

SUBMISSION PANEL AGENDA

MONDAY 3 AUGUST 2009

AT 9.30AM

IN THE CHAMBERS MEZZANINE MEETING ROOM, CIVIC OFFICES

Panel: Councillor Sue Wells (Chairperson),
Councillors Bob Shearing, Mike Wall, and Chrissie Williams.

General Manager:
Michael Theelen
PH: 941-8281

General Manager:
Peter Mitchell
PH: 941-8462

Committee Adviser:
Sean Rainey
PH: 941-8536

1. **APOLOGIES**
2. **BRIEFING AND DRAFT SUBMISSION ON THE PUBLIC WORKS (OFFER BACK OF AND COMPENSATION FOR ACQUIRED LAND) AMENDMENT BILL**
3. **PUBLIC WORKS (OFFER BACK OF AND COMPENSATION FOR ACQUIRED LAND) AMENDMENT BILL**

Attached.

Presenter: Vivienne Wilson

1. **APOLOGIES**
2. **BRIEFING AND DRAFT SUBMISSION ON THE PUBLIC WORKS (OFFER BACK OF AND COMPENSATION FOR ACQUIRED LAND) AMENDMENT BILL**

Report structure

1. **Introduction**
2. **Purpose of Bill**
3. **Background to section 40 of the PWA**
4. **Terms of Amendment Bill**
5. **Consequences for the Council**
6. **Initial draft submission / staff comments on the Bill**

1. Introduction

- 1.1 The purpose of this report is to introduce the Submission Panel to the Public Works (Offer Back of and Compensation for Acquired Land) Amendment Bill, and to provide a draft outline of a possible submission on the Bill. The draft outline suggests that the Bill not proceed beyond Select Committee.
- 1.2 The Bill is a Member's Bill and is promoted by Te Ururoa Flavell of the Māori Party. The Bill was introduced on 26 June 2007 and had its first reading on 17 June 2009. It has been referred to the Local Government and Environment Select Committee. The Committee has called for submissions by 14 August 2009. Both the National and Labour parties supported the introduction of the Bill and its referral to Select Committee. It is unclear whether they will continue to support the Bill at the Select Committee stage.
- 1.3 Local Government New Zealand (LINZ) has circulated the Bill and asked for feedback on the Bill to determine whether or not it should make a submission and the focus of that submission. However, its website now indicates that it will be making a submission. It has asked for feedback by 5 August 2009.
- 1.4 It should be noted that LINZ began a review of the Public Works Act 1981 (PWA) in 2000. LINZ issued a public discussion paper and over 255 submissions were received. It subsequently published a summary of submissions and the submissions were used to develop policy options. However, the review has not progressed beyond this stage. On the LINZ website, the update of the review is dated 2003.

2. Purpose of Bill

- 2.1 The Bill has three purposes. These are to:
 - Ensure that former owners of land who have been deprived of that land by the Crown for the purposes of a public work are given the first right of refusal to purchase that land where the Crown no longer requires it for the particular public work for which it was originally acquired.
 - Provide for solatium payments for former owners of land deprived of their land for public works purposes for which the land was never actually used.
 - Provide for the descendants of the former owners to exercise those rights, where the former owners are deceased.
- 2.2 In this respect the Bill makes various amendments to section 40 of the PWA and introduces a new section 42AA to provide for a particular type of solatium payment.

3. Background to section 40 of the PWA

- 3.1 At present, section 40 of the PWA requires the Crown and any local authority to offer back any land no longer required for a public work (either the original public work or any alternative public work) first to the person from whom the land was acquired for the public work (or his or her successor).

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3.2 Specifically section 40(1) provides that where any land held for any public work is no longer required for that public work and is not required for any other public work, then the Chief Executive of LINZ or of the local authority must endeavour to comply with section 40(2). Section 40(2) provides that unless

- the Chief Executive considers that it would be impracticable, unreasonable, or unfair to do so, or
- there has been a significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or is held,

then the land must be offered back to the person from whom it was originally acquired (or that person's successor).

3.3 There is a process for determining the sale price of the land, but ordinarily it is offered back to the former owner at the current market value of the land as determined by a registered valuer. If the former owner does not take up the offer to purchase the land, the Crown or the local authority may sell the land to the owner of the adjacent land or may sell the land by public auction, public tender, private treaty.

3.4 This provision was introduced in 1981 and followed a major review of the Public Works Act 1928 in the 1970s by the then Ministry of Works. It followed the Bastion Point and Raglan Golf Course land occupations, which had called for the return of land to Māori once the land was no longer required for public works. Federated Farmers had also made submissions on the review of the 1928 Act their point being that it was fair and just that land no longer required for the purpose for which it was held should be returned to the person from whom it was acquired.

3.5 In terms of the Council complying with its section 40 obligations, before the Council sells a piece of land, the Legal Services Unit first considers whether the land must be offered back to the person from whom it was acquired. A recent example is the property at 2 Glandovey Road, where land acquired for road widening purposes was found to be surplus and sold.

3.6 With respect to submissions made during the LINZ review of the PWA in 2000, the LINZ website notes about the disposal provisions that

"Submissions were received from all major categories of submitters with Māori and users of the legislation being the most prominent. There was general agreement that the current provisions were in need of amendment in order to provide clarity and certainty.

Of note are the differences expressed between users of the legislation and those affected by it, particularly Māori. There was widespread support from users for the offer back provisions to become less onerous. Many felt the current provisions were too costly and time consuming to implement and they were in favour of streamlining the process as much as possible.

On the other hand, those affected by the legislation had diametrically opposed views to users when it came to the offer back provisions. Many affected parties wanted strengthening, rather than streamlining, of the offer back requirements and were generally supportive of any suggestions to remove exemptions. Māori had particularly strong views and wanted land to be offered back in all cases, preferably at less than current market value or at no cost. Some Māori wanted additional compensation because the acquiring authority had received the benefit of the use of the land.

Strong views were also expressed by all categories of submitters on transferring land held for an existing public work to another public work without invoking the offer back provisions. Again there were differences between users of the legislation and those affected by it. Users were very supportive of the current provisions while at the same time they recognised that where land was to transfer from the Crown to a local authority, the Crown's obligations to Māori needed to be clarified. Those affected by the legislation, particularly Māori, were strongly against the continuing practice of allowing land to be acquired for one public work and, when the need for that work had finished, using the land for another public work. Many opponents to such transfers sought the return of the land to the former owner, that the former owner be consulted, or that there be a requirement for the new work to be assessed on its merits and not to go ahead simply because the land was available."

4. Terms of Amendment Bill

4.1 The Bill proposes a number of key changes to section 40. These changes are:

- Amending section 40(1) so that the offer back obligation applies when land is no longer required for the original purpose for which it was acquired. In other words, if the Council acquires the land for a public work, eg waterworks, and the land is no longer needed for waterworks the land must be offered back irrespective of whether it is required for another public work.
- Amending section 40(2) to remove the "impracticable, unreasonable, or unfair" exception and the "significant change in the character of the land" exception. Therefore, the land must be offered back to the original owner even if it is impracticable, unreasonable, or unfair to do so. Similarly the land must be offered back even if there has been a significant change in the character of the land. This means that the PWA will no longer take account of the changed circumstances of the land.

4.2 The Bill also proposes inserting a new provision allowing for solatium payments. The current Act contains two sections (sections 42A and 42B) dealing with solatium payments. These are payments made to former owners for the loss of the opportunity to purchase land that was originally acquired from them. (For example, land may have been acquired from a private owner for a public work but as a result of Treaty of Waitangi Settlement, the land may be returned to Māori. The private owner may apply for a solatium payment from the Crown for the loss of the opportunity to purchase the land.) The sections were inserted as part of the Waikato Raupatu Claims Settlement Act 1995.

4.3 The new provision (new section 42AA) will allow any person to apply for a solatium payment when land is held for a public work but has not been used for the specific public work for which it was acquired or alienated. The solatium payment will be for the loss of the opportunities associated with the use of the land.

4.4 The Bill states that the amendments come into force on the day after the date on which it receives the Royal assent. The Bill does not contain any transitional provisions however, clause 7(3) of the Bill states that *"any other consequential amendments to this or any other Act can be deemed to have been proposed should such be required to ensure that the purpose of this Act is upheld"*.

5. Consequences for the Council

5.1 If the Bill is passed in its current form:

- Potentially, the Council will need to assess whether it is holding parcels of land that are no longer required for the public works for which they were originally acquired, even if they have been applied to other public works. The parcels that are no longer required for the public work that they were originally acquired will need to be offered back to the former owners or their successors, irrespective of whether they are still required for another public work.
- The Council will not be able to use a piece of land acquired for one public work for another public work without first going through the offer back process. Generally speaking, where appropriate, it is often more efficient to use land already in Council ownership than to acquire additional land from the public. However, such transfers from one public work to another will not be automatically available if the Bill in its current form is passed.
- The Council will not be able to rely on the "impracticable, unreasonable, or unfair" exception or the "significant change in the character of the land" exception. These existing specific exceptions to the offer back requirement allow a local authority to examine the particular circumstances relating to a parcel of land when considering whether section 40 applies. Whilst they add to the complexity of the decision, they do allow relevant matters to be considered. As an example of "impracticability", if the former owner of the land in question were a defunct company, it would be impractical to require that land be offered back. As an example of "unreasonableness", it may be unreasonable to require that land be offered back where the costs of undertaking that process exceeded the value of the land. An example of where a "significant change in character" might be found to exist could be where the land in question was vacant land when originally acquired, but has subsequently been developed by the construction of a significant building.

- 5.2 Because the Bill does not contain any transitional provisions, it is not clear whether the new section 40(1) is triggered by land that has already been acquired for one public work and is currently being used for another public work. Does this land need to be offered back to the former owners? It is also not clear what constitutes the original public work. Is this the public work for which the land was first acquired, or is this the public work at which the time the amendment will come into force? Furthermore, the provision about consequential amendments (clause 7(3)) is extremely confusing. If consequential amendments to the PWA or any other statute are required, then these amendments should be clearly set out in the Bill. It is not satisfactory to leave consequential amendments to be deemed to be made. This could mean anything to any person.
- 5.3 The new solatium provision refers to payments being made by the Crown but it is unclear whether this will have any subsequent repercussions for local authorities.
- 5.4 A practical example of a parcel of land subject to section 40 of the PWA is the old Edgware Pool site. The land comprising the site was originally acquired by the Council in 1920 for the purposes of a stone or materials storage yard. The site has subsequently also been used for social housing, a public swimming pool and water infrastructure. The Council now proposes to sell the land previously comprising the swimming pool and to retain the balance of the site occupied by social housing and water infrastructure. If this Bill were enacted, the Council may need to offer the land back to the persons from whom the Council acquired the original block of land or those person's successors irrespective of whether it wishes to continue to use those parts of the land currently used for water infrastructure and social housing. If the Council wished to continue those public works, it would then need to re-acquire those land parcels. In comparison, under the current provisions of the PWA those parts of the land now used for water infrastructure and social housing would not need to be offered back but could be retained by the Council for those public works.
- 5.5 If the Submission Panel is of the view that the Council should make a submission on the Bill then a draft submission is included as a part of this report. In the draft submission, the primary suggestion is that the Bill should not proceed and that any amendments to section 40 should only be made in the context of the review of the PWA. However, if the Select Committee is of the view that the Bill should proceed then the draft submission asks the Committee to make some clarifications to the terms of the Bill. In considering the submission, the Submission Panel also needs to determine whether the Council should be heard in support of the submission.

6. Initial Draft Submission on the Bill

Introduction

The Council thanks the Select Committee for the opportunity to make a submission on the Public Works (Offer Back of and Compensation for Acquired Land) Amendment Bill.

While the Council appreciates that there is some pressure to change the Public Works Act 1981 (PWA) and, in particular section 40, the Council believes that any amendment to section 40 should be made in the context of a review of the PWA as a whole. The Council's submission is that at this point in time the amendments contained in the Bill should not proceed.

However, if the Amendment Bill does proceed, then the Council submits that a number of clarifications should be made to the Bill. These are set out below.

The Council [*would like*] [*would not like to be heard*] in support of its submission.

Background to Council's submission

At present, section 40 of the PWA requires the Crown and any local authority dealing with land no longer required for a public work to offer it back first to the person from whom the land was acquired for the public work (or his or her successor).

There are two main exceptions to offering back the land to the former owner. These are if -

- the Chief Executive considers that it would be impracticable, unreasonable, or unfair to do so, or
- there has been a significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or is held.

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In terms of the Council complying with its section 40 obligations, before the Council disposes of a piece of land, the Legal Services Unit of the Council first considers whether the land must be offered back to the person from whom it was acquired. While this can be costly in terms of time and money to complete the necessary investigations, generally speaking, the offer back process is relatively clear and there is an accepted process to follow.

In following this process, on occasion, the Council does need to rely on the exception that it would be impracticable, unreasonable, or unfair to offer the land back to the former owner (or successor). The Council follows the case law when applying this exception. The Council is concerned that the current Bill removes this exception and its removal will place a considerable burden on the Council in offering back the land to the former owners even if circumstances of impracticality, unreasonableness or unfairness exist.

A similar comment can be made about the removal of the exception where there has been a significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or is held. It may be entirely inappropriate to offer land back which has experienced such a significant change in character from its state when originally acquired.

From time to time the Council transfers land acquired for one public work to another public work. In this respect it is more efficient to use land already in Council ownership than to acquire additional land from the public. Again, the Council is concerned that the current Bill proposes to remove this provision altogether. In the circumstances where land is required for a public work, other than the original public work for which it was acquired, the removal of this provision will impose added costs on local authorities and delay. This is because the Council will need to complete the offer back process, and then reacquire the land before the land can be transferred to another public work.

At a time when the Minister of Local Government has stated that he wants "*to ensure that central government policy making takes proper account of any costs to be imposed on local government*"¹, the Council is concerned that the amendments proposed in this Bill will impose greater and considerable costs on local authorities. The Council questions whether this Bill has taken proper account of the costs to be imposed on local government.

Retain the PWA until the 2000 review of the Act is finally completed

The Council notes that LINZ began a review of the PWA in 2000. LINZ issued a public discussion paper and it subsequently published a summary of submissions received. The LINZ website advises that the submissions were used to develop policy options. However, the review has not progressed beyond this stage. The Council's primary submission is that any amendments to the PWA should not be made in an adhoc fashion. The 2000 review should be completed and any amendments to section 40 should be made in the context of the overall review of the PWA.

Resolve issues with proposed amendments

If the Select Committee is of the view that the Bill should proceed, then the Council's submission is that some drafting changes should be made to the proposed amendments to section 40.

The purpose clause of the Bill refers to the fact that it is designed to ensure that former owners of land who have been deprived of that land by the Crown for the purposes of a public work are given the first right of refusal to purchase that land where the Crown no longer requires it for the particular public work for which it was originally acquired. However, the Bill has a lot wider application than this because the PWA also applies to local authorities. The purpose clause should therefore also refer to local authorities.

The Bill does not contain any transitional provisions. It is therefore not clear whether the new section 40(1) is triggered by land that has already been acquired for one public work and is currently being used for another public work. Does this land need to be offered back to the former owners? It is also not clear what constitutes the original public work. Is this the public work for which the land was first acquired, or is this the public work at which the time the Bill will come into force?

The new solatium provision (section 42AA) refers to payments being made by the Crown but it is unclear whether this will have any subsequent repercussions for local authorities. Again, this is a matter which needs to be clarified.

¹ See speech of Minister of Local Government Hon Rodney Hide to Local Government New Zealand Conference, 28 July 2009.

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Clause 7(3) of the Bill states that "*any other consequential amendments to this or any other Act can be deemed to have been proposed should such be required to ensure that the purpose of this Act is upheld*". This provision is extremely confusing. If other consequential amendments to the PWA or any other statute are required, then these amendments should be clearly set out in the Bill. It is not satisfactory to leave consequential amendments to be deemed to be made or proposed. This could mean anything to any person.

One example of where a consequential amendment is required is section 52(4) of the PWA. The effect of the Bill is that land cannot be transferred to another public work unless it has been offered back to the former owner. However section 52(4) provides that "*...if the whole or any part of any land held by a local authority (other than a road, access way, or service lane) is required for another local work to be undertaken by that local authority, the Minister, on receiving a written request by the local authority signed by its [chief executive], may by notice in the Gazette declare the land to be set apart for that other local work.*" It is not clear how section 40 and section 52(4) relate to each other. Again, this is a matter which needs to be clearly set out in the statute.