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Dear Ms. Pat Jayiya

### **Submission on review of section 25 of the Constitution and other sections where necessary**

This letter from Afesis-corplan is in response to parliaments call for submissions from the public<sup>1</sup> to review section 25 (and other sections where necessary) of the constitution to make it possible for the state to:

1. *Expropriate land in the public interest without compensation; and*
2. *Propose the necessary constitutional amendments where applicable with regards to the kind of future land tenure regime needed.*

Afesis-corplan is a vibrant, dynamic development NGO situated in East London. We are recognised as pioneers in deepening participatory democracy and good local governance, community development and alternative settlement development approaches since 1992. Our vision is of a self-reliant society in which people have equitable access to resources and institutions are an expression of people's needs and aspirations and our mission is to support civic agency through catalytic interventions aimed at achieving systemic change in good local governance and sustainable human settlement development.

The following questions help frame our submission:

- a. Does the constitution need to be changed?
- b. What is our motivation for this position?
- c. Is the state living up to its constitutional obligations?
- d. What broadly needs to be done to improve land reform?
- e. What specifically could be done to address land redistribution and tenure reform?
- f. What else can be done to improve land reform?

#### **a. Does the constitution need to be changed?**

We believe that **there is NO need to change the constitution** at this stage to deal with (1) expropriation without compensation, or for (2) the kind of tenure regime needed.

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<sup>1</sup> See call for written submissions at: <https://www.parliament.gov.za/press-releases/constitutional-review-committee-calls-written-submissions>

b. What is our motivation for this position?

In relation to “*expropriate land in the public interest without compensation*”:

- We believe that the state has not sufficiently tested the “just and equitable” clause in section 25(3) of the constitution to determine the extent to which, in certain instances, zero or close to zero compensation is justified.
- We agree that land expropriation needs to be one of a multitude of options available to the state to acquire land (see Annexure 1 for a list of examples for how land may be acquired).
- We do not believe that the binary distinction in public discussions between expropriation without compensation and expropriation at market value (which the phrase ‘willing seller, willing buyer’ actually means) is helpful. The issues are far more nuanced than this with there being a continuum of ways to reach a decision on compensation amounts as described in annexure 2.
- **The state therefore needs to test the “just and equitable” clause, so we can learn from this experience before we decide if it is necessary to make any changes to the constitution.**

In relation to “*the kind of future tenure regime needed*”:

- We believe that we have not had a discussion as a country on the type of tenure our country needs.
- For land that is expropriated (and also acquired through other mechanism for the purposes of land reform) there are a multitude of tenure options for how this land may be held (see annexure 3: examples of tenure options). We do not recommend ‘putting all our eggs in one basket’ in terms of how land is held such as the privatisation of all land or making all land state owned land.
- We do not claim to know which options would be the most appropriate in which contexts so we therefore propose that policy and legislation make it possible for a variety of tenure approaches to be accommodated and that the role-players involved in a particular case choose which tenure form they feel is appropriate in their situation.
- **The state therefore needs to conduct more research and investigation into the advantages and disadvantages of various tenure options in different circumstances to inform any decisions on the tenure regime needed.**

c. Is the state living up to its constitutional obligations?

We recognise however, as articulated in the report prepared by the High Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change, which was established by the Speakers Forum, and published its findings in November 2017, that **all is not well with our country’s land reform programme.**<sup>2</sup>

The following extracts from the Panel’s Executive Summary<sup>3</sup> support this claim:

*“Evidence presented to the Panel shows how land reform policy has drifted from its initial pro-poor focus to one marked by signs of elite capture. Implementation has also been dysfunctional”. (page 37)*

*“The Constitution provides for positive land rights in Sections 25(5), (6), (7) and (9). These are the rights to equitable access (redistribution), tenure security and restitution. These rights are not being adequately promoted, enforced and protected. Instead, they appear to be under attack from policies and practices that redirect the benefits of land reform to potential political alliances with specific elites”. (page 51)*

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<sup>2</sup> See copy of report at: <https://www.parliament.gov.za/press-releases/download-report-high-level-panel-assessment-key-legislation-and-acceleration-fundamental-change>

<sup>3</sup> Available at: [https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/HLP\\_Executive\\_Summary/HLP\\_Executive\\_Summary.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Executive_Summary/HLP_Executive_Summary.pdf)

*“The failure to give legal effect to the tenure security provisions of the Constitution has emerged as a foundational issue throughout the Panel process”. (page 59)*

Based on this and other evidence, we submit that as a country **we have not lived up to section 25(5) of the constitution that deals with land redistribution, nor to section 25(6) and (9) dealing with tenure reform**<sup>4</sup>.

In effect we contend that:

- A. in relation to land redistribution, the state has **NOT** taken sufficient *“reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”* Despite the commendable efforts of government to build houses for our people, the demand for land and housing continues to rise<sup>5</sup>, and in the rural context, land redistribution efforts are not leading to equitable access to land<sup>6</sup>.
- B. in relation to land tenure reform, the state has **NOT**, sufficiently, to the extent provided by an Act of Parliament, created a situation where *“a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, ... either to tenure which is legally secure or to comparable redress.”* Legislation has been developed to protect people from unfair eviction from land (e.g. the Interim Protection of Informal Land Rights Act (IPILRA), the Prevention of Illegal Eviction from and Unlawful Occupation Act (PIE) and the Extension of Security of Land Rights Act (ESTA), etc.), but insufficient attention has been given to provide substantive and positive rights to people that can ‘be defended against the world’ without these people having to go to court on a case by case basis when their tenure security is questioned<sup>7</sup>.

Further, in line with findings made in the National Development Plan (NDP) (Vision 2030), we note that **colonial and apartheid geography persists**, with poor, predominantly black still living in marginal Bantustan homeland areas and in townships and other areas identified through group areas legislation. The National Development Plan<sup>8</sup> states that *“[d]espite reforms to the planning system, colonial and apartheid legacies still structure space across different scales.”* (NDP, page 260)

#### d. What broadly needs to be done to improve land reform?

We do not believe that changing the constitution at this stage will assist us as a country in addressing our commitment to land redistribution, land tenure reform and land reform generally. The main problems with the failure of land redistribution and tenure reform are more to do with the **failure of the state to have a clear land reform policy that is translated into clear legislation, programmes and projects** that address land redistribution and tenure reform directly. Again, this claim is supported by the findings of the High Level Panel who state: *“No law currently exists to give meaning to, or set standards for measuring whether land reform enables citizens to gain access to land on an equitable basis.”* (page 37)

The state has not adequately used many of the provisions that are already found in the constitution to push the boundaries of how to deal with land redistribution and land tenure reform in this country. We believe

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<sup>4</sup> We further believe that the country has not lived up to section 25(7) dealing with land restitution, but we do not go into more detail with this issue in this submission.

<sup>5</sup> See <http://afesis.org.za/wp-content/uploads/2017/06/Learning-Brief-Land-Acquisition-and-development-for-human-settlement-development.pdf>

<sup>6</sup> See Ruth Hall & Thembela Kepe (2017): Elite capture and state neglect: new evidence on South Africa’s land reform, Review of African Political Economy, DOI: 10.1080/03056244.2017.1288615. To link to this article: <http://dx.doi.org/10.1080/03056244.2017.1288615>

<sup>7</sup> See motivation for a new Land Records Act as expressed by the High Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change (page 478)

<sup>8</sup> Available at: [https://www.brandsouthafrica.com/wp-content/uploads/brandsa/2015/05/02\\_NDP\\_in\\_full.pdf](https://www.brandsouthafrica.com/wp-content/uploads/brandsa/2015/05/02_NDP_in_full.pdf)

that the solutions to our immediate challenges in addressing the land related rights as outlined in the constitution lie elsewhere, and not in changing the constitution.

We believe that the process of calling for comments on 'expropriation of land without compensation' and looking at 'the kind of land tenure regime needed' provides a positive precedent for parliament to open up a longer term and more sustained dialogue and debate about what an appropriate land reform policy should look like for the country.

At the moment the official policy guiding land reform interventions is the White Paper on Land Reform from 1997. We believe that **it is time for our land reform or land transformation policy to be updated**. As a build up to updating the land policy we suggest that **the "land question" needs to be broken down into a set of multiple "land questions"; the answers to which will help inform a broader land reform policy update**. Note that the issue of expropriation is just one sub question of multiple of questions; and the issue of 'with or without compensation' is a further subset of this sub question.

The following provides an example of what some of these questions could be.

- Why do we need land reform, including restitution, redistribution, and tenure reform?
- When acquiring land, what land needs to be acquired? Land in rural areas? Land in urban areas?
- What future spatial structures should we be aiming for in various contexts? Rural villages? High density urban metropolitan regions? Smallholder farms? Mixed use activity? Transport orientated development?
- What should this land be used for? Residential development, smallholding development, commercial farming?
- Who should gain access to this land? Those on housing waiting lists? Those on smallholder waiting lists? Those on commercial farm acquisition waiting lists? Those who can afford to provide matching financial contributions to support provided by the state? Those presently living in informal settlements and other poor conditions? The most poor? The destitute? Women and/or men?
- How should this land be acquired? On the open market? Through expropriation on a 'just and equitable' basis (as provided for in the constitution)? Through expropriation with no compensation?
- Who should be responsible for gaining access to land? Any minister dealing with land? The premier of a province? Any municipality?
- How should this land be held once obtained? Held by private individuals in ownership? Held by the state and leased to occupiers or users? Held in a form of a communal property institution?
- What actions can various stakeholders (both those who benefited from or were disadvantaged by past land dispossession) take now to confront and respond to the injustices of the past? Facilitate dialogue? Arrange exchange visits between groups? Organise networked healing spaces?<sup>9</sup> Provide financial reparations? Provide symbolic reparations? Other?

#### e. What specifically could be done to address land redistribution and tenure reform?

In the meantime, while the consultation process as described above takes place, we submit the following additional set of recommendations to be considered for more short to medium term implementation:

1. To deal with improving land redistribution
  - a) Develop a draft National Land Reform Framework Bill, using the draft bill proposed by the High Level Panel as a starting point<sup>10</sup>, and circulate it for public comment. This will provide

<sup>9</sup> For more on networked healing spaces see <http://ggln.org.za/media/k2/attachments/SoLG.2014-Afesis-corplan.pdfv>

<sup>10</sup> See recommendation 3.1(page 223) in the report, and annexure of Draft Bill available at: [https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/Commissioned\\_reports\\_for\\_triple\\_challenges\\_of\\_poverty\\_unemployment\\_and\\_inequality/Illustrative\\_National\\_Land\\_Reform\\_Framework\\_Bill\\_of\\_2017\\_with\\_Land\\_Rights\\_Protector.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_reports_for_triple_challenges_of_poverty_unemployment_and_inequality/Illustrative_National_Land_Reform_Framework_Bill_of_2017_with_Land_Rights_Protector.pdf)

more guidance for the state on how to develop and inform land reform programmes, especially in relation to the issue of equitable access to land (from section 25(5) of the constitution).

- b) Develop and adopt a new Land Expropriation Act that is in line with the constitution and takes into account issues that are identified through these parliamentary public hearings. This will assist the state in implementing its land expropriation programmes for public purpose and public interest.
- c) As part of governments human settlement programme introduce a Managed Land Settlement Programme<sup>11</sup> and a Housing Support Programme.<sup>12</sup> This will increase the supply of land and basic services for settlement development, and also assist households to progressively improve their housing conditions on land they have already secured.
- d) Also, as part of governments human settlements programme, introduce a smallholder subsidy programme<sup>13</sup>. This will increase the supply of land for smallholder farming.
- e) Test section 25.5 of the constitution in the courts through a series of court cases to determine whether the state is fostering conditions which “enable citizens to gain access to land on an equitable basis.”<sup>14</sup> Section 25.5 has never been tested in the courts.<sup>15</sup> This will ‘force’ government to review its housing and agricultural development policies and programmes from a pro-poor perspective and make the necessary policy and legislative amendments as required.
- f) Require municipalities, as part of their Spatial Development Framework (SDF) plans, to include a land acquisition and development plan and programme.<sup>16</sup> This will mean that more appropriate land is being obtained and developed in a way that contributes towards spatial transformation – bringing people closer to work and social opportunities, creating more integrated settlements, etc.
- g) Develop guidelines for national, provincial and local government as to how they can interpret and accommodate the development principles (especially spatial justice<sup>17</sup>) found in section 7 of the Spatial Planning and Land Use Management Act (no. 16 of 2013). This will contribute towards municipalities and government being more effective in spatial restructuring.<sup>18</sup> As part of the process of developing these guidelines, conduct research on how the concept of ‘spatial justice’ can be linked to the concept of gaining “access to land

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<sup>11</sup> For more information on MLS see <http://afesis.org.za/managed-land-settlement/>

<sup>12</sup> For more information on housing support see: <http://afesis.org.za/wp-content/uploads/2017/06/6-Learning-Brief-Motivation-for-a-housing-development-support-programme.pdf>

<sup>13</sup> For more information on a smallholder subsidy see [http://afesis.org.za/wp-content/uploads/2017/05/The-Missing-Middle-a-smallholding-land-subsidy-programme\\_web4.pdf](http://afesis.org.za/wp-content/uploads/2017/05/The-Missing-Middle-a-smallholding-land-subsidy-programme_web4.pdf)

<sup>14</sup> For more background to this idea of testing section 25.5 in the constitution in the courts see:

<http://afesis.org.za/learning-brief-12-equitable-access-land/>

<sup>15</sup> “The meaning of section 25(5) has not in the past 20 years been interpreted judicially; in other words, while other provisions, such as the right to restitution and to secure tenure, have been extensively challenged and adjudicated in the courts, what constitutes adequate measures to ‘enable citizens to gain access to land on an equitable basis’ has not. There is no existing jurisprudence as far as we are aware related to this right which forms the constitutional basis for land redistribution.” Kepe, T. and Hall, R. 2016. *Land Redistribution in South Africa*. Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa. Available at:

[https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/Commissioned\\_Report\\_Land/Commissioned\\_Report\\_on\\_Land\\_Redistribution\\_Kepe\\_and\\_Hall.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_Land/Commissioned_Report_on_Land_Redistribution_Kepe_and_Hall.pdf)

<sup>16</sup> For more information on land acquisition see <http://afesis.org.za/wp-content/uploads/2017/06/Learning-Brief-Land-Acquisition-and-development-for-human-settlement-development.pdf>

<sup>17</sup> The SPLUMA development principles include: spatial justice, spatial resilience, spatial sustainability, spatial efficiency and good administration.

<sup>18</sup> The Dept. Rural Development and Land Reform has already started to work on this exercise. More public consultation is needed in this research.

on an equitable basis” as found in section 25(5) of the constitution. This will also contribute towards special restructuring and providing access to land on an equitable basis.

- h) Initiate a national land acquisition programme to explore, test and reflect on alternative mechanisms for land acquisition. See annexure 1 for an incomplete list of such mechanisms. We will be able to determine, based on this experience, which mechanisms are more appropriate in which circumstances and we will then be able to improve these land acquisition and development mechanisms over time.
  - i) Re-open discussions around “inclusionary housing” that were being discussed in the 2000’s<sup>19</sup>, with the intention of developing and implementing a national inclusionary housing policy and programme. This will also increase funding for and supply of additional land for settlement development and contribute to spatial restructuring.
2. To deal with improving tenure reform:
- a) Begin to develop and introduce a new comprehensive land administration system that includes: 1) the existing land registration system that deals with title deeds and survey general plans; and 2) a new land records system that deals with existing off-register land tenure situations such as in communal land areas, informal settlements, farm dwellers, communal property association etc. as recommended in the Housing Development Agency report<sup>20</sup> and the report of the High Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change.<sup>21</sup> This will contribute towards the creation of a reformed land tenure system for the country.
  - b) Undertake research to investigate how to keep well located land affordable into the future<sup>22</sup>. This will ensure that people who gain access to (well located) land are able to continue to stay on that land and that potential future residents of these areas are able to continue to access this land.
  - c) Work towards the development of a single national land information data management system, starting by establishing a coordination structure within government to coordinate existing land information systems. This includes information on who has and/or is claiming what rights to which pieces of land, what land use activities exist and are permissible on the land, what the environmental and topographical characteristics of the land are, etc. This will facilitate all other aspects of land reform and spatial restructuring.
  - d) Establish provincial unauthorised land occupation response support structures within provinces, that municipalities and other land owners can draw on to be advised on how to lawfully respond to instances of land invasion and unauthorised land occupation.<sup>23</sup> This will assist municipalities, land owners and people living in informal settlements to follow the correct procedures when dealing with unauthorised land occupation and land invasion situations.

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<sup>19</sup> <http://abahlali.org/files/Framework%20for%20an%20Inclusionary%20Housing%20Policy%20in%20SA.PDF>

<sup>20</sup> See report by HDA. 2016. *Rethinking Communal Land Administration*. Available at: <http://afesis.org.za/rethinking-communal-land-administration/>

<sup>21</sup> See recommendation 5.5 (page 481) from the *Report on the High Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change*. 2017. Available at: <https://www.parliament.gov.za/high-level-panel>

<sup>22</sup> For example, see the work of Afesis-corplan on restricted equity cooperative housing at: <http://afesis.org.za/housing-co-operatives/>. Also see examples of community land trusts found around the world: <http://www.communitylandtrusts.org.uk/what-is-a-clt/history-of-clts>

<sup>23</sup> See motivation for such a structure on page 68 of the report: HDA. 2016. *Managing and Curbing Unauthorised Land Occupation*. Available at: <http://afesis.org.za/unauthorised-land-occupation/>

#### f. What else can be done to improve land reform?

Additionally, while the country debates and develops a national land policy and legislation, the following provides additional examples of more short to medium term interventions that the state can undertake to improve land reform outcomes.

1. Establish a national coordinating structure to “drive a coherent and co-ordinated spatial framework for South Africa” as recommended by the High Level Panel.<sup>24</sup>
2. Establish national and provincial land reform or land transformation forums that include representatives from a range of stakeholder groups with a interest in land - from government, business, communities, traditional leadership, NGO’s, academics and others. In these forums land related matters can be discussed and progress can be monitored in implementing the short, medium and longer term activities needed to affect land transformation.
3. Establish a dedicated Department of Land Affairs that deals with all aspects of land reform in both urban and rural contexts.<sup>25</sup> The Department of Rural Development could possibly be amalgamated with the Department of Agriculture.
4. Establish a national land funds coordinating structure (located in the Department of Land Affairs) so that all government programmes dealing with land acquisition are coordinated and government departments and entities know where they are able to access funds for land acquisition and development. This will also make it easier to track progress in acquiring land for (urban and rural) land redistribution targets.<sup>26</sup>
5. Significantly increase national budget allocations and resources (including human resource capacity) towards all aspects of land reform in line with governments renewed commitment to dealing with land redistribution, land tenure reform and other aspects of land reform.<sup>27</sup>
6. Enact Chapter 5 of the *Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000* (commonly known as the Equality Act)<sup>28</sup> so that departments dealing with land related matters can plan for and account for how their interventions are addressing equality.

#### Conclusion

In summary we submit that the constitution does not need to be revised at this stage to (1) expropriate land without compensation, and (2) create an appropriate tenure regime. The state should however (1) test the constitutional provisions to determine under what circumstances it is ‘just and equitable’ to provide zero or

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<sup>24</sup> See recommendation 5.3 (page 462) from the *Report on the High Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change*. 2017. Available at: <https://www.parliament.gov.za/high-level-panel>

<sup>25</sup> See recommendation 16 on page 11 of the Afesis-corporplan (2015) *Comments on “draft policy framework on a coherent and inclusive approach to land for human settlements” June 2015*. Available at: [http://www.incrementalsettlement.org.za/wiki/images/8/8a/High\\_Level\\_Panel\\_on\\_Key\\_Legislation\\_-\\_Afesis-corporplan\\_submission\\_August\\_2016\\_%28third\\_submission%29.pdf](http://www.incrementalsettlement.org.za/wiki/images/8/8a/High_Level_Panel_on_Key_Legislation_-_Afesis-corporplan_submission_August_2016_%28third_submission%29.pdf)

<sup>26</sup> See recommendation 25 on page 15 of the Afesis-corporplan (2015) *Comments on “draft policy framework on a coherent and inclusive approach to land for human settlements” June 2015*. See link in previous footnote.

<sup>27</sup> Presently governments budget allocation for land reform is 0.4% of the national budget, and has only slightly gone over 1% on two occasions. See Institute for Poverty, Land and Agrarian Studies University of the Western Cape (2016) *Diagnosis Report on Land reform in South Africa*, Commissioned for the High Level Panel. (page 62) [https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/Commissioned\\_Report\\_Land/Diagnostic\\_Report\\_on\\_Land\\_Reform\\_in\\_South\\_Africa.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_Land/Diagnostic_Report_on_Land_Reform_in_South_Africa.pdf)

<sup>28</sup> Section 26 of the Equality Act, requires the State to 1) adopt equality plans, regulations and other measures to promote equality, 2) monitor the implementation of these plans, and c) make regular reports on progress in achieving these plans. The enactment of chapter 5 of the Equality Act will go a long way to assisting the country achieve section 25.5 of the constitution that makes specific reference to ‘fostering conditions which enable citizens to gain access to land on an equitable basis’. (emphasis added).

less than market value compensation; and (2) undertake research and investigation into the advantages and disadvantages of various tenure options in different circumstances, to inform appropriate tenure regimes.

More broadly, we believe that the state is not living up to its constitutional obligations to (A – as per section 25.5) take sufficient *“reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis”*, or (B – as per section 25.6) create a situation, to the extent provided by an Act of Parliament, where *“a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, ... either to tenure which is legally secure or to comparable redress.”*

By making this criticism we do not want to take away from the significant achievements made by government in addressing land reform in the country since 1994, including for example building RDP houses for people and finalising land restitution claims, but we do want to highlight that there is still much to be done.

We contend that the solutions to these failures do not lie in changing the constitution but rather relate to developing a clear land reform policy that can be translated into specific land redistribution and tenure reform legislation, programmes and projects. We note that the official policy guiding land reform interventions in the country at the moment is the White Paper on Land Reform from 1997. We believe that it is time for this policy to be updated.

In order to develop such a policy, government needs to initiate and facilitate a process whereby we can, as a country, debate and engage with each other around a set of ‘land questions’ in order to come to a general understanding of what vision we want for land reform in the country and what a land reform or land transformation policy and programme could look like.

Afesis-corplan is willing to participate in and contribute where possible to any land reform policy development process. Land for sustainable settlements is already a key focus area of Afesis-corplan and we are open to investigating opportunities for collaboration and partnership with government and others in pursuing land redistribution, land tenure reform and spatial restructuring.

In the meantime, while this dialogue takes place, government can begin to implement the specific recommendations made in this submission. Actions to address the land needs of our country cannot wait for policy to be debated and approved. We need to follow a parallel process of developing policy and undertaking actions: allowing the insights gained from each of these processes to inform the other.

Afesis-corplan is willing to make a verbal submission as part of this public review process during public hearings that will take place in the Eastern Cape (Buffalo City).

We thank you for the opportunity to make this submission and look forward to further engagement on these matters.

Yours faithfully



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## **Annexure 1: Land acquisition mechanisms**

The following provides an incomplete list of possible mechanisms that can be used to facilitate and acquire land for redistribution (and other) purposes.<sup>29</sup>

- Land swaps: The state swaps a piece of land they own but don't need with a piece of land someone else owns but the state wants.
- Land polling and readjustment: The state negotiates to combine land owned by various land owners into one 'pool' of land, arranges to develop the land by sub dividing it and putting in the necessary engineering infrastructure, and then returning a smaller portion of the land to the original land owners (that is now valued at a similar price compared to their original undeveloped portion of land). The state then keeps the remaining land for redistribution purposes.
- Vacant land tax: The municipality charges higher rates on land portions that are not been used for any purpose. In this way land owners are encouraged to either use the land or sell it to others who will use it.
- Site/ land tax: Government calculates municipal rates according to the value of the land only, without taking any improvements into account. Such site tax encourages land owners to develop the land as they do not pay rates on improvements. At the moment South Africa uses a flat rate, where the tax rate is calculated on the value of the land plus improvements and does not provide for site/land tax.<sup>30</sup> Government should modify laws governing land taxation to allow municipalities to use whichever approach they feel is appropriate to calculate property rate taxes.
- Land value capture: Government uses various instruments to 'capture' any private land value increase that is the result of state and societal investment in a neighbourhood, and then uses these funds to pay for land redistribution efforts in well located areas.<sup>31</sup>
- Inclusionary housing: Government requires developers of commercial and middle to high income residential development, as part of the development approval process, to include a component of low income housing into their development plans.

## **Annexure 2: Compensation Continuum**

The following provides an example of a continuum of mechanisms for determining compensation amounts. It provides a gradation of scales of compensation as they relate to the compensation amount paid to the person whose land is being expropriated.

- Expropriation above market value: This option may be occurring in many instances at the moment because when the state is trying to get the land in the public interest (i.e. for redistribution purposes) or for a public purpose (e.g. to build a public school) one is often dealing with an unwilling

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<sup>29</sup> For more information on mechanism for land acquisitions see article by Eglin, R. 2009. *Make housing delivery easier by unlocking bulk land for 'Land First'*. available at:

[http://www.urbanlandmark.org.za/newsletter/issue/0403/download/april\\_may\\_trans\\_09.pdf](http://www.urbanlandmark.org.za/newsletter/issue/0403/download/april_may_trans_09.pdf)

<sup>30</sup> For more on site tax see Eglin, R. 2010. *Balancing Public and Private Rights to the Commons: new thoughts on land management*. Available at: [http://afesis.org.za/wp-content/uploads/2017/02/Transformer\\_Vol-16-No-6-December-2010.pdf](http://afesis.org.za/wp-content/uploads/2017/02/Transformer_Vol-16-No-6-December-2010.pdf) (page 34 -37)

<sup>31</sup> One example of how Land Value Capture works is where government's investment in a new bus rapid transit system means that the property values of portions of land adjacent to these interchanges increase due to them becoming more accessible. This property value increase is not as a result of anything the land owner has done, but is rather as a result of governments (or societies) investment in the surrounding neighbourhood. Society as a whole, it is therefore argued, should benefit from these land value increases. Land taxes (or contributions) can be used to capture all or some of this value increase; the proceeds of this capture can then be reinvested into improvements in the neighbourhood or shared amongst members of society. For more information on LVC see: Urban LandMark, 2012, *Improving access to the city through value capture*. Available at: [http://www.urbanlandmark.org.za/downloads/improving\\_access\\_city.pdf](http://www.urbanlandmark.org.za/downloads/improving_access_city.pdf)

seller and a willing buyer, where the unwilling seller increases the asking price. In other instances corrupt practices may be in play for some of the parties involved in the transaction to skim off funds for personal gain.

- Expropriation at market value: This is effectively a purchase by willing seller willing buyer. The introduction of the Valuer General's office by government is an attempt to arrive at a clear market value.
- Expropriation below market value: This is the option which should be the most likely outcome if the provisions of the constitution were implemented diligently, as the constitution specifically states that when determining a '*just and equitable*' compensation amount that reflects an "*equitable balance between the public interest and the interests of those affected*" that has "*regard to all relevant circumstances, including -*
  - a) *the current use of the property;*
  - b) *the history of the acquisition and use of the property;*
  - c) *the market value of the property;*
  - d) *the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
  - e) *the purpose of the expropriation.*
- Expropriation without compensation: This option is also theoretically possible if, in using the '*just and equitable*' provisions of the constitution to determine the compensation amount, it is determined that due to historical reasons, such as how the land was acquired and how it is being presently used, there is no need to compensate the person presently claiming ownership of the land.
- Expropriation with negative compensation. This option could occur, for example where the land was obtained through illegal methods and the person who obtained the land needs to return the land and pay back any ill-gotten gains they may have received.

### **Annexure 3: Examples of some options for land tenure**

The following provides an incomplete and rough list of examples of different forms of tenure:

- 'Ownership' recorded in the national deeds register
- 'Ownership' recorded in new land records system
- Long term lease
- Rental in social housing institutions
- Rental with private landlords
- Rental from the state
- Cooperative ownership