Toitū Te Whenua
Land Information
New Zealand

Guideline for disposal of land held for a public work

LINZG15700

Crown Estate Regulation

10 November 2023

Te Kāwanatanga o Aotearoa
New Zealand Government

Acceptance

Role	Name	Signed	Date
Commissioner of Crown Lands	Craig Harris		03/11/2023

Regulatory attributes

LINZG15700	
Type	Guideline
Publication date	10/11/2023
Effective date	03/12/2023

Contents

Terms and definitions

For the purposes of this guideline the following terms and definitions apply:

Term/abbreviation	Definition
acquiring agency	a Crown agency asking the Minister to acquire or take land under the PWA, and includes a Crown property accredited supplier contracted by an acquiring agency
Authority and Instruction form	a form approved by the New Zealand Law Society and Registrar-General of Land for electronic transactions to meet requirements of s 30 of the Land Transfer Act 2017
beneficially entitled person	the donor of gifted land, or, where the donor has died, the person who benefits from the donor's estate at the time of death or subsequently, including those determined as entitled successors by the Māori Land Court
Chief Executive	Te Tumu Whakarae/Chief Executive of Toitū Te Whenua Land Information New Zealand, including an authorised delegate
Assessment - Clearances	business group of Toitū Te Whenua Land Information New Zealand's Regulatory Practice and Delivery team charged with making statutory decisions on work received from Crown property accredited suppliers
CMV	current market value
Crown	His Majesty the King
Crown agency	a statutory entity and includes former government agencies, now private entities, that have obligations under s 40 of the PWA
Crown entity	an entity as defined in s 7(1) of the Crown Entities Act 2004
Crown property accredited supplier	a private sector supplier of Crown property services, accredited by Toitū Te Whenua Land Information New Zealand, and contracted by a vendor agency
disposal process	the process for disposing of land, including all relevant legislative and government policy requirements, that must be complied with land is no longer required for a public work
DOC	Department of Conservation
donor	with reference to the GLP, the donor is the person who gifted the land, or if that person has died, is the beneficially entitled person who benefits from that person's estate at the time of death or

Term/abbreviation	Definition
	subsequently, including those entitled successors as determined by the Māori Land Court.
Fenton Agreement	an agreement under which Ngāti Whakaue gifted areas of land to the Crown in the 1880's for the Rotorua township
former owner	the person from whom the land was acquired for a public work
Gazette	the *New Zealand Gazette - Te Kāhiti o Aotearoa*, published under the authority of the Government of New Zealand
GLP	gifted land policy
GST	goods and services tax
Kāinga Ora	Kāinga Ora – Homes and Communities
lawyer	as defined in s 6 of the Lawyers and Conveyancers Act 2006
local authority	as defined in s 2 of the PWA
LVT	Land Valuation Tribunal
marginal strip	as defined in s 2 of the Conservation Act 1987
Māori land	as defined in Te Ture Whenua Maori Act 1993
Minister	Minister for Land Information, including an authorised delegate
NZRCRA	New Zealand Railways Corporation Restructuring Act 1990
offer back	the requirement under s 40(2) of the PWA to offer to sell land that is no longer required for a public work by private contract to the person from whom it was acquired or the successor of that person
party	includes all natural and legal persons and other organisations and entities
PWA	Public Works Act 1981
record of title	as defined in s 5 of the Land Transfer Act 2017 and created by the Registrar-General of Land under s 12 of that Act; formerly known as a computer register
Registrar-General of Land	the Registrar-General of Land appointed under s 5 of the Land Transfer Act 2017

Term/abbreviation	Definition
right of first refusal	in Treaty settlements this is the right of a governance entity to receive the first offer to purchase land, before it is disposed of on the open market
RMA	Resource Management Act 1991
s 40	section 40 of the PWA, including the requirement under s 40(2) of the PWA to offer to sell land that is no longer required for a public work by private contract to the person from whom it was acquired or the successor of that person
SOE	State-Owned enterprise
Standard	LINZS15000: Standard for disposal of land held for a public work
successor	as defined in s 40(5) of the PWA
successor in title	the current owner of land that remains after part of its original title has been acquired for public works and subsequently become surplus
Te Arawhiti	Te Arawhiti – The Office for Māori Crown Relations
territorial authority	as defined in s 5(1) of the Local Government Act 2002
Toitū Te Whenua	Toitū Te Whenua Land Information New Zealand
TPK	Te Puni Kōkiri
Treaty	Te Tiriti o Waitangi/Treaty of Waitangi
Treaty settlement	an agreement between the Crown and a Māori claimant group to settle all that claimant group's historical claims against the Crown. The key documents that form the agreement are the Treaty settlement legislation, the deed of settlement, and protocols
vendor agency	a Crown agency disposing of land under the PWA and includes a Crown property accredited supplier contracted by the vendor agency

Foreword

Introduction

The PWA and NZRCRA set out the procedures for disposing of land held for a public work but is no longer required for that public work.

Purpose of guideline

The purpose of this guideline is to complement LINZS15000: Standard for disposal of land held for a public work, by expanding on content and providing examples about the disposal process.

Intended use of guideline

This guideline provides guidance on best practice when disposing of land under the PWA and NZRCRA and is intended to assist vendor agencies regarding the information required by Toitū Te Whenua.

It is important that recognised interests in the land be addressed in order of priority and using the correct processes.

This guideline may not cover all situations that may arise during a disposal. Vendor agencies should contact the Crown Estate Regulation (crownestatereg@linz.govt.nz) team at Toitū Te Whenua as soon as possible for situations that fall outside this guideline.

Superseded documents

This guideline supersedes the previous version of this guideline, listed below:

> Land Information New Zealand, Crown Property Regulatory. *2009. Guideline for disposal of land held for a public work – LINZG15700.*

References

It is intended that this guideline be read in conjunction with the following documents:

Reference:
Conservation Act 1987
Land Information New Zealand, Crown Property Regulatory. *Standard for resumption and stopping of road, -* LINZS15002. LINZ:2009.

Reference:

Land Information New Zealand, Crown Property Regulatory. Standard for the acquisition of land under the Public Works Act 1981 – LINZS15005. LINZ: 2017.

Local Government Act 1974

New Zealand Railways Corporation Restructuring Act 1990

Public Works Act 1981

Resource Management Act 1991

Te Ture Whenua Maori Act 1993

Toitū Te Whenua Land Information New Zealand, Crown Estate Regulation. *Standard for disposal of land held for a public work – LINZS15000*. Toitū Te Whenua: 2023.

Toitū Te Whenua Land Information New Zealand, Crown Estate Regulation. *Standard for Treaty settlement requirements for disposal of Crown-owned land – LINZS15001*. Toitū Te Whenua: 2023.

Urban Development Act 2020

1 General

Delegation of functions

The Minister for Land Information, as the Minister of Lands, and the Chief Executive of Toitū Te Whenua have statutory powers under the PWA when dealing with land held by the Crown for public works.

References to Toitū Te Whenua in the Standard should, unless otherwise advised, be considered to refer to Assessment – Clearances whho act under delegation from the Minister and the Chief Executive.

Provision of work

The vendor agency is required to submit all actions, including reports and recommendations seeking the Minister's or Chief Executive's decision to Assessment - Clearances, Toitū Te Whenua.

Records

The vendor agency is required to record and maintain the following information in the manner approved by Toitū Te Whenua:

(a) evidence that it has authorized its accredited suppliers to act on its behalf,

(b) records of relevant communication and discussions between the vendor agency and other parties relating to the disposal, and

(c) evidence of compliance with the requirements of the PWA or NZRCRA and the Standard in respect of every action taken.

Case law

The vendor agency should seek to be aware of the implications of any relevant case law applying to the disposal of land under the PWA or NZRCRA, including any new case law that may arise during a disposal.

Timeframe for disposal

The Chief Executive needs to apply an efficient process to identify where land is no longer required for a public work and if necessary, promptly comply with their offer back obligations. Case law has held that a period of 12-18 months may be required to:

(a) confirm the land is no longer required by the vendor agency,

(b) identify any other public works requirements,

(c) conclude any transfer or setting apart for that work,

(d) identify the former owners and their successors (in probate and title),

(e) consider any exemptions to the offer back, and

(f) prepare an offer, including a valuation.

The timeframe for each disposal will vary due to the complexities of the land, the history of its acquisition, and the ease of identifying and locating former owners or their successors. The vendor agency should monitor the timeline and engage with Toitū Te Whenua where there is a risk of a disposal not being progressed in a timely manner.

2 Commencement of disposal

Vendor agency no longer requires land for a public work

Note that whether land is no longer required for a public work is a matter of fact. Land could be determined to be no longer required based on the actions of the vendor agency, even where the agency has not made any formal decision that the land is surplus.

Vendor agencies should consider the impact of any management decisions on land they hold for a public work and the requirements of s 40(1)(a) of the PWA.

There is no corresponding requirement in s 23 of the NZRCRA that land being disposed of must be no longer required for that public work of railway purposes.

Doubt whether land is still required for a public work

Whether land is still required for a public work is a question of fact, based on the decisions and actions of the vendor agency. This may mean that an objective assessment of those decisions and actions may conclude that land is no longer required for a public work before the vendor agency identifies the land as surplus.

The vendor agency will need to identify situations where it is unclear whether the land is still required for a public work. If this arises, the vendor agency should contact Toitū Te Whenua as soon as possible. The aim of this notification is to flag the property so the Chief Executive can consider their obligations under the PWA, including the tests under section 40(1). Examples of such situations are provided below.

EXAMPLES:

(a) an extended period between when the land was last actively used for the public work and the commencement of the disposal process,

(b) areas of a larger property acquired that have never been used for the construction or operation of the public work. This can include land that was not needed for the public work but was acquired as the result of a severance or whole property purchase,

(c) historic long-term leases of the land to third parties for non-public works activities,

(d) the commencement of a disposal in the past that was not completed, or

(e) approaches from former owners or their successors that raise questions about ongoing use of the land that the vendor agency is unable to address.

The situations above may raise questions whether the land is still required for a public work, and if not, the effective date of valuation for offer back purposes. It is important to consider this as early as possible to avoid situations where Toitū Te Whenua questions the timing and dates of any surplus decision.

Due diligence considerations

Vendor agencies should undertake due diligence of their property to identify and, where appropriate, remedy any issues that may impact on its disposal. These factors can include investigating and considering any:

(a) legal matters that could affect the disposal, including:

  (i) all relevant legislation and government policies,

  (ii) confirming that clear title can be obtained to the land,

  (iii) third party rights over the land, such as leases, easements or informal use arrangements,

  (iv) potential planning uses or constraints on the land, and

(b) the physical position of the property, including:

  (i) the age and condition of any improvements on the land,

  (ii) any values on the land that should be protected before disposal,

  (iii) any encroachments on the land from adjoining properties,

  (iv) shared services between the property that are no longer required and land to be retained by the vendor agency,

  (v) possible contamination from use of the land for a public work or by third party actions (e.g., illegal residential property use by a tenant),

  (vi) any issues of public concern or health and safety regarding the property, and

(c) financial considerations, including establishing book value, the disposal costs and any other financial consequences to the vendor agency from the disposal.

Possible actions

Any due diligence investigations should include:

(a) undertaking an inspection of the land,

(b) identifying any clearances or notifications required for the disposal,[1]

(c) reviewing historic information held on the land, such as details of activities that have occurred on the land,

(d) identifying any approaches from other government agencies, members of the public or interest groups about the land,

(e) reviewing records held by local authorities, or registers held by agencies such as Heritage New Zealand Pouhere Taonga (Heritage New Zealand),

(f) rectifying any health and safety issues, and

(g) where appropriate, considering any public information about adjoining properties.

Subdivision

Resource consent not required

Where land no longer required for a public work comprises only part of a single instrument of title, resource consent will be required for the subdivision unless:

(a) an exception permitted by s 11 of the RMA applies; or

(b) the division is to give effect to a subdivision shown on a survey plan, and the statutory approvals required by s 226 of the RMA have been obtained, or that section is otherwise complied with; or

(c) a separate parcel of land for a public work is to be disposed of pursuant to s 119(2)(a) of the PWA and is to be incorporated with adjoining land in a single record of title (note also requirements in respect of stopped roads in s 345(2) and (2A) of the Local Government Act 1974); or

(d) the division is to set apart land under s 52 of the PWA, provided the public work is one for which the land is legitimately needed, and not a pretext for obtaining a separate record of title for disposal purposes or to dispose of the balance; or

(e) the land is for Treaty settlement purposes. Treaty claim settlement legislation tends to exempt such transfers from the provisions of Part 10 of the RMA (each case must be considered on its merits); or

(f) the land is exempted under another authority as authorised by other legislation from time to time.

[1] Refer to section 12 of this guideline for more information on clearances that may be required.

Amalgamation of land parcels

Vendor agencies should not plan for amalgamation or any sale of land ahead of obligations such as s 40 of the PWA, s 23 of the NZRCRA or Treaty settlements being addressed. While vendor agencies may have considered future disposal strategies when acquiring the land, these cannot be put into effect until all of the Crown's statutory and policy obligations have been addressed.

Right of First Refusal

Vendor agencies should identify whether the land is subject to any right of first refusal (RFR) as early as possible in the disposal process.

Vendor agencies should ensure that any RFR obligations are considered throughout the disposal process, and that any disposal is provided for within the terms of the relevant RFR.

Refer to LINZS15001: *Standard for Treaty settlement requirements for disposal of Crown-owned land* for more information.[2]

Clearances

See section 12 of this guideline for details of the clearances that may be required from other agencies and government policies that may apply to the disposal.

Refer to Appendix D of the Standard for details of what requirements apply to which vendor agencies.

Potential requirement for another public work

Guideline

The words 'required for any other public work' in s 40(1)(b) of the PWA should be interpreted to mean:

(a) the land has been designated for another public work, or

(b) written notification has been given to the vendor agency that the land is needed for another public work, and

(c) the acquiring agency has demonstrated that there is an actual need for the land, or

[2] Toitū Te Whenua has also produced guides setting out the key aspects of the RFR provisions in individual Treaty settlements. See Right of First Refusal guides | Crown property, Māori and iwi Guidance (linz.govt.nz).

(d) the acquiring agency has demonstrated that the land will be used for the proposed purpose, within a reasonable timeframe.

Competing public work requirements

A vendor agency may agree to allow the land to be transferred, acknowledging another public work has precedence, but should that work not proceed, the current public work requirement remains – so the land is technically not surplus.

Where Toitū Te Whenua is notified that there is more than one expression of interest in the land, it may engage or meet with the vendor agency and other agencies to understand these requirements and seek to resolve this. This includes making a decision under s 40(1)(b) of the PWA. It is important to work as quickly as possible given the need for the Chief Executive to act in a timely manner when determining other public work requirements.

EXAMPLE

If it is agreed to make land available from a school for a road, but the road does not eventuate, the land would remain used for education purposes.

Where only part of the land is required

Where the acquiring agency only requires part of the land that is no longer required for a public work, the vendor agency should seek to resolve any setting apart or transfer as soon as possible. This is to ensure that the land that is not required for the new public work can be progressed through the disposal process in a timely manner.

This may include subdividing the required land and dealing with the transfer or setting apart and the disposal of the balance land concurrently.

Resolution

Where another public work requirement has been identified, the acquiring and vendor agencies should work as quickly as possible to confirm the area and value of the land to be transfer. Any undue delay in resolving this may result in the new public work period being 'out of time' in terms of the timeframes for considering PWA s 40 obligations and could require offer back to be addressed.

If agreement cannot be reached within six months the Standard requires the vendor agency to notify Toitū Te Whenua. Toitū Te Whenua will consider options for resolution of any impasse, depending on the nature of the disagreement. This may include escalation to senior leadership or Ministers.

Setting apart under s 52 of the PWA

Application of section 52

Section 52 applies where there is a change in purpose for which land is held. It does not apply to a change in ownership, which is achieved by transfer through s 50 of the PWA.

Valuation

For intra-Crown transfers the parties should jointly commission a single, independent valuation of the property to be transferred. This will set the value of the land for its sale and purchase by the parties.

Agreement between agencies

The vendor agency will sign an agreement or exchange of letters giving effect to the transfer of the land between Crown agencies. While this does not need to be executed by the Minister, a copy of the agreement is required to be submitted to Toitū Te Whenua to evidence that agreement has been reached.

Land that was Māori land when acquired for a public work

The vendor agency, when seeking execution of a Gazette notice by the Minister to give effect to the agreement, should provide details of the acquisition of the land for its public work and in the case of any land previously in Māori ownership, provide details of the ownership.

This can include information on:

(a) who the land was acquired from and when,

(b) the public work purpose for which the land was acquired, and whether there have been any changes in public work purpose since then,

(c) the Act and section under which the land was acquired,

(d) whether the land was gifted to the Crown,

(e) if not gifted, the amount of compensation paid; where this can be easily identified, or advice where the land was acquired or taken without compensation being paid,

(f) whether any sites of significance (wāhi tapu) have been identified on the land and proposals to protect them have been made, and

(g) any relevant comments from the owners at the time of the acquisition that could indicate their expectations for use of the land; where these can be easily identified.

The vendor agency should advise the acquiring agency that the land was former Māori land. The acquiring agency should consider whether there is any practical alternative to acquiring land that was former Māori land, even if this is not ideal. If it wishes to continue it should provide advice on why this is the case to the Minister for a decision under s 50 or 52 of the PWA.

Transfer to a local authority under s 50 of the PWA

Section 50 applies where for the transfer of an existing public work, there is a change in ownership and by agreement land is transferred to a local authority.

Land that was Māori land when acquired for a public work

The vendor agency, when seeking the Minister's power to give effect to the agreement, is required to provide details of the acquisition of the land for its public work, and in the case of any land previously in Māori ownership, provide details of the ownership and the actions taken to protect that status.

Refer to the LINZS15001: Standard for Treaty settlement requirements for disposal of Crown-owned land for more details on the transfer of land that might be affected by Treaty settlements.

3 Right of offer back under s 40(2) of the PWA

Assessing the history of public works use

Land used for successive public works

Where land has been used for a number of public works, there should be research back to the first acquisition of the land for a public work to determine if there are any possible former owners.

Application of section 40

If land was held for a public work, then declared Crown land after the introduction of the PWA on 1 February 1982, then was later set apart for a public work, and is no longer required, then s 40 should be considered at the time of the first holding of the land for a public work.

Māori Land acquired after 1 July 1993

For Māori land acquired after the commencement of Te Ture Whenua Maori Act 1993, the acquisition of the land for a public work may not have automatically changed the status of the land. The vendor agency should confirm that the status was changed through the Māori Land Court. If not, it will need to consider any implications for the offer back process, including a potential right of first refusal for members of the preferred classes of alienees if the former owners decline the offer back.

Former owners and successors

Former owner

If the former owner is alive, that person has the right to an offer back of the land subject only to the right being voided by the Chief Executive's decision to exercise a statutory discretion in relation to the exemptions under s 40(2)(a) or (b) of the PWA or s 23(1)(a), (b) or (c) of the NZRCRA.

Identification of a successor

The statutory test under s 40(5) of the PWA or s 22 of the NZRCRA for a successor is a matter of fact – whether the successor was entitled to the former owner's land at the date of the former owner's death.

If the successor is alive, that person has the right to an offer back of the land subject only to the right being voided by the Chief Executive's decision to exercise a statutory discretion in relation to the exemptions under s 40(2)(a) or (b) of the PWA or s 23(1)(a), (b) or (c) of the NZRCRA.

Guideline for determining successors

It is Toitū Te Whenua practice to:

(a) interpret successor in probate to be limited to beneficiaries identified under the will or to follow the statutory lines of succession for intestacy,

(b) make all successors an offer jointly, irrespective of the shares in the estate that may be specified,

(c) recognise that acceptance by any one of the offerees will conclude an agreement where the offer is to more than one person.

EXAMPLE

If an offer is made to three successors, any one out of the three could accept, if the other two decline the offer.

The former owner was a company or other legal entity

Where a former owner was a company or other legal entity that is no longer registered or otherwise no longer exists, the vendor agency should first ensure that the company or other legal entity has not:

(a) merely changed its name or

(b) amalgamated with another company or

(c) has changed its registration status.

If none of the above circumstances apply, the vendor agency should consider the possibility that the removed company or other legal entity might be reinstated to a register or other legal status. There should be a reasonable period (for example six months) for the company or other legal entity to seek reinstatement. Setting a timeframe is important where they may be other offerees waiting for an offer of the land to be made.

See Appendix A of this guideline for the Toitū Te Whenua practice note: *Companies and Public Works Act Offerback*, for more information on how removed companies can be dealt with for the purposes of a section 40 offer.

EXAMPLE

If a former owner was a company that is no longer registered, the approach is to consider whether the company might be reinstated to the companies register to enable an offer back to be made.

Former owner and successors have died

A lawyer with no connection to the will maker should interpret the will for identification of a successor.

Care should be taken where only part of a person's land was originally acquired for a public work. The vendor agency should not overlook the requirement to apply the offer back provisions to the successor in title, if applicable.

Successor in title

A successor in title is the current owner of the land that remained after part of its original title was acquired for the public work. This person can be different to the successors who are entitled to receive the land on the death of the former owner where the remaining land has been sold since the public works acquisition.

Where:

(a) only part of an original title was acquired for a public work, and

(b) the former owner has died;

the vendor agency when identifying the successor in title is required to provide information and analysis to enable Toitū Te Whenua to decide the priority between a right to offer back to successors by will or intestacy and the successor in title.

Where former Maori land could be offered to either a successor who is entitled to to receive the land on the death of the former owner or successor in title, and these are different parties, the vendor agency should provide advice to Toitū Te Whenua that identifies the aspirations of both parties for the land.

Locating former owners or successors

Vendor agencies should make the same efforts to locate the former owner or their successors as they would if they were seeking to acquire land for a public work.

It may take some time to locate former owners or successors, particularly where they no longer live in the area where the land is situated. The vendor agency should advise Toitū Te Whenua of any situation where the potential offerees cannot be located within **six months** of that exercise being commenced.

Staged approach to s 40 of the PWA

Toitū Te Whenua may consider approval in stages, to facilitate the offer back process under ss 40 and 41 of the PWA. These stages may include:

(a) confirming that the tests in s 40(1) of the PWA are met;

(b) determining whether the exemptions to offer back apply;

(c) determining if there is anyone to offer back to, and either:

(d) executing the offer to the former owner or successor, or

(e) requesting an exemption; and

(f) concluding the offer back process, where an offer has been made and has been declined or has lapsed.

Each stage may be submitted to Toitū Te Whenua for a decision before the vendor agency continues the offer back process.

4 Exemptions to offer back under s 40(2) of the PWA

The offer back and exemption process has been the subject of several significant legal challenges. Therefore, the grounds for exemption must also be read along with the latest case law interpreting the relevant statutory provisions.

Principles for considering exemptions

The key principle is that land should be offered back to the person from whom it was acquired or their successor unless there is a valid reason (exemption) for not doing so.

Where doubt exists whether any exemption from the requirements of s 40 apply, then the benefit of the doubt should be given to the person from whom the land was acquired (or their successor) and the land should be offered back.

Each case for exemption should be considered objectively and on a case by case basis, with full rationale provided to Toitū Te Whenua to make a decision.

Impracticable to offer back

Care should be taken where only part of a person's land was originally acquired for a public work. The vendor agency should not overlook the requirement to apply the offer back provisions to the successor in title, if applicable.

Cannot offer back original parcels

The current land use, or the permanency and substantial nature of an improvement on the land or its value, may make it impracticable to offer back the original parcels of land.

EXAMPLE

If the Crown has acquired several parcels of land from different owners and amalgamated these into one record of title, before building substantial improvements that now straddle the original parcel boundaries, this may support an approach that it would be impracticable to subdivide the land.

However, if the improvements are not substantial or permanent, then demolition or sale for removal could be a practical option for the vendor agency to take, resulting in an offer back of the land under s 40(2) of the PWA.

Crown cannot create a separate record of title

The rules applying to the land may be such that a separate record of title cannot be created. In some cases, a territorial authority will only give subdivision consent subject to an amalgamation with adjoining land.

Unreasonable or unfair to offer back

Under the PWA, the decision about what is 'unreasonable or unfair' rests with the Chief Executive. To build a case, evidence on the individual merits of the case will need to be provided.

EXAMPLE

Where the history of the acquisition raises questions as to whether there was any compulsion involved or any outstanding agreements that should be taken into account, then the vendor agency could, in its assessment to show there was no compulsion, provide evidence that the property had been on the open market for a length of time.

Acquisition at owner's insistence

If, at the owner's insistence, an entire property was purchased, even though only part of it was required for the public work, an exemption may be appropriate for the residual land, if that land was not used for the public work.

Pre-1982 agreement to sell land

Where the Crown entered into an agreement to sell the land before the PWA came into force on 1 February 1982, it may be appropriate to apply an exemption if the Crown could be in breach of such an agreement by offering back the land.

Land was Crown land before public work

Where land may have been Crown land before first being held for a public work, it would usually be appropriate to apply for an exemption from offer back on the grounds of unreasonableness. The Crown need not offer back to itself.

Significant change in the character of the land

Care should be taken when building a case to apply for significant change in the character of the land as a ground for exemption. The relevant case law applicable to significant change should be considered and applied.

Factors to consider

The significant change in character may be as a result of:

(a) a change to the land itself, e.g. land reclamation or major landscaping work,

(b) a change in zoning or use,

(c) building improvements on the land (see the section on improvements below), or

(d) demolition of improvements on the land at the time of acquisition.

There may be a combination of factors that together make a case for significant change having occurred.

> **EXAMPLE**
>
> If the land that was acquired from the former owner for the public work could be recognised by the owner as being the same land, then a potential test of significant change would not be met.

Improvements constituting significant change

Factors to be considered when assessing whether improvements constitute a significant change in character include:

(a) whether or not the improvements are suitable in scale, construction, and condition for the site and are likely to remain in use,

(b) whether or not the improvements have come to the end of their economic life (i.e. continue to add value to the land or are exhausted),

(c) the value of the improvements in relation to the capital value of the land

(d) whether or not the improvements are the 'highest and best use' of the land in terms of its zoning, physical characteristics, and public demand, or

(e) whether or not the improvements would likely be demolished to achieve the 'highest and best use'.

Significant change on only part of the land

Where a significant change affects only part of the land, the case for exemption must be considered carefully. Where a large block of undeveloped land was acquired and a substantial improvement was erected in connection with the public work on one portion of the block, it is necessary to consider if the change is significant enough to warrant not offering back all of the property. If this is not considered to be the case, the recommendation should be that all the land be offered back, including that portion with the substantial improvement.

Where separate records of title are readily available for the area of land covered by the improvement and the balance of the land, an exemption on the grounds of significant change should be considered separately for each parcel.

Where subdivision of the land covered by the improvement and the balance of the land is being considered, the costs of the subdivision and related approvals should be provided to Toitū Te Whenua to consider any exemption on the grounds of unreasonableness.

Evidence of significant change

Information and photographs should be provided to demonstrate that the character of the land has been changed significantly.

Land acquired as a non-essential work

The offer back provisions under s 40(2) of the PWA and s 23(1) of the NZRCRA do not apply to land that was acquired after the PWA came into force on 1 February 1982, where the land was not needed for an 'essential work' as defined in the PWA.

Such land could not be acquired under the compulsory acquisition provisions of the PWA and as a result s 40(2) and s 23(1) do not apply.

The category of 'essential work' was repealed as from 1 April 1988.

Sale to owner of adjacent land

After a decision has been made that s 40(4) of the PWA or s 23(4) of the NZRCRA applies, the following guidelines should be considered when implementing that decision and offering the land to an adjacent owner.

More than one adjacent owner

If there is more than one adjacent owner, the vendor agency should consider the practicability of offering to sell land to all adjacent owners under s 40(4) or s 23(4). The report to Toitū Te Whenua should identify how such a situation will be dealt with.

If there are grounds for disregarding one or more adjacent owners, these grounds should be clearly documented in the report to Toitū Te Whenua.

Application of Treaty settlements

Some Treaty settlements, including the Waikato Raupatu Claims Settlement Act 1995 and the Ngāi Tahu Claims Settlement Act 1998, do not provide an exemption to a right of first refusal for land that falls under s 40(4) of the PWA or s 23(4) of the NZRCRA. The right of first refusal will need to be complied with before the land can be offered to the adjacent owner under s 40(4) of the PWA or s 23(4) of the NZRCRA.

The vendor agency should advise Toitū Te Whenua of the impact of any relevant Treaty settlement on the ability to offer the land to the adjacent owner under s 40(4) of the PWA or s 23(4) of the NZRCRA.

If land not sold

If the land is not sold to the adjacent owner, the vendor agency should advise Toitū Te Whenua and identify what further actions could be taken.

5 Offer back of former Māori land

Application of sections 40 and 42

Where Toitū Te Whenua decides under s 41(d) of the PWA to use s 40 as the means of offering the land, then both ss 40 and 42 of the PWA apply in the usual manner.

Where Toitū Te Whenua decides under s 41(e) to apply to the Māori Land Court to have the land vested in the former owner or their successor, then s 40 applies only to the extent that it has already been considered for the purposes of s 41, i.e. to determine whether the land is required to be offered back.

There is no specific requirement that ss 40 and 42 of the PWA apply to the Māori Land Court and s 134(6) of Te Ture Whenua Maori Act 1993 provides the Chief Executive with discretion to specify the conditions of sale. However, where offerees have been identified, vendor agencies should seek the offerees' agreement as to the terms and price for the land before seeking Toitū Te Whenua's approval to the application to the Māori Land Court.

General land owned by Māori

Section 41 of the PWA also applies to general land that was owned by Māori at the time it was acquired. The vendor agency should make reasonable endeavours to identify whether this was the case, and if the tests under s 41 are met, advise whether it should be used to return the land rather than s 40.

It may be difficult to identify whether the owners of general land were Māori when the land was acquired. The vendor agency may need to investigate the history of the land before it was acquired for a public work or identify familial connections between the owners of general land.

EXAMPLE

There may be properties owned by Māori under general title that had only recently been converted from Māori freehold land before the land was then acquired for a public work.

Effect of Treaty claim settlements

It is important to note that Treaty settlement obligations may affect the ability to apply to the Māori Land Court directly under s 134(6), as vesting may not be an exempted

disposal under a relevant RFR. In such cases, the vendor agency should discuss the matter with Toitū Te Whenua before proceeding further.

Change to Māori Freehold land by vesting order

Under Te Ture Whenua Maori Act 1993 a change to Maori freehold land on a change of ownership following an offerback under the PWA, must be confirmed through a vesting order from the Māori Land Court. The Crown Law Office (Crown Law) will act for the Chief Executive in legal proceedings, including applications to the Māori Land Court.

The vendor agency will need to work with Toitu Te Whenua and Crown Law to prepare the vesting order application. However, Crown Law will be acting on instructions from the Chief Executive.

EXAMPLE

Where Māori land taken or acquired under the PWA is subject to disposal, then the vendor agency should consider the tikanga for that land and how that tikanga should apply to take account of those persons in whom the land is to be vested.

If the land was acquired many decades or multiple generations ago, then vesting the land under s 134 of Te Ture Whenua Maori Act 1993.should be considered.

6 Effective date and valuation of offer back

Effective date

Definition

For the purpose of obtaining a valuation for an offer back, the effective date of the offer is either:

(a) the present day, or

(b) an earlier date on which the offer back should have been made, if the offer has not been made in a timely manner, taking into account the circumstances of the case.

Determining effective date as early as possible

The vendor agency is responsible for ensuring that the disposal process leading up to making an offer under s 40 of the PWA is carried out in a timely manner, and advising Toitū Te Whenua where this is not the case.

Given its importance for completing offer back, the effective date should be identified as early as possible in the disposal process (for example, once it is confirmed that there is no other public work requirement for the land). This is so the vendor agency and Toitū Te Whenua are aware of the date and can address any issues that might arise.

The vendor agency should seek guidance from Toitū Te Whenua on the effective date early in the disposal process where needed. This is to avoid costs of valuations that might be set at the wrong date.

Valuation at effective date is more than CMV

Where the effective date is earlier than the present day, the current market value may be different. The vendor agency should obtain valuation advice that identifies both values for comparison and the land should be offered back at the lower of these two values. This is relevant in situations where the current market value is the lower value, to ensure that the offeree is not disadvantaged in the case of a falling property market.

Currency of valuation

In practice, the vendor agency will obtain a valuation before completing the offer document and submitting it to Toitū Te Whenua for execution. Where the effective date is the present day, this means that the CMV will be determined at a date earlier than the date the offer will be made.

The vendor agency should consider whether there has been a delay between obtaining the valuation and submitting the offer to Toitū Te Whenua, and whether the valuation is still current or if it needs to be updated.

7 Making an offer back and negotiations over price

Counteroffer from offeree

Where an offeree provides a counteroffer to an offer by the Chief Executive, the vendor agency should advise Toitū Te Whenua of any developments.

Negotiations over price

Negotiations should only be undertaken subject to the following:

(a) counteroffers are to be supported by a valuation from an independent registered valuer in accordance with the Standard,

(b) offerees are encouraged to agree to a meeting of valuers to attempt to resolve any dispute over CMV,

(c) parties should try to agree on a dispute resolution process such as mediation at the outset in the event that valuers cannot agree on price, and

(d) any agreement to enter a dispute resolution process must be ratified by the Chief Executive.

Determination before the Land Valuation Tribunal

It is Toitū Te Whenua policy to agree to refer the matter to the LVT if the offeree executes the offer, resulting in a contract subject only to the price being set by the LVT.

Management of referrals

Toitū Te Whenua will manage referrals to the LVT with Crown Law and the vendor agency.

8 Gifted land policy

Background

The GLP was introduced by Cabinet in 1995 and recognises situations where landowners had donated a property to the Crown for it to construct and operate a public work, such as a school. The policy provides, where land is being returned to the donor, the donor of the land should not have to pay the Crown the value of the land (as they gifted it).

Priority of the gifted land policy in disposal

The order of precedence for disposal processes is:

1. section 40 of the PWA or other Act that limits the disposal of land. Any investigation should consider whether the land was acquired by gift or purchase.
2. Treaty claim settlement legislation.
3. the GLP.
4. the Māori Protection Mechanism and Sites of Significance processes.[3]

Improvements

Gifted land is returned at nil value on condition that the donor pays the value of any improvements on the land that were constructed by the Crown. The vendor agency has the discretion to offer the improvements to the donor at current market value or a lesser price.

The vendor agency may sell the improvements to another party for removal.

The vendor agency may, with the agreement of the new landowner, sell the improvements to a person or body who will become the new landowner's tenant.

There may be some situations where land and improvements were gifted, and those improvements remain. Those improvements should be identified, and form part of the land being returned.

[3] See section 12 of this guideline, for further information on the Māori Protection Mechanism and Sites of Significance processes.

Requirement for timely process

Any potential delay in obtaining approval to an appropriation to reimburse the vendor agency should not be a reason to delay making an offer back of gifted land.

Period of offer

While there is no set time period when an offer of gifted land is made outside of the s 40 process, the vendor agency should provide a minimum of 40 working days, or greater, depending on the circumstances of the case.

The vendor agency should also actively manage interactions with the donor or beneficially entitled persons to ensure that due consideration of the offer is continuing.

Identification of donor or beneficially entitled person

Beneficially entitled person

A beneficially entitled person may be a descendant, several generations removed from the donor. Given the passage of time since land may have been gifted, the GLP should be considered even where the beneficially entitled persons do not meet the definition of successor under the PWA. However, if this is the case, then other statutory requirements for the disposal, including an RFR, will take precedence over the GLP (see *Application outside s 40* below).

Evidence of entitlement

The onus is on the donor or beneficially entitled person to provide evidence of entitlement, which may include statutory declarations or succession orders.

Beneficially entitled person and successor in title are different people

If applying the GLP within a s 40 offer back and the beneficially entitled person is not a successor, the successor in title should still be considered. Each case must be dealt with on its own merits and be clearly documented.

Statutory precedence

Where there is a former owner or a successor and that person is different from the beneficially entitled person, s 40 takes precedence. This could occur where land was originally gifted to the Crown, but passed out of Crown ownership without first being offered back to the donor.

Land value

Since 2010, the vendor agency has been responsible for seeking any appropriation for returning gifted land, in the following ways:

(a) for Crown-owned land owned by Crown agencies – the loss on disposal is to be accounted for by the vendor agency and any loss on sale is to be dealt with through guidelines for changes in baselines,

(b) For land owned by a Crown entity – the Crown entity is to be reimbursed the market value of land as the return of gifted land is a Crown obligation. This is to be resolved through an appropriation change as they relate to the Crown obligation.

The vendor agency should contact The Treasury to discuss how the value of the land is to be treated, including any funding requirements.

Application outside s 40

While land may have been gifted to the Crown, there may be situations where the GLP cannot be given effect to through an offer under s 40. This includes where the beneficially entitled person does not meet the definition of successor in terms of s 40(5) of the PWA (e.g., is a "successor of a successor").

In such cases the vendor agency should discuss this with Toitū Te Whenua as soon as possible, as other Crown obligations, such as a RFR under a Treaty claim settlement, may affect the ability to give effect to the policy.

Types of gifted land

Absolute gift

An absolute gift is a gift given free of conditions of use. Gifted land should be returned to its donor, unless there is evidence specifying that a gift was absolute.

If the intended use of a gift is unclear, the vendor agency should err on the side of caution and assume:

(a) the gift was not absolute,

(b) the land was given for a specific purpose, and

the GLP applies.

Gift with conditions

The Crown owns many properties that were originally gifted for community purposes or with conditions of use specified. If these conditions of use no longer apply, e.g. the land is

no longer used for the purpose it was gifted, or a specified period of time has passed, then the GLP applies.

Gifted by Māori

When assessing the validity of a claim on land gifted by Māori, the vendor agency should take into account that land may have been vested for use by the Crown for the time being, without reward, on the understanding that it would be returned to the donor when the Crown no longer requires it.

9 Ngāti Whakaue gifted lands policy

Background

In September 1993, the Crown and Ngāti Whakaue signed a Treaty Settlement for the Ngāti Whakaue claim to the Pukeroa Oruawhata Block. As part of this settlement, the Crown agreed to investigate the disposal of any surplus gifted lands, and any future changes of use of the gifted lands that might fall outside the scope of the original gifting.

See Appendix B of this guideline for a map of the area of land covered by this policy.

Policy

The Ngāti Whakaue Gifted Land Policy (introduced in 1994) recognises that:

(a) the Crown has a Treaty obligation to Ngāti Whakaue as the donor to act in good faith to actively protect the donor's interest,

(b) when lands accepted by the Crown as gifted by Ngāti Whakaue are declared surplus, that land will be offered back at no cost, except that Crown improvements will be offered at their CMV, and

(c) where it is proposed to change the use of gifted land to a use not contemplated in the terms of the Fenton Agreement, the Crown will consult and seek the agreement of Ngāti Whakaue.

Improvements

The Ngāti Whakaue Gifted Land Policy was amended in 1999 to include three options for dealing with improvements on the land.

The options include:

(a) Ngāti Whakaue purchasing the land and improvements at CMV; or

(b) the Crown selling the property on the market and paying Ngāti Whakaue a cash amount equivalent to the CMV of the land only, or

(c) Ngāti Whakaue and the Crown entering into a ground lease for the land under the improvements and the Crown transfers the land to Ngāti Whakaue subject to the ground lease.

These options are to be submitted to Ngāti Whakaue in each case of a disposal. Ngāti Whakaue will then decide on its preferred option.

10 Market or reserve price under s 42 of the PWA

Date of assessment of value

The vendor agency should ensure that the valuation is current. Generally, Toitū Te Whenua would consider a current valuation to be no older than three months prior to the date of tender, auction, or other sale.

However, the vendor agency should always consider the currency of any valuation and whether it needs to be updated before the land is advertised for sale or auction held. This is especially important in a rapidly changing property market.

Marketing and advertising

How long should a property be advertised on the market?

The marketing and advertising of a property to be disposed of should not be less than four weeks. The actual time advertised on the market will depend on the circumstances of the property and the market conditions at the time.

Closed tenders

A vendor agency cannot use a closed tender as a method of offering land for disposal under s 42 of the PWA, as s 42(1)(d) requires that the sale of land be offered by 'public tender'.

Disclosure to prospective purchasers

The vendor agency should advise all prospective purchasers in writing:

(a) of any statutory restrictions or physical encumbrances that the land is subject to,

(b) of the former use of the land, and

(c) that prospective purchasers should seek independent advice on the impact of any encumbrances, restrictions, or former use.

11 Transfer and settlement

Land Transfer Tax Statements

The Land Transfer Act 2017 requires that, where a transfer of land is to take place, both the buyer and seller of land must complete a Land transfer tax statement form. This has to be completed as part of the conveyancing transaction. This statement is not required in some situations, including Māori land or where the Crown has transferred land under Treaty claim settlement legislation.

Where a tax statement is required, a public authority[4] as transferor or transferee can claim an exemption from providing tax details in the tax statement as a non-notifiable transfer.

The purchaser of land from the Crown will need to complete their own tax statement as part of the transfer.

The vendor agency will need to submit the signed tax statement with the Authority & Instruction form to the Registrar-General for processing of the transfer.

Treatment of GST

The vendor agency should ensure that the correct GST treatment is applied to any disposal of land. It is also important to ensure that where GST is due, that the time of supply is correctly identified in order that GST is returned at the appropriate time.

[4] defined as "every department or instrument of the Executive Government of New Zealand".

12 Clearances required before disposal

The section below identifies the external clearances (meaning external to Toitū Te Whenua) required during the disposal of public works land. These clearances may only apply to certain vendor agencies.

Each vendor agency should ensure that it is aware of its obligations under each of these processes.

This section contains information on the following clearances:

Protection of values on land

In 2009, Ministers wrote to all agencies advising of the Government's expectation that all agencies will proactively ensure that significant values on land proposed for disposal are considered, and where appropriate, protected. These values can include:

(a) natural values, such as plants and animals and their actual (or potential) habitats, ecosystems, landscapes, landforms and processes, and geological features,

(b) existing and potential recreational uses of the land,

(c) historic heritage, including historic sites, structures, places and areas, archaeological sites, sites of significance to Māori, including wāhi tapu,

(d) cultural significance of land to Māori, and

(e) possible use in a future Treaty settlement.

Where values are identified, the vendor agency should contact an appropriate agency to discuss any action that could be required. In some cases, these notifications are part of the Crown's disposal processes, but where they do not apply, the vendor agency should seek expert advice.

The protections for any values identified will vary depending on the nature of the value and its significance. They could range from advising purchasers of the values, recording them on a district plan, creating covenants to protect the value, through to transferring the land to an appropriate management authority.[5]

[5] See Protection of values on Crown-owned land | Toitū Te Whenua - Land Information New Zealand (linz.govt.nz) for further information.

Notifications to Crown agencies at start of disposal process

The following notifications to DOC, Heritage New Zealand, Kainga Ora and the Ministry for Housing and Urban Development should occur at the same time, as early as possible in the disposal process.

DOC – marginal strip and potential conservation values

Under s 24(2A) of the Conservation Act 1987, a vendor agency must advise DOC of the intention to dispose of land so that the marginal strip requirements can be assessed, including whether a strip wider than 20 metres is required. In 2003, this notification process was expanded to enable DOC to identify any conservation values on the land that required protection before disposal.

Vendor agencies must notify the relevant DOC office prior to commencing any formal disposal process and seek confirmation from DOC of its position regarding marginal strips and conservation values.

Requirement to identify marginal strips

In 2007, the Government also directed vendor agencies to identify and record marginal strips before a disposition occurs. Where marginal strips are identified, these must be defined by cadastral survey. This is a two-step process:

(a) the vendor agency identifies whether there are any qualifying water bodies for which marginal strips should be created, and advises DOC, and

(b) following DOC approval, these marginal strips are then identified by cadastral survey.

These requirements only apply to dispositions where marginal strips have not previously been identified or applied (i.e., no survey is required if a record of title for the land is already subject to Part 4A of the Conservation Act).

Identification of qualifying waterbodies

Once a decision to dispose of an interest in land has been made, the vendor agency should determine whether the land includes, or adjoins a waterbody. If no waterbodies are present, the vendor agency can formally advise DOC (see (c)(ii) below).

Where waterways are present the vendor agency should engage a licensed cadastral surveyor to:

(a) prepare a report assessing and identifying any qualifying waterbodies within or adjoining the boundaries of the parcel of land, and

(b) if so, prepare a scheme plan identifying all qualifying waterbodies, and

(c) where qualifying waterbodies are identified, complete sufficient field work on the visit to the land to enable them where needed, to later prepare a cadastral survey dataset recording the beds of the qualifying waterbodies and the marginal strips to be created.

Once the report and/or scheme plan are prepared, the vendor agency should:

(a) decide whether to seek a reduction in the width of, or a full exemption from, any marginal strip identified, and

(b) formally advise DOC, in the format prescribed, of the proposed disposition and provide the report and any scheme plan from the surveyor. The vendor agency should also seek any reduction to or exemption from marginal strips at this time. DOC has 20-working days in which to consider this advice and respond though this can be extended.

Survey of marginal strips to be created

Once DOC confirms that marginal strips are required and the width of those strips, the vendor agency should instruct the licensed cadastral surveyor to undertake a survey in terms of the Surveyor-General's current Cadastral Survey Rules and lodge the dataset with Toitū Te Whenua.

Once approved, the survey plan will become part of the cadastre as a non-primary parcel (i.e., a parcel without appellation) and be available for searching in Landonline.

If a disposition does not occur (e.g., the land transfers to another Crown agency) no marginal strip is created.

Heritage New Zealand Pouhere Taonga notification

Introduced in 2007, this process requires vendor agencies to advise Heritage New Zealand of all disposals at the same time they are referred to DOC (see above). Heritage New Zealand will assess whether there are any historic heritage values that need protection before the land is transferred to another agency or disposed of. The process does not apply to disposals where DOC was notified before 27 August 2007 but takes effect from that date.

All disposals should be notified to Heritage New Zealand.

Note that vendor agencies must also consider the Policy for Government Management of Cultural Heritage 2022. No clearance is required but this policy sets out factors that vendor agencies should consider when disposing of land that may have heritage values. The policy is available on the Manatū Taonga Ministry for Culture and Heritage website:

Policy for Government Management of Cultural Heritage Places (2022) | Ministry for Culture and Heritage (mch.govt.nz)[6].

Kāinga Ora – Homes and Communities notification

Introduced in 2008, this process requires vendor agencies to advise Kāinga Ora when the agency no longer requires land for a public work. This is to assess whether the land is suitable to be used for housing purposes, i.e. for another public work.

Where Kāinga Ora requires the land for housing, it and the vendor agency will proceed with the transfer of land, as per existing protocols and arrangements, and seek the appropriate statutory approval.

If the land is owned by a state-owned enterprise, Crown research institute or other Crown entity, then Kāinga Ora would usually acquire the land under s 17 of the PWA.

Kāinga Ora may seek to use the Urban Development Act 2020 to obtain land for urban development projects.[7] This sets out specific processes, including ministerial approval, for transferring land for such projects.

Ministry of Housing and Urban Development notification

Introduced in 2015, this process requires vendor agencies to advise the Ministry of Housing and Urban Development (MHUD) of land being disposed of that is surplus to their requirements. This is for MHUD to assess whether the land can be utilised for housing purposes. Originally introduced for Auckland, since 2017 this notification requirement has applied to all Crown-owned land.

Where MHUD requires the land for housing, it and the vendor agency will proceed with the transfer of land, as per existing protocols and arrangements, and seek the appropriate statutory approval.

If the land is owned by a State-owned enterprise, Crown research institute or other Crown entity, then MHUD would usually acquire the land under the Housing Act 1955 or s 17 of the PWA.

Te Arawhiti - Māori Protection Mechanism process

The Māori Protection Mechanism is a process for the Crown to consult with Māori when it wishes to sell surplus land. Māori are invited to express an interest in the Crown setting aside the land for possible use in a future Treaty settlement. If the Crown agrees to retain

[6] Accessed 31 January 2023.

[7] See Interim standard for Acquisition of Land for Kāinga Ora under the Urban Development Act 2020 – LINZ OP S 01288 | Toitū Te Whenua - Land Information New Zealand.

the property, it will purchase the property from the vendor agency and then hold it in the Treaty Settlements Landbank; administered by Toitū Te Whenua.

This process is further described in the Office of Treaty Settlements (now Te Arawhiti) booklet *Protection of Māori Interests in Surplus Crown-Owned Land – Information for Crown agencies*, is available on the following page on the Toitū Te Whenua website: Treaty Settlements Landbank and the Māori Protection Mechanism[8].

Te Puni Kōkiri - Sites of Significance

Separate from the Treaty settlement process and Māori Protection Mechanism, the Crown accepts a responsibility to protect wāhi tapu and other sites of historical, spiritual, and cultural significance to Māori on surplus Crown land. This responsibility is administered by Te Puni Kōkiri.

An application form for the submitting of land into the Sites of Significance process is available on the following page on the Toitū Te Whenua website: Treaty Settlements Landbank and the Māori Protection Mechanism.[9]

[8] Accessed 9 December 2022.

[9] Accessed 9 December 2022.

Appendix A: Companies and Public Works Act Offerback

Overview

This practice note modifies and should be read in conjunction with the Standard and this guideline regarding the steps required when determining whether to make an offer under section 40(2) of the PWA where the former owner is a company removed from the register of companies.

Details

Case law

The Court of Appeal's judgment in *Aztek Limited v Attorney-General* [2020] NZCA 249 considered the previous versions of the LINZ Standard and Guideline for disposal of land held for a public work. While the Standard and Guideline provided an example of possible evidence for an exemption to offer back regarding companies that no longer exist the Court noted that neither contemplated the possibility that a removed company might be reinstated to the register of companies.

The Court found the correct approach to s 40 to be to first determine whether each provision of s 40(1)(a); and (b); and (c) applies. Satisfaction of these requirements then marks the beginning of the period in which an endeavour to sell land must be made, and that period must involve the taking of reasonable steps to ascertain whether an offer back may be made.

Keynotes

(a) The Court determined the Chief Executive's obligation at s 40(1) of the PWA to "endeavour to sell the land" must be characterised by reasonable and appropriate enquiries as to whether such a sale is possible

(b) This involves endeavouring to work through s 40 including by taking steps to address the exemptions in s 40(2) in a manner that best meets the purpose of the section in offering land, where possible, back to the former owner or successor.

Section 40(2) exemptions if a former owner is a company removed from the register of companies

Where a former owner of land is a company removed from the register of companies ("removed company"), the exemptions under s 40(2)(a) may apply. This will involve consideration of what is known about the company and how difficult it would be for the

former shareholders or directors to have it restored to the register of companies ("the Register") under the Companies Act 1993.

In the case of a removed company's land the Crown vendor agency disposing of the land should undertake the following steps:

(a) The initial stage report to Toitū Te Whenua on the obligations under s 40 must include where reasonably possible:

  (i) a copy of all relevant information off the Register on the removed company,

  (ii) information regarding the company structure, the relevant directors, shareholders, and the reasons for the company having been removed from the Register; and

  (iii) advice to assist in deciding how difficult would it be for the former shareholders or directors to restore the company to the Register if for example, the company file cannot be found.

  (iv) advice on whether any of the exemptions in s 40(2)(a) or (b) (that do not relate to the fact that the former owner is a removed company) apply.

(b) If information on the Register does not produce satisfactory information that could reasonably lead to the expectation of restoration of the company by the former shareholders or directors of the former owner to the Register, then the Chief Executive may determine that the obligation to endeavour to sell the land in s 40(1) has been satisfied and apply the exemptions in s 40(2)(a).

(c) If the Chief Executive determines that further endeavours to sell the land are required, the relevant director(s) and shareholder(s) (or liquidator, if relevant) of the removed company should be contacted in writing. The relevant person should be advised that the enquiry is in connection with s 40 of the PWA and be requested to:

  (i) provide information relating to the removed company (where available) and the land, and also if in the event that the company was able to be restored, the likelihood of the shareholders desiring to be in the position of a former owner to be considered for an offer of the land,

  (ii) indicate a reasonable time required for restoration of the company to occur, and

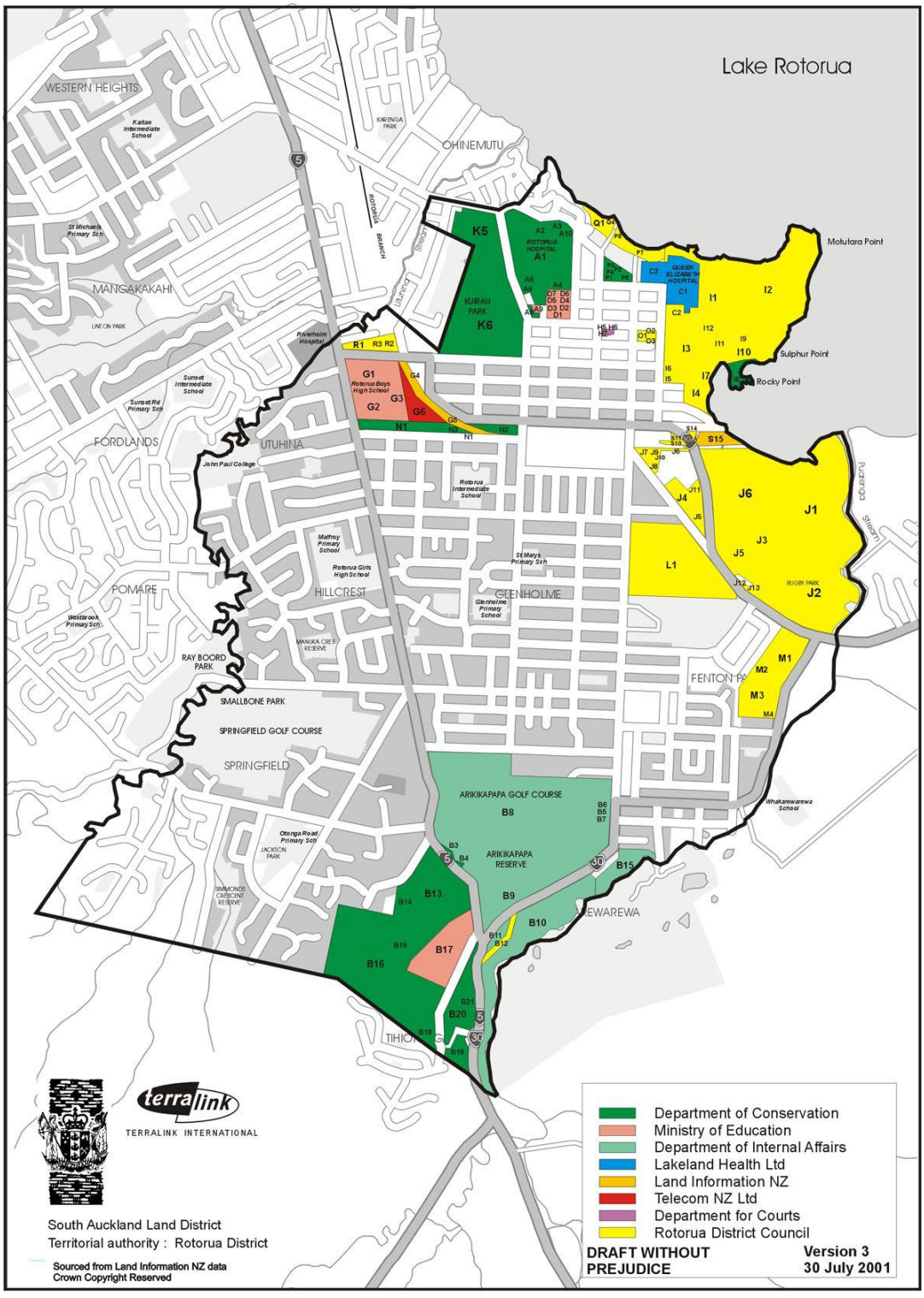
  (iii) acknowledge that, if in the course of attempting to restore the company an irreconcilable dispute arises, or the time to be taken for the company's restoration has unreasonably exceeded the time indicated by the former company's officers, then the Chief Executive may decide that the exemptions under s 40(2)(a) to offer back the land could apply.

(d) If the removed company is restored within the timeframe (or any extension considered reasonable by the Chief Executive) then the company in being restored to the Register is deemed by s 330(2) of the Companies Act 1993 to have continued in existence as if it had not been removed from the Register. In such circumstances the Chief Executive may, if no other exemptions apply, proceed to offer the land in terms of s 40(2).

No obligation to investigate restoration

To avoid doubt, *Aztek* does not require the Chief Executive to investigate whether a company can be restored to the Register. It is for the former shareholders or directors, at their cost and expense, and subject to the Registrar of Companies signing and registering a notice under the Companies Act 1993 restoring the company.

Appendix B: Area covered by Ngāti Whakaue Gifted Lands Policy



Note – this plan was prepared in 2001 so some of the land identified will have already been returned under the policy or otherwise disposed of.