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New Land valuation criteria after the spanish 2011 valuation of land regulation: the objectivation of building expectations in rural land[1]

Keywords: Land valuation, Building expectations, Spanish Land Act, Objectivity principle, Rural Land, Location factors, Speculation.

Abstract The land valuation regime has undergone one of its most important modifications at the hands of the 2008 Land Act and its 2011 Regulation. According to the so-called objectivity principle - which defines all established methods for the new basic situations of land - and according to the stated prohibition of taking into consideration building expectations arising from granted planning permission, the fact is that the existence of circumstances that are not a natural consequence of landowner investments made on the property is easily deducible. This is inconsistent with the spirit of the Land Act in force contained in its Explanatory Memorandum.

INTRODUCTION

The object of the present work consists of some brief reflections on rural land and its valuation in the Spanish legal system, in light of the changes that occurred in the planning law following the entry into force of the Land Act 8/2007 on the 28th of May (hereafter referred to as "LS") and its later adaptation in the Royal Legislative Decree 2/2008 of June 20th, hereafter referred to as "RDLS".

We will analyze some of the problems posed by their current legal status, focusing on their evolution and the different ways, in which the Land Act, in the Spanish Legal System, has sought to resolve major planning issues, the most important of which are the land valuation system and building development generated by the action of governmental authorities. After a brief exploration of the ways in which previous Land Acts have resolved both issues, we can examine the solution adopted by the existing Act, emphasizing what is, in our opinion, the least successful of the measures proposed by the 2008 Act: the assessment of rural land and the alleged prohibition on including *building expectations* (*expectativas urbanísticas* note: this is a literal translation of a notion used in the Spanish legal/planning system referring to the aspirations for development of a given piece of land or property similar to planning gains. The term building expectations will be used throughout this paper) in its determination.

We will conclude the paper with the principal innovations which, in our view, have been introduced in the valuation of this land category (rural) by the recent Royal Decree 1492/2011, from the 24th of October, which approves the Regulation for Land Valuation (hereafter referred to as "RV"), analyzing

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1 This study forms part of the research carried out during the completion of the Doctoral Thesis "Expectations in Building Land Valuation".

how - despite the prohibition of not taking into account building expectations as laid out in the LS and the RDLS - it objectively determines the existence of development expectations in the valuation of rural land.

LAND VALUATION

The Land valuation regime has always represented one of the critical aspects in development policy and at the same time, one of the most controversial and unresolved situations between the Courts and lawyers since the enactment of the first Land Act in 1956 (Bassols, 1999). Not in vain, valuation was presented as the **headline topic** of the 2008 Land Act; its Explanatory Memorandum fiercely criticizes the system in force in which the building expectations generated by the action of the Public Authorities was incorporated. To avoid this situation, the classification of land is disassociated from its valuation.[2] What has been put in place is a system in which land is valued according to its current situation independently of the reason for the valuation. Further, it relies exclusively on the rural or urban conditions in which the land is found, proclaiming to the world the impossibility of including building expectations. Valuation should asses what is there and not what official government planning authorization foresees for the future (Fernández Rodríguez, “La nueva Ley 8/2007...”).

Thus, land valuation and building development constitute the core of the 2008 reform. The pillars upon which this Land Act are based are the search for and implementation of new evaluation criteria. The expressed intention of the RDLS is to eliminate any incidence deriving from urban planning - which would exclude *de facto* any consideration of urban development - established as a reference to the real situation of the Land subject to valuation and not what could come about according to the official government planning documents.

Regarding land valuation, the importance of this type of land is undeniable, not only because it is the classification used for most of the Spanish territory, but also because it is the location of most of our essential natural resources, such as water, landscape, natural space, or primary activities. It is in rural land where the physical organization of space, its relationship with the environment and the preservation of the natural zones find their expression (Ruiz Arnaiz, 2006).

THE EVOLUTION OF RURAL LAND VALUATION IN PLANNING LEGISLATION

The treatment of rural land in Spanish planning legislation has been uneven. While the nomenclature of this land has been modified with each new Land Act, it is in the valuation methods that the most remarkable differences can be found. As we shall now see, the Spanish Legal System has implemented various methods for this kind of assessment, including the capitalization of land income method - established for the first time in the 1956 Land Act and preserved in the subsequent Land Acts of 1976 and 1992 - and the market value method in the Land Regime and Valuation 6/98 Act.

The Land Regime and Town Planning Act from 1956 (hereafter referred to as “LRSOU”) established a new classification policy, for the first time differentiating rural land, urban reserve land and urban land, attributing each not only with a specific value, but also a set of powers and obligations that lead to the definition of property rights.

All of this served both to put to an end to uncontrolled land valuation established by the notion of supply and demand that formed the root of Article 43 of the Compulsory Purchase Act of 1954 as well as to avoid the consequences of growing speculation. The tripartite land classification in the LRSOU has been left unchanged in every subsequent Land Act (except for the existing one) although

2 Traditionally, one of the main characteristics of land valuation in Spain was to link land value criteria to every land category. Pursuant to the new 2008 Land Act, this feature dissappears, therefore land value and categories are dissassociated. Moreover, this Land Act establishes that the former denomination “categories of land” changes into the new “basic situations of land.”

with modifications regarding the specific designation of each category.

Concerning valuation, the LRSOU attempted to introduce a general objective criterion, therefore governmental policy determined the specific contents attributed to each property right. Rural land was valued in accordance with its real profitability[3] resulting from its agricultural potential. This baseline application for valuing land on which no urbanization had taken place was the “original value” (*valor inicial*) that did not take into consideration its potential development[4] deriving from government action. The *valor expectante* was applied to urban reserve land, with which urban development was incorporated. The *valor urbanístico* was applied to urban land, and the *valor comercial* was applied to buildable lots.

The 1976 Revised Land Act (hereafter referred to as “TRLS”) created a much more objective valuation system, which became largely independent from mere formal qualifications. It depended primarily on the effective compliance with the responsibilities and obligations defined by governmental policy. The acquisition of the right to build was also dependent on this compliance, in close relationship with financial estimates. Land classification was established as the most important factor in the valuation process, albeit with significant modifications to the model established by the 1956 Act, starting with the change of the names of the land categories: rural became non-built, while urban reserve was transformed into buildable land. Notwithstanding this, the tripartite classification of land imposed by the LRSOU endures. Conversely, the original four values were reduced to two: the original value relating to the rural resource was calculated on the gross return of the land; and the development value was calculated on the specific value of building assets (Articles 139 et seq. TRLS).

The initial value[5] disregarded any expectation of developing urban land that was associated with its possible use, determined by the gross performance that corresponded to the effective use of rural land of which it was naturally susceptible, or by its average value from sale for agricultural use (Articles 104 TRLS and 141 RGU). Again the building expectations of rural land relating to the possible planning and building use of this land would not be taken into account in its valuation.

Act 8/1990 from July 25 regarding the Reformation of the Planning and Valuation System (LRUV), and the revised text from 1992 (TRLRUV) accounted for the radical transformation of the Spanish Planning Law, not only regarding the traditional evaluative criteria but above all by the reinvention of property statutes which led to the innovative system of the gradual acquisition of powers. Furthermore, the TRLRUV established the independence of the land’s value based on its formal qualities, which in turn primarily depended on landowners’ effective compliance with planning regulations. Two concepts formed the essence of land value:[6] original value and urban value, making it depend, once again, on the valuation of the type and category to which the land was assigned by planning policy.

3 Art. 85.3 LRSOU "we understand by initial value, in regards non urban lands, the intrinsic value of the sites determined by its use at the time of the valuation". For its part, Decree 343/63 of 21st February, came to determine that with regards to rustic use we could also estimate other values: forestry, livestock, hunting and landscape values and any other related factors.

4 Thus Article 6 of the Decree 343/63 of 21st of February confirmed by a later Supreme Court Judgment of the 30th September 1964, establishes: “(...) *the resolution of the Compulsory Purchase panel conforming with the right to apply categories, grades, building volumes and other characteristics of the Land Act and its Annex, while that contrary to the criteria of this Act, the prevailing prices of land transactions located in the same area alleged by the appellant in the first place for not proving that the alleged prices correspond to land situated in the expropriated area, and secondly, because such comparisons are more characteristic for implementing the LEF, especially its Article 43 that the LS is relevant to the data and criteria on which the appealed decision is based*.”

5 Articles. 104 and 107 TRLS and 139 of the Building Management Regulation 1978 (hereafter referred to as “RGU”).

6 Parejo Alfonso affirms that there is a new concept thanks to the TRLRUV: several “intermediate values”, as transitional values, several “complemented original values” (*valores iniciales complementados*), and “advanced development values” (*valores urbanísticos anticipados*). These new types were born thanks to the need for ending up with the traditional dual diagram set out for the valuation of land. (Vid. PAREJO ALFONSO, L., *Suelo y urbanismo*, *el nuevo sistema legal*, Tecnos, Madrid, 1991).

In relation to non-buildable land, original value was determined (Articles 67 and 66.1 LRUV) and assessed by applying criteria contained in the provisions relating to formal assessed valuation[7] without taking into consideration its possible urban use and therefore with no coefficient corrector, fully in line with the new concept implemented by the statute.

The 1998 Land Regime and Valution Act (LRSV) was modified first by the Act 53/2002, from December 30 and later by the Act 10/2003, from May 20, regarding urgent liberalization measures which removed excessive governmental control over the urbanization and construction process set out in the TRLRUV, returning to a system in which the landowner was the absolute protagonist in urban development and government authorities were forced to adhere to landowners' wishes (Tejedor Bielsa, 1998).

The system of the gradual acquisition of urban rights was abolished, and landowners' rights and duties were reintegrated into property rights. The *ius aedificandi* was restored to property rights without the necessity for the landowner to comply with all construction duties for the acquisition of property rights.

Thus, the latter only needed to comply with legally established obligations in order to be able to exercise those rights, though never for its acquisition (Fernández Torres, 2009).

As for the value of the land, the law took a deep approach to considering market value, trying to turn it to a true replacement value. Rural land – referred to as non- buildable land in the LRSV- was valued using the comparison method (articles 25 and 26 LRSV). Alternatively, the capitalization of income method was used when there were no comparables. Remarkably enough, this Act did not establish any caution in relation to the impossibility of taking into account possible building expectations, which is no surprise insofar as the method chosen by the LRSV to assess undeveloped land had already incorporated such speculative values. This was amended by the 2003 Law Reform.

RURAL LAND AFTER THE REVISED LAND ACT 2/2008

First approach

The present Land Act (LS) established a completely atypical and innovative land classification system, ending the traditional trilogy that differentiated buildable land, built and unbuilt land, motivating such conflict in the use of these terms, with the goal of not prejudging, even indirectly, the concrete urban model (Mestre Delgado, 2007). The LS uses the new concept of "basic situations" to define the different states in which land can be found according to its current situation - rural or urban - depending on its "facticity" (*facticidad*) and not its use (Menéndez Rexach, 2008). In accordance with the RDLS, urban land is land consolidated by having been transformed by urbanization and its legal integration within the network of amenities and services provided by population centres (Article 12.3° RDLS); and rural land is not functionally integrated into the urban fabric (Article 12.2° RDLS). Both are valued according to their nature, thus, only in the second case (rural land) is its natural consequence that of being integrated because it has already become an urban reality.

This classification-valuation decoupling has generated disparate views of the doctrine. Some say it is a novelty and some maintain that, despite the changes in nomenclature, we continue to refer to same thing. Other authors argue that while the traditional classification between built and non-built seemed to respond to the nature of things, the new definition of basic rural and urbanized situations responds better to it; the land classes as provided in regional legislation will continue to exist, but attention will have to be redirected towards the two basic situations regulated by State law. This affects the

7 The land values set by the Public Cadastre were established by the 39/1988, 28th of December Act.

property's basic status and is, in particular, decisive for assessment (Menéndez Rexach, 2007). On the contrary, there is another point of view that considers that "unlinking" the classification and the valuation of land is physically impossible (Fernández Rodríguez, "*El proyecto de Ley estatal...*").
However, it is no less true that this new formulation of land typology could have certain pernicious effects. We agree with the theory that affirms that the effects of the State Legislator dispensing with land categories would generate some dysfunctions in the entire urban system.
Aside from the impact of these factual circumstances on the application of valuation methods, there is no doubt that there will also be significant divergences between the basic land conditions and the definition of powers and obligations relative to property rights established by State law in relation to its factual situation which does not have to coincide with its legal status.

THE VALUATION OF RURAL LAND IN THE EXISTING LAND ACT

The RDLS, despite dedicating only one article – Article 23 - and a single Additional Provision - the Seventh- to the valuation of rural land, it is a drastic change from the traditional criteria, not only due to the name change (which is not of the utmost importance) but above all due to the valuation criterion to be used. In any case, both terms show a return to the origins of urban planning, to the system established by the 1956 Land Act, which defined initial value only considering the land's profitability. This could have been tremendously positive if its natural consequences had come about. However it was left midway, as we now see, with the common denominator of the consideration of building development expectations.
The applicable method for the existing Land Act is the capitalization of income from use, which, as stated in the Explanatory Memorandum, ensures greater objectivity in valuations. With this method, profit gained from rural land is taken into account, deducting the cost of labour, materials, technology, machines and other direct and indirect costs. In those properties lacking profitability, one takes into account the potential returns that could be obtained based on the characteristics of the plot of land in accordance with the applicable legislation using the standard technical methods for their (the returns) production. This diverges from the comparison method which led to so many problems during the application of the LRSV, because the valuation of this land took market expectations into consideration in the comparable.
As we shall now see, in the RDLS the turning point lies in the application of some correction criteria to these values that allowed the increase in price of the rural land obtained through the capitalization of income, up to a maximum of twice the value initially calculated, taking into consideration certain location factors that are explicitly laid out in Article 23 RDLS. These criteria, according to the RDLS, should never be considered as building expectations in the valuation of this type of land.
Therefore, the simplicity of Article 23 is only apparent as it contains diverse issues to which there is no easy solution in terms of the valuation of this new basic situation of land.
Let us now analyze in detail the issues faced in the Article.
We find that capitalization does not strictly refer to the rent of land, but that which is obtained through its development. This is consistent with the new approach that the existing Act adopted in order to extend the concept of rural land and its various uses, which cease to be strictly linked to agriculture, forestry, or livestock, but can refer to a wide spectrum of activities such as tourism or recreation. The extension of these uses was much needed since we are witnessing a progressive abandonment of the agricultural use of land simply because it is no longer profitable, replacing it with a so-called "entertainment value" (*valor ocio*), that is increasing and has nothing to do with the capitalization of income (Tomas Ramon Fernandez, "La nueva Ley 8/2007..."). The extension of this idea is necessary due to the fact that development also alludes to the concept of industry, its occupation by the large multinational and regional monoculture, and ultimately to Land entrepreneurialism *(empresarialización*

in Spanish). On an economic level, this modification is most beneficial to land compulsorily purchased by the Government or to expropriated land, given that it will have room not only for effectively obtained income, but also for business benefit. This incorporation of the yield from the use and enjoyment of the terrain lead to the introduction of a Senate Bill.

Article 13.1° RDLS established the possibility of legitimizing acts and specific uses for public or social interest as a consequence of its contribution to rural management and development, because they had to be placed in the rural environment (always on an exceptional basis and under the procedure and conditions provided for in urban and territorial legislation). This possibility has been widely criticized since it gives rise to a more or less indiscriminate acceptance of uses under a formula that has been set out in numerous regional Acts and that hardly seems compatible with the criterion set out by the Constitutional Court Judgment 164/2001 with respect to the admission of minor buildable uses based on the nature of the soil (Pareja Lozano, 2007).

In this sense, it is necessary to remember that the Judgment of the Spanish Constitutional Court dating from June 20th, 1997 established that the determination of the uses of the land pursuant to a specific urban model is not up to the State. State legislation on the limitations affecting non-urban land has a merely preservation purpose, and does not impede broad jurisdiction of the autonomic legislature[8] not only to delimit the land, but to define uses which, without being strictly agrarian, are consistent with the use of the natural resources of the land, protecting the urbanisation process. The admission of alternative uses can have pernicious effects that are totally contrary to the spirit of the Land Act. As mentioned in Judgment 4393/1997 dated June 20 that establishes that the value that the plot of land can add to these potential uses cannot be considered, as introduced, in response to possible urban use. But it should not be excluded that, in some cases, it could be conceived as the updating of an expectation that is oblivious to agricultural output in compulsory proceedings. In this way, we can not be sure, given the vagueness of the term 'building expectations', that the intention of the Court was to indicate that these uses may not be considered as a product of consolidated expectations of this nature because of being, for example, in instrumental relationships with urbanized areas.

- Concerning the profits that should be taken into account in calculating the value of a particular property, real income is counted, regardless of its particular use, as well as the land's future potential. Although these potential incomes are limited exclusively to those deriving from rural use, those relating to construction activity are expressly excluded. In practice, and as a result of the absence of regulations, the potential was calculated taking into account the effective development of the surrounding land. In any case, it gives the landowner the value of both and the possibility of choosing the more economically advantageous one.
- The capitalization rate established in the RDLS for the assessment of rural land isn't a peaceful issue either, given that the choice of one or another capitalization rate can cause a noticeable difference in the final property value. Given that what is done is to move future economic values to the present, it is not really capitalization that is occurring, but rather updating traditional income (Falcon Perez and Serrano Moracho, 2008).

Traditionally this type of public debt was taken as a reference. Thus, the mortgage market valuation contained in the Order of November 30, 1994 regarding the valuation standard for real property for certain financial institutions (repealed by the existing Order ECO/805/2003, dated 27th of March) established criteria, methods, procedures, and technical instructions for those who had to

8 Spain has 17 autonomous communities with legislative powers recognised by their own Parliaments. In terms of competence, the autonomous communities can develop several subjects devolved in the Spanish Constitution (sic. Articles 148 and 149), one of them being urbanism (148.3° CE), with the exception of expropriation (149.18° CE).

adjust the calculation of the real estate appraisal value, by setting minimum values for rates depending on the type of asset. However, it has been said that this kind of procedure links rural land value to the evolution of the value of a monetary asset without any risk, which could have some logic. But it must be noted that these are markets with absolutely different characteristics since a rise in inflation generates an increase in the reference rate and therefore a decrease in the value of the capitalization of the property. That is, when the prices of other goods, including agricultural production, rise, land value decreases. And at a time of financial turbulence, the valuation of such goods may vary significantly depending on the date of publication of the reference index (Pérez Marín Law Firm, 2009).

Therefore the seventh Additional Provision of the Land Act modified the rate by recognizing that, despite capitalization of annual income - real or potential - of rural land, the capitalization rate to be used is the latest reference published by the Bank of Spain of the State public debt performance in secondary markets for up to three years. It is possible - and herein lies the change in the approach- that the General State Budget Act modifies this and sets minimum values according to crop types and land use, provided that the evolution observed in the land prices or interest rates move significantly away from the result of the values of land market prices. Hence, Act 2/2008 of 23th of December of the 2009 State Budget established consistently in its sixteenth Final provision - in principle with indefinite duration- the modification of paragraph 1 of the aforementioned Provision of the Revised Land Act. However, if, up until now, it had been postulated as one of the values that provided greater stability, the truth is that the new economic crisis gives rise to the need for valuations that review the capitalization rate.

Some authors maintain that this forecast (which is a reasonable intention of objectivity in the determination of a particularly sensitive parameter in the method's implementation) identified, therefore, the profitability of rural property whatever the type of development or use and enjoyment, with risk-free investment in the short term. This is quite debatable when you consider that the three-year debt indicator (that has evolved from an average of 2.38% in 2005 to 3.95% in February 2007, equivalent to a growth rate of almost 70% in less than two years) has a reduced relation to the relatively stable markets of property leases. Is it therefore necessary to adhere to the second paragraph of the aforementioned Additional Provision, which states that "*the General State Budget Act may modify the capitalization rate laid down in the previous paragraph and set minimum values according to types of crops and use of the land, when the evolution observed in the land prices or interest rates risk moves significantly away from the result of the valuations with regard to the market prices of rural land regardless of building development expectations*", (García Erviti, 2007).

- The RDLS also allows the inclusion of grants as income in the case of potential income, but only those that have a stable character for the agricultural uses of the rural land. This poses the question as to whether there are indefinite grants. As we have seen, the Spanish economy is not largely rural; rural land is no longer being used agriculturally, which once represented the bulk of subsidies, because it is no longer profitable. Therefore, today, the greatest value that land with these characteristics can get comes not from its intrinsic value but from public subsidies which help to raise the taxable amount in the equation so that when multiplying the resulting value by two, we get a decent value and not such an insufficient value as a result of the application of these parameters without the stated corrections, as per Article 23LS.

  It has been stated that, despite the premise that the most appropriate approach to assess real estate is its real situation, the reality of real estate can coincide with (or not) the value derived from the new legal appraisal criteria. For those that are not subjected to use in accordance with their rural nature, there is no doubt that the equivalence between the value derived from their potential income and reality will be an unintentional coincidence (Pareja Lozano, 2007). It is, ultimately, an attempt

by the Legislator to increase the value of rural land in view of the insignificant figures obtained pursuant to objective valuation methods of this basic situation and the obvious difficulty of rural landowners to achieve the indemnity principle set out Article 33 of the Spanish Constitution (vid. Judgments 61/1997 and 164/2001 of the Spanish Constitutional Court).

- Finally, and this is the most controversial issue in the RDLS, Article 23.1.a, which includes a correction to the increase in quantities obtained after capitalization of income from use, a possibility that has been difficult to implement for three years after the entry into force of the LS in the absence of any statutory determination of the assumed applications and criteria for weighting referred to in the aforementioned Article[9]. This location coefficient came about through the introduction of circumstantial location criteria such as proximity to urban centres, centres of economic activity or by its location in places of unique environmental or scenic value.

The use of the location factor is not due to the existing Land Act. Although strictly speaking, the modern origin of the theory is attributed to Alfred Weber, such academics as Von Thünen, Kuhen, Laundhart, Coronado and De Santiago drew attention to the economic significance of spatial elements, in what has been called "agricultural economics". Before Von Thünen, agricultural landowners were unaware of the extent to which the division and fragmentation of plots of land, and their distance from the center of use, could influence income. They did not know how to estimate the depreciation of certain lands located in unfavourable economic conditions. Von Thünen, guided by accounting and calculation, formulated laws, indicated exchange rules, and determined the circumstances in which such exchange could be advantageous (García Lizana, 1986).

The admission of this coefficient weighting based on the proximity of rural land to urban areas has been a constant in our jurisprudence. It is not, therefore, something new introduced by the RDLS. Therefore, while the consideration of expectations has been vetoed in all of the previous Land Acts - including the LRSV 1998 after its reform in 2003 - on repeated occasions, the jurisprudence has interpreted these aspects in a particular way, acknowledging their existence due to the proximity of the land to towns or urban services, applying the evaluative criteria of the LEF.[10] However, this location criterion finds its justification in the doctrine formulated by the Supreme Court, among others, in the aforementioned Judgment of 20th of June, 1997, confirming the possibility of derogating the prohibition on including urban development expectations in undevelopable land values.[11]

9 Third Temporary Provision on the RDLS: "*While the valuation criteria and calculation methods of this Act are not developed by regulations, the following provisions and rules shall be applicable, whenever compatible with this Act: Subsection 3 of Article 137 of the Urban Management Regulation, approved by Royal Decree 3288/1978, 25th August, and certain rights and real estate valuation rules included in the Ministry's Order ECO/805/2004, 27th March or any other provision that may replace it*".

10 The Judgment of 29th of June, 1987, of the Spanish Supreme Court states that "*not only does consider the agricultural exploitation of the land, but also influences it, even in the agricultural field, ,the proximity land has to the population nucleus in order to market products, more than the undeniable urban influence that induces an increase in the market value of land, although they are legally classified as agricultural land*". See also Judgments on October 25th and November 14th of 1958; on November 9th of 1960; 16th April of 1965; on November 16th, of 1973; on February 28th, of 1979; on April 14th, of 1982; on April 6th, of 1983; on May 24th and on September 7th of 1984.

11 The Judgment of 20th June, 1997, of the Spanish Supreme Court states that "*the concept of planning expectations is not a univocal concept, it has other meanings and allows different distinctions, and such existence prevents its exclusion from the valuation of non-buildable land." In effect, it can be said in general terms that the prohibition of including urban expectations in the value of non buildable land, at least if it is understood as the non valuation of the land instead of other types of uses exclusively based on its agricultural use,allows no exception. It's one in which the authorised determinations by the sectorial standard and concreted by the planning classification is clear; it is a specific use of another order. The fate of land depends not only on the title that was formally assigned to it as non urban - because this classification has no more meaning than that aimed to preserve the urbanisation process, excluding all forms of urban property from the characteristic of this type of property-construction or business uses, but also the determination of the uses to which it can be oriented on a sectorial basis. The value that the land may add to these potential uses may not be considered as introduced in response to possible urban use, but it should not be excluded that in some cases it could be conceived as the update of an expectation oblivious to its valuable agricultural performance in expropriation proceedings. One can be assured, given the vagueness of the term "urban expectations" that these uses not may be considered as a product of expectations of this nature*". See also Judgment on December 12th, 2002 and September 24th, 2001, of the same Court.

Jurisprudence has named such values "*agro-urban*" values, stating that, despite the fact that they are indeed building expectations; their use is admissible when it is an assessment of the real value of rural land.[12] It involves increasing the value of rural land to a rate superior to that obtained from purely agricultural considerations, and that is associated with non-developable land by the fact that the land is located on the outskirts of an urban area.

In my opinion, this upwards correction is a covert form for landowners to appropriate capital gains. Therefore, this is why the Land Act in force expressly states that it won't take into account planning expectations arising from the buildable uses that have not been fully implemented, but finally acknowledges the possibility of assessing some kind of 'location-factors' for rural land.[13] We thus face a new case of Spanish legal hypocrisy regarding the 'patrimonialization' of capital gains (Boix Palop, 2012). It is clear that the common denominator of all the jurisprudence to which we have referred in the previous paragraph is the admission of correction criteria based on the location of rural land and the effective consideration of building expectations deriving from the urbanization process. And this approach fully concurs with the view that, until now, has been used by the courts to support their incorporation, leading to a 50% increase in the value of rural land. Therefore the incoherence of the Land Act is evident, despite recognizing the impossibility of considering urban expectations arising from factors extrinsic to the value of the land, allowing its estimation through the existence of a location factor, provided that these circumstances are properly postulated in the terms that have been established statutorily.

We are confident that the introduction of correction factors will indeed reach values that are more suited to reality, transcending the eventuality of their productive situation at a particular time (Parejo Alfonso and Roger Fernandez, 2008), which will offset - more than reasonably – the 'affective assessment' deriving from the loss of the property (Roger Fernandez 2007). It evidences that the Legislator was not certain that the proposed formula was correct, being aware that the values obtained are not real, if we admit that the market provides value components rather than mere yield (Pérez Marín Law Firm, 2009).

PRINCIPAL MODIFICATIONS TO THE VALUATION OF LAND REGULATION 1492/2011.

On November 9th, 2011, Royal Decree 1492/2011 of 24 October was published in the Spanish Official Gazette (BOE), approving the valuation of land Regulation - hereafter referred to as "RV"- thanks to the authorization contained in the second Final Provision of the Revised Land Act, which authorized the Government to develop it.

Insofar as it refers to the valuation of rural land (although the RDLS is weak in its considerations on this basic land situation), the Regulation contains over a dozen articles. According to some authors this weakness of the RDLS is due to the basic situation of the land, together with the subsidiary nature of rural land, and it could be because it is contemplated as a limited and irreproducible factor of production of construction activity. However, from an exclusively "*urbanicola*" perspective, it poses a

12 The Judgment on September 24th, 2001, of the Spanish Supreme Court establishes that "*regarding the incorporation of expectations, it certainly does not ceases to amaze that a new kind of land referred to in the jury, aside from the classification of the law on the ground, with the expression"agrourbano. But that is not an obstacle to proximity to the population, even without changing the land class, it may affect its value even as such not land (...) Certainly, and what it does to the reproach of having incorporated urban expectations and gains the judgment clarifies the jury's findings - and thus the generic expression that uses "analog criteria" is not applied urban expectations in strict and proper sense, but takes into consideration the fact of proximity to the urban land to set a value that, as far as possible, approximates the actual* one." See also the judgment of the High Court of Justice of Madrid on October 7, 1998.

13 The Motive V, of the Explanatory Memorandum of the RDLS entitles that: "*It adopts the usual method for the capitalization of income, but without forgetting that, without considering the urban, expectations that may be taken into account other circumstances not derived entirely from the plan, such as transport, its proximity to towns, which in any case should be considered as "added values", not as urban development expectations resulting from the Plan*".

challenge to the *General Theory of Agrarian and Forestry Valuation*, which considers that, in addition to agricultural, livestock, forestry and environmental activity, there are other uses such as extractive activity (mining), energy (wind farms...) (Caballer Mellado, 2010).

Let us analyse the main innovations in the RV, following the previous scheme.

- First, the justification found in the Regulation deserves mention in terms of the adoption of the capitalization of income method, as compared to any other that involves market values since, in my opinion it is much more coherent and complete than the one posited by the RDLS, which did not offer solid arguments for the abandonment of the traditional method.
- As for the capitalization of income, the Regulation changes the focus to which we have already referred, by recognizing the existence of a wide range of economic activities - different from conventional uses - susceptible to being developed on rural land and more typical of a modern and advanced economy. These new uses of rural land come from its consideration as an 'asset for the future', given that, thanks to its natural characteristics, one of the new possibilities open to rural land is, for example, the location of renewable energy production in one of its many forms: wind, photovoltaic, hydraulic, geothermal energy and biomass. This consideration of non-agricultural uses for rural land could be a potential alternative to the elevation of regular land value, although logically dependent on the suitability of the land for those non-agricultural uses. In this regard, we would like to point out briefly the peculiar proposal made by the University of Santiago de Compostela (Galicia, Spain) in the consideration of a new category of rural land, "energy rural land" (*suelo rural energético*). Taking into account the existence of a growing use of this land for mining activities, for renewable energies, a new category of land is proposed according to this use.[14]
- Following from the previous paragraph, the Regulation also replaces references to the capitalization of land with development incomes, in line with modern agriculture and Community Agrarian Policy. All of this is according to new, more frequent non-agricultural uses of rural land where allowed. This makes reference to the capitalization of land, understanding development as a unit of production. The reference in Article 10.3.d) LS is equally innovative regarding the inclusion of infrastructure for teaching and research in rural uses.
- By what is referred to as actual and potential incomes, the Regulation understands that real incomes are those that correspond to the use of rural land in accordance with its state and activity at the time of its assessment (Articles 7, 11 and subsequent RV). These real incomes must be accredited by the land owner (Article 8.1 RV) through relevant accounting procedures and technical or economic information on the effective development of the land. On the other hand, it considers potential revenue to be that which could be attributed to the development of this land according to the uses and activities more susceptible to being implemented.

The RV requires proof of the existence and viability of such uses and activities - at least statistically - and only if their justification through an economic feasibility study of the uses and the necessary titles to enable its implementation is not possible. In both cases, the RV enables this possibility for actual or potential incomes using the information from studies and publications on yields, prices and costs carried out by the competent public authorities (Article 9 RV).

The content of Article 7.2° RV is equally innovative regarding cases of absence or the impossibility of developing the land due to conditions of the land at the time of the assessment. The Regulation considers that this value should be determined through the capitalization of a theoretical income equivalent to one third of the minimum real income of the land established by statistics and studies published in the area in which it is located (Article 16 RV).

14 See the report "Value of the rural land for the energetic uses of land in Galicia", Applied Economics Department, Escuela Politecnica Superior, Santiago de Compostela University (Galicia, Spain).

- Regarding the types of capitalization, the Regulation provides a novel treatment consisting of the proposal of different types of capitalization for different types of development based on the risk of each activity on the rural land, establishing an algebraic formulation derived from the field of financial mathematics whose primary output is the sum of geometric progressions.

In this sense, Articles 11 - 17 RV establish the types of capitalization that correspond to the different uses and development of the land, fixing a generic annual development income from the first year until the end of the unlimited duration of its useful life (Article 11 RV), in accordance with the parameters set out in Annex III. It is maintained as a type of generic capitalization (Article 12.1 RV), whose last reference is published by the Bank of Spain on the performance of the State public debt in secondary markets for three years and sets a correcting coefficient depending on the specific activity developed on the rural land, limited to cases of agriculture, forestry, mining, commercial and industrial activities and services (Article 12.1°, b) and c); and Article 12.2° RV). For their part, agricultural and forestry activities (Article 13 RV), mining and commercial farms (Article 14 RV), industry and services deployed on rural land (Article 15 RV) have different types of capitalization in relation to the risks of the given activities.

- Finally, the Regulation clarifies little as far as what is referred to as controversial location factors. Although the Land Act hardly defines this kind of correction, the Legislator has again discarded the opportunity for the correct development of such a highly controversial institution. Article 7.3 RV allows for the retrieved value to be corrected upwards, applying the location factor, which in turn will be obtained by the product of three correction factors: accessibility to population centers, accessibility to economic centers and location in contexts of unique environmental or scenic value. However, the Regulation suffers from a grey area, leaving several issues regarding the practical application of the location criterion unanswered.

To illustrate this, Article 17.4° RV makes reference to the concept of “proximity” of rural land, but also to “near location”, establishing, for proximity that in no case shall exceed a distance of 60 km, without establishing anything in regards to the second. Therefore, must we understand that “near location” is synonymous with “proximity”? In the same way, the Legislator should have been less scant in his/her reference to ports, airports, railway stations, intermodal areas or complexes in urbanized areas, specifying the specific type that is referenced.

Concerning the values to be used, the Regulation states that the factor regarding accessibility to population centers shall be weighted up to 2 points, the same as the unique environmental or scenic factor, where the value will be weighted between 0 and 2, while in no case is any criteria established that allows the rigorous fixing of the percentage to be chosen in each case.

While we cannot speak of indeterminate legal concepts, the lack of definition by the RV is overly extensive, especially in the case of a norm of vital importance for Spanish urban development. This is surprising in view of the permanence that the issue of land valuation has had in our legal system and in light of the crisis that this country has undergone for years. The situation is serious because the interpretation of most of the parameters for obtaining this coefficient is left to the discretion of the professional who carries out the assessment (González Ruiz, 2012), which might lead to disparate interpretation and no objective criteria.

Finally, it is very significant that - contrary to what determines the explanatory memorandum of the RDLS - its Regulation does not indicate that the location factor is to be excluded from consideration of urban expectations, although again - but in a generic way - it establishes the impossibility of considering expectations that are not derived from the investments made on the property. As we have seen, this is a clear objectification of building expectations in rural land.

CONCLUSIONS

The Land Act of 2008 starts with a critique of the traditional valuation system and the way in which it incorporates mere expectations generated by the action of the public authorities. To avoid this, the RDLS unlinks the classification of land and valuation, demanding that land is valued according to its factual situation independent from the evaluative cause. Thus, it establishes objective valuation criteria that do not take into account the building development expectations, banishing rural land as set by the 1998 Act comparison method and proposing the capitalization of development incomes as a way of completely excluding market value, which usually appears full of expectations.

The operating income capitalization method proposed in the RDLS has resulted in abnormally reduced compensations for the expropriation of rural land. That is the reason why it has been forced to establish more or less valid alternatives to comply with the principles of objectivity and the exclusion of building development expectations as laid out in the Explanatory Memorandum. Thus, it allows certain elements that are external to the intrinsic value of the land, which are not derived from the investments on the property, correcting upwards the value obtained by the capitalization method. But to be able to act this way, the RDLS is inconsistent in its approaches, and blatantly ignores the general rule prohibiting the inclusion of urban expectations in rural land prices, as if they were some kind of incidental right.

The Regulation confirms the existence of some kind of incidental rights derived from rural land location factors, and therefore it confirms the existence of a general rule against the prohibition of not including such referred expectations. Hence, it follows that, despite the criticism that the explanatory statement of the RDLS casts on expectations, this position also echoes the Regulation, which is entirely inconsistent in its development and evidences that is not possible to unlink urban expectations from land valuation.

While it enters into urban rationality that those who own land close to urban areas should be favoured, as opposed to those own land in more remote places, there is no logic in doing so without establishing cautionary principles, giving rise to building expectations and speculation. When transferring the building expectations of the landowner to the final price of the land, its rural value is completely disappearing and is being transformed into a different value that takes into account its future urban use, which evokes - without a doubt - the “*valor expectante*” set out in the 1956 LRSOU.

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