

Landowner's rights

When the Crown requires your land
for a public work

May 2017



LANDOWNER'S RIGHTS WHEN THE CROWN REQUIRES YOUR LAND FOR A PUBLIC WORK

Land Information New Zealand
May 2017

© Crown Copyright

DISCLAIMER:

While every effort has been made to ensure the accuracy of this publication, it is made available strictly on the basis that Land Information New Zealand is excluded from any liability resulting directly or indirectly from the contents of this publication.

Landowners faced with specific instances where the Crown requires their land for a public work should refer to the full text of the Act or Acts under which the land is to be acquired or taken. Landowners should seek their own legal and other expert advice and should not rely solely on the text of this publication.

About this booklet

This booklet has been given to you by a Land Information New Zealand (LINZ) accredited supplier who is a private service provider engaged by the Crown to carry out negotiations to acquire land for a public work. The accredited supplier has been accredited by LINZ (a government department), to negotiate the purchase of land or an interest in land (such as an easement) for the Crown.

The accredited supplier has been instructed to give you this booklet because the Crown requires your land for a public work.

This booklet is intended to inform you of your rights and to help you understand the accredited supplier's role in the negotiations that will follow.

While every endeavour has been made to ensure that the information contained in this booklet is correct at the time of publication, it is not a substitute for any law or Act that the Crown may use to acquire land. This booklet merely explains, in simple terms, your rights and the Crown's obligations.

If you have any concerns about your rights, you should immediately consult your solicitor who will be able to advise you in more detail.

You are entitled to repayment of any reasonable legal costs you incur.

Explanation of terms

The term "land" that is used throughout this booklet is synonymous with the terms "property" and "premises". The term includes buildings and substantial structures that are permanently annexed to the land. It also includes a lesser interest in land such as an easement.

The words "acquire" and "acquisition" refer to land purchased by the Crown by agreement.

The word "take" refers to the compulsory acquisition of land.

The term "acquiring authorities" refers to organisations that may use the Public Works Act 1981 to purchase land. These organisations include the Crown, government departments, Crown entities and local authorities.

A "requiring authority" under the Resource Management Act 1991 is also included in the term "acquiring authorities" in this booklet. A "requiring authority" is further explained on page four.

"Negotiation start date" means the earlier of the date on which the requiring authority having financial responsibility for the public work notifies you in writing that it intends to acquire your land under section 17 of the Public Works Act or serves notice on you regarding the land under section 18 of the Public Works Act.

CONTENTS

BACKGROUND	3
PUBLIC WORKS ACT ACQUISITION PROCESS	4
Organisations who can use the Public Works Act Accredited supplier's role	4
Entry on land	5
Easement	5
Land acquired by agreement	5
Compulsory acquisition	7
COMPENSATION	8
Basic entitlements to compensation	8
General provisions for compensation	9
Acquisition of part only	11
Compensation when no land is taken	11
Additional compensation	11
GENERAL	15
Acquisition of severed land	15
Procedures where the Crown abandons a proposed acquisition	15
Removal costs for residential and business tenants	15
Purchases ahead of actual requirement	15

Background

Public works often cannot be carried out without affecting private landowners and their interests in land. For these reasons many governments throughout the world, including New Zealand, provide themselves with legislative powers to compulsorily acquire land for public works so that public works proposals are not unreasonably delayed. A basic principle of our system of government is that no person shall be deprived of land by the Crown without receiving fair compensation.

In New Zealand the Public Works Act 1981 provides the power to acquire land for public works and to pay compensation. LINZ, on behalf of the Crown, is responsible for administering this Act.

A large number of decisions made by the courts in both the United Kingdom and in New Zealand aid interpretation of the compensation provisions of the Public Works Act. Entitlements to compensation are therefore well settled.

Public Works Act acquisition process

The Public Works Act provides the Crown with the statutory authority to acquire land for a public work. The Crown has the power to acquire or take land for a wide variety of purposes and may negotiate for the land in the same way as a private purchaser. While the Crown's powers are wide, it can only acquire land, whether by negotiation or compulsorily, in accordance with the Act.

The acquisition process generally takes place after all required consents for the use of the land have been granted, or a designation has been provided for by the territorial authority.

Organisations who can use the Public Works Act

In the past only the Crown and local authorities had access to the acquisition provisions of the Public Works Act.

In the 1980s and 1990s many of the activities previously carried out by the Crown and local authorities became the responsibility of statutory organisations such as State-Owned Enterprises (SOEs), local authority trading enterprises (LATEs), other Crown entities and private companies. These organisations are neither government departments nor local authorities, and do not have the power to compulsorily acquire land in the same way as the Crown or local authorities. They must therefore buy land on the open market.

The exception is any network utility operator which the Minister for the Environment, through a notice in the Gazette, has classified as a "requiring authority" under the Resource Management Act. A requiring authority is an operator of a service requiring development which includes lines for electricity distribution, roads or pipes for water supply, drainage and sewerage. A requiring authority for a project or work is able to use special provisions in the Resource Management Act to seek the agreement of the Minister of Lands (presently known as the Minister for Land Information) representing the Crown to acquire or take land on the requiring authority's behalf.

Accredited supplier's role

Where the Crown requires your land for a public work, a LINZ accredited supplier is engaged to carry out the negotiations.

- The accredited supplier will negotiate the purchase of the land with you the landowner;
- The accredited supplier will ensure that the compensation negotiated is "fair" both to you, the landowner, and the Crown.

Entry on land

Entry for surveys or investigations

The Crown has powers of entry onto your land for survey or investigation purposes. The accredited supplier will give you reasonable notice of intention to enter your land for making a survey or will seek your agreement when survey and investigation on your land is required, as the case may be.

Entry agreement for construction

The accredited supplier may negotiate entry onto your land before construction of a public work. Your agreement in writing is required first. The agreement is then submitted to LINZ for approval and acceptance.

Easement

If a requiring authority needs to use of part of your land for the purpose of drainage or water supply, to operate electricity services or other utility services an easement is usually required. This is first negotiated with you for your agreement on the terms of the easement. These include conditions that allow the requiring authority access to its works for maintenance or operational purposes. The agreement is submitted to LINZ for approval and acceptance together with a grant of easement from you that is registered against your land title.

Land acquired by agreement

Landowners may agree to sell their land to the Crown. In such a case both parties must negotiate and agree on appropriate terms and conditions including the amount of compensation payable under the Public Works Act.

Negotiation of agreement

The accredited supplier will obtain a valuation from a registered valuer (except in cases of minor value) and seek other professional advice as appropriate.

You may also obtain an independent valuation from a registered valuer. The valuations obtained by both parties form the basis for negotiation and agreement on compensation.

If you seek independent advice from a valuer, solicitor, accountant, or other professional adviser, the reasonable cost of this advice may be reimbursed if the advice is necessary to quantify your loss.

As the Public Works Act provides for acquisitions to be negotiated, the accredited supplier will negotiate an agreement with you. For your own protection you should:

- **Seek independent legal and professional advice;**
- **Insist that all undertakings, payments or work that an acquiring authority has agreed to do in connection with the public work are detailed in the agreement with the Crown you will be asked to sign.**

Past experience indicates when both parties are prepared to exchange information openly and take a realistic approach that agreement is reached.

If you agree to the acquisition of your land by the Crown but cannot agree upon the amount of compensation payable, the Land Valuation Tribunal may be used to decide the compensation.

Formal agreement required

When agreement in principle has been reached with you, the accredited supplier will prepare an agreement for sale and purchase for your land (including any lesser interest in that land) which, when signed by you, is sent to LINZ for approval and acceptance on behalf of the Crown. LINZ will check and must approve the terms of agreement before accepting it on behalf of an acquiring authority as the purchaser.

Once LINZ signs the agreement form it becomes a binding contract. Payment is usually made by the acquiring authority when you give vacant possession of the land. Following settlement, ownership of the land may be transferred to the Crown by the normal conveyancing process. Alternatively the land may be acquired by a declaration made under the Public Works Act.

Compensation certificate

If only part of your land or an interest in it is required, a compensation certificate will be registered on your title to protect the Crown's interest under the agreement. Unless the certificate has ongoing conditions it will be removed as soon as any necessary survey and legalisation work has been completed.

Compulsory acquisition

Where voluntary agreement cannot be reached on the purchase of land for a public work, the Public Works Act provides for compulsory acquisition by the Crown through the Minister of Lands. This power will be exercised only after an acquiring authority (through an accredited supplier) has made all reasonable endeavours to negotiate in good faith the sale and purchase of your land, without reaching an agreement.

If the Crown intends to take your land and you object, you have the right to have your objection heard by the Environment Court. However, your right to object relates only to the taking of the land, not to the amount of compensation payable.

If you and the Crown cannot agree on the amount of compensation to be paid, the Act enables you to give notice to the Crown requesting that the issue of compensation be determined by the Land Valuation Tribunal.

Compensation

The Public Works Act provides for the payment of compensation for losses arising from the acquisition of land by the Crown. Entitlement to compensation is set out in Part V of the Act. Section 60(1) provides that affected landowners are entitled to "full compensation" so that they are left in a no better or worse position, than they were before the public work commenced. This means that landowners will not be deprived of their land without fair compensation, but will not be compensated so as to make a profit from the public work.

Only persons who have an interest in the land are entitled to compensation. Owners of interests that are less than freehold (eg a lessee's interest) are also entitled to compensation if their interests are acquired. An interest in chattels or personal rights does not give a right to compensation.

Basic entitlements to compensation

Compensation is not limited to the value of the land acquired or taken. In addition to the value of the land taken, the Public Works Act entitles you to be fairly compensated for losses that may include:

- permanent depreciation in the value of any retained land (which the Act calls "injurious affection");
- damage to any land;
- disturbance resulting from the acquisition.

Further information on these types of loss is set out later in this section of the booklet.

Obligation to minimise losses

The courts have ruled that there is an obligation on landowners to take all reasonable steps to ensure that their losses are kept to a minimum. It is important you keep a record of all communications and detailed records of all expenses incurred and losses sustained, as you may be able to recover these as part of your claim for compensation. You may only receive compensation for expenses and losses that occur as a direct consequence of the acquisition of your land.

You are under a duty to mitigate your loss. This means you should take steps to minimise your losses. If losses are increased as a result of your actions (or lack of them) you will not receive compensation for these increased losses.

An acquiring authority that acquires your land will try where possible to extend every opportunity for the landowner to take any action necessary to minimise potential losses including actions such as delaying taking possession.

General provisions for compensation

The assessment of compensation is governed by section 62 of the Public Works Act. Briefly the provisions are:

Market value

The value of land is based upon the amount the land would be expected to sell for if sold on the open market by a willing seller to a willing buyer on a specified date. There are some exceptions to this, which are set out in section 62(1)(b) of the Act.

The test of value is the price that your land would fetch on the "open market". This is distinct from the personal value to you as the landowner, or value to an acquiring authority that wants to purchase your land. The intention of the legislation is that a person whose land is taken or acquired is placed in the position of receiving

an amount that is neither more nor less than would have been obtained if the landowner had sold to a private person in an open market sale.

No increase in compensation will be paid due to the fact that land is to be taken for a public work.

Damage

If any physical damage to land caused by or in connection with a public work interferes with the landowner's rights, compensation may be payable for the damage or reinstatement.

Change in value before the specified date of acquisition

Where, before the specified date of acquisition, the value of the land required from you increases or decreases as a result of the proposed work, any effect on the land value is to be disregarded. The "specified date" can be the date on which the land was vested in the Crown or the date on which the land was first entered upon for the public work.

The intention of this principle is that you should not suffer loss from the adverse effect of the public work (if it lowers the value of your land that is required) nor profit from the beneficial effect of the public work (if it increases the value of your land).

Special suitability or adaptability

The key factor in the application of "special suitability" is the term "no market". If there is a reasonable possibility of a market, apart from the particular work of an acquiring authority, then that potential will be taken into account in valuing the land.

The special suitability or adaptability of your land for any purpose is not to be taken into account if:

- The specialist purpose could only result from the use of statutory powers; or
- There is no market other than for the needs of an acquiring authority.

Increase in value resulting from the public work

Where the public work being undertaken increases the value of land you retain, or the value of any other land in which you have an interest, this increase in value may be deducted from the total amount of compensation that would otherwise be paid to you. This is known as "betterment". Betterment applies whether the increase in value occurs before the specified date or is likely to occur after the public work commences.

This means that in assessing your compensation any betterment will be deducted from any increase in value of your retained land caused by the public work.

Increase in value because of improved access

New Zealand Transport Agency as a requiring authority, sometimes exercises power under section 91 of the Government Roading Powers Act 1989 to create crossing places to give access to "Limited Access Roads". Where this increases the value of your retained land, this increase in value will normally be deducted from any compensation to be paid to you.

Acquisition of part only

Injurious affection

If there is an adverse effect on the land you retain you may be entitled to additional compensation. The compensation for depreciation in value of the retained land is called "injurious affection". Compensation for injurious affection is provided

by section 64 of the Public Works Act. Where only part of your land is taken or acquired the compensation is assessed by adopting a "before and after" approach. This means agreeing to the value of the whole property disregarding any proposed work prior to acquisition, and comparing this with the value of the land you are left with after the taking or acquisition.

Advance payment of compensation

An advance on compensation will be paid if:

- Only part of your land is acquired; and
- It is not possible to adequately assess full and final compensation prior to carrying out the public work.

Compensation when no land is taken

A right to compensation under the Public Works Act may also arise in certain circumstances when no land is taken. Section 63 of the Act provides for compensation for substantial injurious affection to your land caused by the construction of the public work.

Additional compensation

Disturbance payments

In addition to being compensated for the value of land taken or acquired you may be entitled to reimbursement for "disturbance". This is payment for actual monetary loss or costs incurred of a temporary non-recurring nature. Compensation for disturbance is covered in section 66 of the Public Works Act. Any compensation under this section must be as a direct result of your land being taken or acquired by the Crown, the cost of which you could not have avoided by taking reasonable precautions. Disturbance payments are not a 'general amount' to cover possible unspecified contingencies such as 'inconvenience'.

In order to qualify for disturbance payments:

- Disturbance must be the direct result of you being required to give up possession of your land to the Crown;
- Costs must be reasonable and proven that they would not have occurred were it not for the Crown's purchase of your land, or your business.

Valuation, legal and other professional costs

If you obtain professional advice, you are entitled to reasonable costs (valuation, legal and other professional costs) incurred as a result of negotiating compensation for your land.

If you intend to seek professional advice, you should first discuss this with the accredited supplier who will outline the criteria for approving professional costs. This discussion will avoid any misunderstanding about what costs you are entitled to and who will pay.

If you engage a registered valuer you must instruct the valuer that the valuation is required for compensation purposes under the Public Works Act 1981. You should make the valuation report available to the accredited supplier, if requested, to facilitate discussions.

Any costs incurred for professional advice for the purposes of negotiating compensation for your land must be reasonable.

You are not able to claim the cost of your personal time spent in negotiations.

Removal costs

If your land is taken or acquired, you are entitled to the reasonable costs incurred in transporting your movable property to other land. This is subject to the other land being within the same general locality, or a greater distance if that is necessary to reach the nearest land that could have been reasonably acquired in substitution for your land.

Any claim is subject to the following:

- If you intend to claim for removal costs you should discuss this with the accredited supplier before engaging a removal contractor;
- You must be able to justify that the transportation costs are reasonable.

Allowances for special improvements

Where your land is taken or acquired, there is no obligation on an acquiring authority to take over removable improvements or to pay for these items. Removable improvements are not normally part of the land acquired. However, if the improvements are not readily removable and are of use to a disabled owner or a disabled member of an owner's family, and are not reflected in the value of the land, this loss can be recovered through compensation.

Loss on mortgage repayment

Where a loss occurs in having to transfer a mortgage as a direct result of land being taken or acquired, you as the borrower are entitled to compensation for the loss where you have to take a mortgage at a higher rate which will be more expensive than the existing mortgage over your land.

Business loss

If you have a business located on your land, you may claim compensation for business loss resulting from the relocation of the business. The loss may include loss of profits and goodwill. However, the loss of profits must relate to proven loss of "actual profits". Loss of "anticipated profits" is not provided for in the Public Works Act.

During the period of changeover from business premises that have been acquired for a public work, to alternative business premises, you may be forced to close down your business for the time being, resulting in your business not earning during that period. You may claim the net loss suffered, under the heading of "business loss". The main point to note is that it is the net loss of profit that is compensatable, not the loss of revenue.

If you intend to claim for "loss of profits" or goodwill you should ask your accountant to assist with preparation of your claim. It is important to support such claims with verifiable proof of loss by reference to the last three years' annual accounts of your business.

Payment for homeowners

If the land to be acquired contains your home that you live in, and the Crown takes the initiative to purchase it and requires you to give vacant possession on an agreed date or (if none) within one month of vacant possession being required by written notice, compensation up to \$50,000 is payable under section 72 of the Public Works Act

Section 72A provides the amount to be determined as \$35,000 if vacant possession is given on the agreed date, plus \$10,000 if a sale and purchase agreement that includes a date for vacant possession is executed within six months of the negotiation start date, plus \$5,000 at the Minister's discretion if your personal circumstances or the circumstances of the acquisition warrant such a payment.

Payment for landowners

If the land acquired does not include your home, compensation at the rate of 10 percent of the value of the land taken is payable from a minimum of \$250 to a maximum of \$25,000 provided vacant possession is given on the agreed date.

You cannot get compensation for your land being acquired if you are paid compensation for the loss of your home on that land.

Assistance to purchase

Part V of the Public Works Act also provides for other types of reasonable assistance in addition to compensation payable under the Act.

If you wish to seek assistance under Part V of the Act, or if you believe you are entitled to any additional compensation, you should discuss this with the accredited supplier.

General

Acquisition of severed land

Sometimes taking part of a landowner's land for a public work results in another part of that land being severed from the retained land so that it becomes more costly to retain or less useful to the landowner. In these circumstances the landowner may require the Crown, on behalf of an acquiring authority, to purchase the severed land. The acquiring authority may then rationalise its landholdings by selling this land to an adjoining landowner.

An acquiring authority may acquire other land and develop it for the purpose of granting that land as compensation to the person from whom land has been acquired for a public work.

Procedures where the Crown abandons a proposed acquisition

If, following negotiations, the Crown abandons its proposed acquisition of land that is made subject to a requirement or has been designated for a public work, the Public Works Act enables the landowner to claim reimbursement of actual and reasonable costs and expenses incurred as a result of the abandoned acquisition.

Removal costs for residential and business tenants

Any business or residential tenants required to vacate land so that vacant possession can be given, may claim reimbursement of actual and reasonable costs (eg removal expenses). In order to claim, tenants must give notice of their proposed move and associated costs.

Purchases ahead of actual requirement

If land has been designated for a public work in terms of the district plan, then under the Resource Management Act, you can request an acquiring authority to acquire your land (or to consider leasing your land) before it is physically needed.

However you must first establish that you are the owner of the land designated (or the owner's spouse) and that because the land is subject to a designation:

- You cannot sell your land at the current market value the land would have had, if it was not subject to the designation; and
- You cannot reasonably use your land.

Where the accredited supplier is satisfied that you meet these criteria, the accredited supplier will recommend purchase without requiring you to formally prove you cannot sell your land. Following negotiation, an agreement form (when signed by you) is sent to LINZ for approval.

An acquiring authority may also consider an advanced purchase of designated land on "hardship", "compassionate" or other appropriate grounds.

Where only part of your land is acquired in advance of the public work, an acquiring authority may offer to lease that part back to you until it is actually needed. The rental expected will be the market rental.

If you consider that you have a case for an advanced purchase, please contact the acquiring authority that requires your land. If the acquiring authority will not agree to purchase in advance, you may apply to the Environment Court for an order obliging the Minister to acquire your land under the Public Works Act.



National Office
Radio New Zealand House
155 The Terrace
PO Box 5501
Wellington 6145
New Zealand

www.linz.govt.nz