property, in which case it is not an issue. The valuation report should seek to indicate, roughly, the contribution of so-called >non-essential improvements= to the overall estimated market value of the property. Similarly, the effect of location should be indicated.

Preferred valuation approach

The preferred valuation approach is to estimate the market value for the property being considered, by means of the comparable sales method. As is customary for this method, adjustments must be made to arrive at a good estimate, on the basis of location, improvements, land quality, size, etc.

Special valuation requirements or provisions

Where a paucity of comparable sales makes the comparable sales method infeasible, and where the property is to be acquired by the beneficiaries mainly for agricultural production, then the productive value should be estimated with the income method. The prospective seller should be

requested to share recent financial and production records, as a basis for determining the earning capacity of the land. However, if the property is under-utilised for non-economic reasons, then the earning capacity of the property may also be estimated on the basis of the earning capacity of similar, nearby properties.

4.1.2 Expropriation with compensation to owner

Purpose of valuation

There are two primary purposes of the valuation. First, as before, to ensure that sellers are not overpaid for their land, and that state resources deployed on behalf of beneficiaries are used efficiently. And second, to determine an amount of compensation to the owner that is just and equitable according to the provisions of the Constitution.

Preferred valuation approach

The preferred valuation approach is to estimate the market value for the property being considered, by means of the comparable sales method. As is customary for this method, adjustments must be made to arrive at a good estimate, on the basis of location, improvements, land quality, size, etc. The just and equitable compensation will further take into account the present value of past subsidies and other factors stipulated in section 25(3) of the Constitution. (See 3.5 for details.)

Special valuation requirements or provisions

Three main types of past subsidies must be taken into account. These must be translated into present-day rand values by means of the land price index (lpi) and/or consumer price index (cpi), as per section 3.5.3 above, and then subtracted from the market value of the property. An example of the application of this formula is in appendix A1.

Where a paucity of comparable sales makes the comparable sales method infeasible, and where the property is to be acquired by the beneficiaries mainly for agricultural production, then the productive value should be estimated with the income method. The prospective seller should be requested to share recent financial and production records, as a basis for determining the earning capacity of the land. However, if the property is under-utilised for non-economic reasons, then the earning capacity of the property may also be estimated on the basis of the earning capacity of similar, nearby properties.

4.1.3 State land disposal

Purpose of valuation

The purpose of valuing land in the context of redistribution projects on state land, is to gauge how much land beneficiaries should be able to acquire with their grants, or how much of their grants should be absorbed for the acquisition of the land.

Preferred valuation approach

The preferred valuation approach is to estimate the productive value of the property in terms of its current land use.

Special valuation requirements or provisions

Unlike most of the other valuations contemplated in this Handbook, typically a valuation of state land for productive purposes can be done by the provincial department of agriculture. In some cases, the land may be part of a going concern, for instance leased out to a commercial farmer, or managed as a state farm by government or on behalf of government. In these cases, existing production activities and records can be used as the basis for evaluating the land's productive value. However, it is also often the case with state land that there is no existing farmer from whom one can acquire financial and production records, as a basis for determining the earning capacity of the land. In these situations, the valuer will have to rely on her/his estimate of the agricultural potential of the land (taking into account development costs), and/or rely on the expertise of the department of agriculture. Usually, some sort of agricultural feasibility study will have been done by that point on behalf of the prospective beneficiaries, so most of this information need not be assembled from scratch.

4.1.4 Tenure Awards and Compensation to Displaced Beneficial Occupiers

Purpose of valuation

A tenure award is a means of resolving tenure disputes related to overlapping claims, by means of offering one or more parties alternative land. This land may be state land, or it may be private land specifically acquired for this purpose. Beneficial occupiers on state land who are displaced from that land in order to expedite another land reform initiative, may also be given compensatory land, either alternative state land or private land, or they may be compensated in cash.

In the case of both tenure awards and of displaced beneficial occupiers, where compensation is to be in the form of land acquired from a private land owner, that land must be valued before the DLA proceeds to purchase it. Where compensation is in the form of state land, that land must also be valued, so that the state can record the value of resources of which it is disposing. Finally, where compensation may be in cash, the value of the property from which people are being displaced, must be established, so that an appropriate amount of money can be offered.

Preferred valuation approach

The preferred valuation approach in each case is to estimate the market value of the land using the comparable sales method, whether that being given, or that which is being given up. This is notwithstanding the fact that the tenurial status enjoyed by beneficial occupiers is usually inferior to either communal or individual freehold. Because the degree of this inferiority is not quantifiable, those displaced are given the >benefit of the doubt= in equating their right in land to a freehold market value.

Special valuation requirements or provisions

In the case of putting a value to the land being lost by beneficial occupiers, it may sometimes be the case that it is difficult to identify a discrete piece of land accruing to that one group or household or individual. It may therefore be necessary to try to estimate the capitalised value of the use rights that the individual has enjoyed. An example of this is provided in the section on labour tenants.

4.2 Labour tenants

Purpose of valuation

Valuations are done in labour tenant cases for two rather different reasons. First, a valuation is necessary to assist in negotiations with land owners over how much land the labour tenant should be accorded to arrive at an acceptable arrangement. Usually, Land Affairs commissions a valuation at such time as it believes the parties are ready for a settlement. Also, because labour tenants usually rely on a grant from DLA to acquire the land, it is obviously necessary for the DLA to have that land valued. Alternatively, if a settlement does not appear possible and expropriation proceedings are initiated, a more complete valuation may be required which shows not only market value, but also other factors to be considered in terms of just and equitable compensation.

The second situation in which valuation is sometimes required for labour tenant cases, is when the land owner disputes the tenant=s claim to be a labour tenant. One of the qualifications of a labour tenant is that he or she is remunerated for labour services mainly in terms of tenancy, rather than by cash wages or payment in-kind (other than relating to tenancy). For those labour tenants that also receive some wages or payments in kind, it is essential to establish the relative value of their tenancy. Therefore, the aim of the valuation is to determine the value of the rights presently and/or formerly enjoyed by the tenant.

Preferred valuation approach

Valuing the land the tenant is presently attempting to acquire should be done according to estimated market value, on the basis of the comparable sales method.

Where the purpose of the valuation is primarily to assist in deciding whether or not a person qualifies as a labour tenant, the approach should be to establish the value of the individual=s (or household=s) use rights, and not focus directly on the market value of the land. Use rights in this instance are measured as a mix between the rental value of the resources that the tenant has historically made use of, the value of the residential rights the tenant enjoyed, and/or the opportunity cost to the owner of having given over some land resources for the tenant=s residential use. This must be done for the whole period during which the tenant claims to have been a labour tenant. Then, there are two alternative ways to make a final determination whether the tenant qualifies as a labour tenant. One approach is to assess the tenant=s use value versus wage income on a month-by-month basis, and then determine in how many months the implicit payment through use value predominated over that from cash or in-kind wages. The other approach is to sum up the accrued benefits from tenancy for the whole period, and likewise the cash and in-kind income for the whole period, and then compare the two sums. While this second approach would appear to be less tedious, it has the disadvantage of requiring the valuer to sum up benefits over a period of time. Since there is still little experience with these sorts of cases, it is probably advisable that both approaches are employed, and then the results of each compared. The cost of doing both is little more than doing just one or the other, since they are based on precisely the same information.

In the case of determining use value, it will often be the case that some of the benefit historically derived from the tenancy, does not correspond to a discrete area over which the tenant has had exclusive use. For example, the tenant may have been permitted over the years to graze his or her livestock together with those of the land owner.

Special valuation requirements or provisions

Where market value is to be estimated, the usual guidelines apply. Where on the other hand use value must be estimated, the valuer can start by distinguishing residence from arable land from grazing land. For arable land, the valuer must know the number of hectares the tenant used in each period (e.g. month), and determine how much a hectare of comparable quality would have rented for in the area. In other words, the use value of a hectare is based upon a >comparable rental= value, but determined for discrete periods of time over the course of the tenant=s occupation.

For grazing, the approach is similar, but somewhat more indirect. First, the valuer must ascertain the number of grazing animals kept by the tenant on the owners land, e.g. per month. Then, using average stocking rates for the area, one can determine how many hectares of land this implied. If for example in a given month the tenant had 5 cattle (large stock units, or LSUs), and the stocking rate is 10 hectares per LSU, then the tenant=s use of grazing land for that period is $5 \times 10 = 50$ hectares, even if the tenant=s cattle are mixed in amongst the land owner=s. The valuer must then ascertain the >comparable rental=, i.e. how much a hectare of similar grazing land would have leased for in that area for the same period. If the tenant also had 21 sheep or goats, then these can be converted to LSUs before determining the implied land use, using the standard conversion that 7 sheep or 7 goats equal 1 LSU. In other words, 21 sheep/goats translates to 3 LSU equivalents, implying an additional $3 \times 10 = 30$ hectares of land. Poultry and

pigs can be ignored, or rather subsumed within whatever calculations are used to put a value to the tenant's homestead. Note that these procedures establish the estimated use value per year, and not for >all time=.

For the tenant's residential rights, there are two alternative approaches. A simple one is to simply look at the opportunity cost of the land area that is displaced by the tenant's homestead. If for example the tenant's homestead (including garden and piggery and other things kept close to the home) occupies an area of 0.25 hectares, and this might otherwise have been good arable land, then the valuer would return to the comparable rental values associated with arable, and impute the land owner's loss accordingly. If rather the land could otherwise only have been used for grazing, than a different comparable rental value would be used.

The other approach to valuing the residential rights of the tenant would be to look at rental rates for comparable residential opportunities in the area. This is often a poor method, however, as it is very difficult for a valuer to determine what is truly comparable by way of residential sites.

Appendices

A1 Determining the value of past subsidies

The formula below represents the present value sum of all three types of subsidies to be considered in the application of 25(3) of the Constitution:

$$\text{Sum of subsidies} = (B - A) \times k_0 + E_1 \times k_1 + E_2 \times k_2 + E_3 \times k_3 + \dots,$$

where

B is the true market (or productive) value of the property at the time of acquisition;

A is the actual price paid at the time of acquisition;

k_0 is the inflation factor related to land acquisition, based on the cpi *or* on the land price index;

E_1, E_2, E_3, \dots , are the historical values of interest rate subsidies and infrastructure subsidies received; and

k_1, k_2, k_3, \dots , are the corresponding inflation factors for these subsidies, based on the cpi.

The following example is a fiction made up of ingredients of various actual cases.

Essential facts

In late 1998, an independent valuer estimated the fair market value of Tara Farm at R2.53 million, including improvements made by the present owner, and excluding machinery and other moveable assets. Ms O'Hara purchased Tara Farm in 1965. Estimated market value (or maybe productive value) was R200 000, but Ms O'Hara paid R150 000. In order to make the purchase, Ms O'Hara took out a 25 year loan for R112 000 with the Agricultural Credit Board (ACB), on which the interest rate was 5% per annum from 1966 through 1990. A 25% fencing subsidy was obtained in 1970, and again in 1976. In 1970, the expenditure on fencing was R4 000, of which the Department of Agriculture Contributed R1 000. In 1976, another R3 000 was spent on fencing, of which the government's contribution was R750.

Acquisition subsidy

The value of the acquisition subsidy in 1965 was $200\ 000 - 150\ 000 = 50\ 000$. We translate this into today's terms by noting that the value of the lpi in 1965 was 9, and in 1998, 114, implying that between 1965 and today, the general price level of land has increased by a factor of $114 / 9 = 12.7$. Therefore, the value of the 1965 subsidy in today's terms is $50\ 000 * 12.7 = R633\ 000$. Note that the acquisition subsidy should only be ascertained if there is reason to believe that the present owner received the land below its market cost, for instance, if the present owner received land that was made available through the process of homeland consolidation.

Interest rate subsidy

The interest rate subsidy is calculated by means of finding the difference between the interest actually paid and what would have been paid if commercial rates had applied. This is done for each year, and the difference per year is then translated into a present value by means of the corresponding cpi factor.

	Interest paid at 5%	Interest payable at comm. rates	Difference	cpi	cpi factors	Present values
1965						
1966	5 600	8 960	3 360	4.76	12.30	41 324
1967	5 483	9 251	3 769	4.93	11.90	44 832
1968	5 360	9 007	3 648	5.03	11.65	42 501
1969	5 230	8 742	3 512	5.19	11.29	39 652
1970	5 094	8 621	3 527	5.40	10.85	38 270
1971	4 952	8 637	3 686	5.70	10.28	37 891
1972	4 802	8 324	3 522	6.10	9.61	33 832
1973	4 645	7 686	3 041	6.70	8.75	26 601
1974	4 480	8 408	3 928	7.50	7.81	30 690
1975	4 307	8 759	4 452	8.50	6.89	30 693
1976	4 125	9 261	5 137	9.40	6.23	32 021
1977	3 934	8 918	4 984	10.50	5.58	27 817
1978	3 733	8 533	4 800	11.60	5.05	24 250
1979	3 522	7 849	4 327	13.10	4.47	19 357
1980	3 301	6 984	3 683	14.90	3.93	14 484
1981	3 069	7 724	4 655	17.20	3.41	15 860
1982	2 825	8 415	5 590	19.70	2.97	16 629
1983	2 569	8 334	5 766	22.20	2.64	15 219
1984	2 300	8 926	6 626	24.70	2.37	15 720
1985	2 018	8 757	6 739	28.80	2.03	13 713
1986	1 721	6 577	4 855	34.10	1.72	8 344
1987	1 410	4 776	3 366	39.60	1.48	4 981
1988	1 083	3 926	2 842	44.70	1.31	3 726
1989	740	3 602	2 862	51.30	1.14	3 269
1990	380	2 086	1 706	58.60	1.00	1 706
sum						583 380

Infrastructure subsidy

The value of the cpi in 1970 and 1976 are 5.4 and 9.4, respectively. This implies that, since 1970, prices have increased by a factor of $123.6 / 5.4 = 22.89$, and since 1976, by a factor of $123.6 / 9.4 = 13.15$. The value of the fencing subsidy for 1970 is therefore $22.89 * 1\ 000 = R22\ 890$, while that for 1976 is $13.15 * 750 = R9\ 862$. The total value of the fencing subsidy is therefore $R22\ 890 + R9\ 862 = R32\ 752$.

Putting it together

Putting these pieces together, the total value of subsidies received either to facilitate the acquisition of the property, or to render capital improvements to the property, is:

$$\begin{array}{r} 633\,000 \\ + 583\,380 \\ \hline + 32\,752 \\ \hline 1\,249\,132 \end{array}$$

or R1.25 million.

A2 Historical price indices and interest rates

The following table reports the consumer price index (cpi), the land price index (lpi), and average annual rates of interest on long-term mortgage loans from the Land and Agriculture Bank. For the cpi and lpi, 1995 = 100. For the series on interest rates, unfortunately the data are incomplete, and will be completed as soon as possible.

year	cpi	lpi	interest rates
1960	4.12	6	
1961	4.18	7	6.25%
1962	4.30	7	6.00%
1963	4.36	8	
1964	4.42	9	
1965	4.60	9	
1966	4.76	9	
1967	4.93	11	
1968	5.03	11	
1969	5.19	12	
1970	5.40	13	
1971	5.70	16	
1972	6.10	15	
1973	6.70	16	
1974	7.50	19	
1975	8.50	24	7.00%
1976	9.40	23	
1977	10.50	28	
1978	11.60	27	
1979	13.10	28	
1980	14.90	32	
1981	17.20	40	
1982	19.70	46	11.00%
1983	22.20	53	
1984	24.70	54	14.00%
1985	28.80	57	
1986	34.10	59	13.00%
1987	39.60	67	12.50%
1988	44.70	76	13.50%
1989	51.30	83	15.50%
1990	58.60	95	
1991	67.60	91	
1992	77.00	91	16.50%
1993	84.50	94	14.50%
1994	92.00	94	14.50%
1995	100.00	100	16.50%
1996	107.40	107	
1997	116.60	111	
1998	124.60	114	
1999	131.08		
2000	134.65		

A3 Making requests for information on past subsidies to land owners

Enquiries for information about past interest rate subsidies should be submitted by post or fax to the Directorate: Debt Management, National Department of Agriculture. Presently, the contact person is Mr. Anton Ennis, fax number 012-310-4244, or Private Bag X250, Pretoria 0001.

The request should include three things:

1. An indication that the information is being sought in connection with a possible expropriation via the land reform programme;
2. Relevant information about the owner (e.g. name, year purchased) and about the land;
3. A copy of the Aktex printout corresponding to the property in question.

It should be noted that some land owners may change the name in which the property is registered, for example in the name of a newly-formed company owned by the farmer. Since the Department of Agriculture will look for information according to the name of the owner who received the loan, it may also be necessary to provide the name in which the property had been registered previously.