



BRIEFING

Urban development legislation – land acquisition

Date:	8 February 2018	Priority:	High
Security classification:	In Confidence	Tracking number:	1922 17-18

Action sought		
	Action sought	Deadline
Hon Phil Twyford Minister of Housing and Urban Development	Agree to the recommendations Forward a copy of this briefing to the Minister for Land Information and the Minister for the Environment Consult Ministers Sage and Parker	13 February 2018
Hon Jenny Salesa Associate Minister of Housing and Urban Development	For your information	N/A

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Di Anorpong	Manager, Construction and Housing Policy	04 901 8743	s 9(2)(a)	
Andre Anderson	Principal Advisor	04 474 2815	s 9(2)(a)	✓
Logan Penniket	Policy Advisor	04 896 5376		

The following departments/agencies have been consulted
Land Information New Zealand, Department of Conservation

Minister's office to complete:

☐ Approved

☐ Declined

☐ Noted

☐ Needs change

☐ Seen

☐ Overtaken by Events

☐ See Minister's Notes

☐ Withdrawn

Comments



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Purpose

This paper seeks further decisions on compulsory acquisition powers for the national urban development authority (UDA).

Executive summary

Our previous advice on land acquisition for the national UDA recommended that the urban development legislation include a list of specified works for which the UDA is eligible to compulsorily acquire land. At a meeting on 7 December 2017, Ministers told us they were comfortable with this approach, but wanted advice on further safeguards to ensure that acquiring land for certain works will produce public benefits.

Officials do not recommend introducing a public benefits test for all compulsory acquisition applications. However, MBIE considers that there is merit in applying a limited public benefits test to types of works which may not generate public benefits in all cases, namely urban renewal and some commercial or industrial activities. We recommend that the test take the form of a general requirement that the works enhance the wellbeing of the local or regional community. This determination would effectively be made by the Minister for Land Information.

We have revised the list of specified works in line with Ministers' feedback. The revised list includes a catch-all clause, which covers any works that are not specified but which would qualify as a 'public work' under the Public Works Act. This provision will 'future proof' the legislation so that it will support future technologies that are not foreseen at the time of drafting.

You are scheduled to discuss the recommendations in this briefing with Ministers Sage and Parker on Tuesday 13 February 2018.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **note** that in general officials do not consider it necessary to include a public benefits test for compulsory acquisitions by the national UDA
- b **note** we consider there is a case for applying a limited public benefits test only to types of works that may not generate public benefits in all cases (urban renewal and some types of commercial and industrial works)

- c **note** that there are risks associated with a limited public benefits test, including:
 - A. potential costs and delays for the UDA in gathering evidence about the benefits works would have
 - B. s 9(2)(g)(i)
 - C. adding complexity to the acquisition process by imposing an additional test
- d **note** that officials expect these risks to be mitigated by the confined scope of works to which the limited public benefits test will apply
- e **agree** to apply a limited public benefits test to acquisitions by the UDA for works for urban renewal purposes and commercial or industrial works (except where the commercial or industrial works are ancillary to housing)

Agree / Disagree

- f **agree** that the UDA be empowered to seek the compulsory acquisition of land for any work that meets at least one of the following descriptions ('specified works'), regardless of whether the work also meets the definition of 'public work' in the Public Works Act 1981:
 - A. drainage
 - B. stormwater
 - C. sewerage
 - D. water supply
 - E. waste disposal and recycling
 - F. works to avoid, remedy or mitigate the risks of natural hazards or climate change
 - G. soil conservation
 - H. energy infrastructure, including:
 - i. the production or distribution of electricity, gas or other energy
 - ii. the construction, acquisition or holding of any associated pipes and network infrastructure
 - I. hospitals or health care facilities
 - J. education facilities, including tertiary institutions (universities, wānanga, polytechnics), schools, kindergartens, early childhood centres and kōhanga reo
 - K. roads, accessways, carparks or service lanes
 - L. pedestrian malls, cycleways or walkways
 - M. railways, light rail, terminals, busways or other public transport facilities
 - N. airports
 - O. communications infrastructure
 - P. emergency services, including:
 - i. police facilities
 - ii. fire stations
 - iii. ambulance stations and helipads
 - iv. civil defence facilities

- Q. works for marine transport including:
 - i. quays, docks, piers, wharves, jetties and launching ramps
 - ii. dredging and other activities to facilitate access or remove obstructions
- R. prisons and other correctional facilities
- S. housing, including:
 - i. dwellings
 - ii. papakāinga
 - iii. retirement villages
 - iv. supported residential care facilities
 - v. night shelters
 - vi. boarding houses and hostels
 - vii. structures that are ancillary to any of the above items
- T. commercial or industrial activities that:
 - i. are ancillary to housing (as described in paragraph S above); or
 - ii. involve the demolition, repair, replacement, reconfiguration or repurposing of existing use and development of any type in the project area, provided that the works enhance the wellbeing of the local or regional community
- U. community facilities for educational, recreational and cultural activities, including but not limited to commercial facilities for these purposes
- V. public open space and public memorials
- W. cemeteries, crematoria and urupā
- X. works to demolish, repair, replace, reconfigure or repurpose existing use and development of any type in the project area to enhance the wellbeing of the local or regional community, including but not limited to remedying or mitigating health or safety risks
- Y. the reinstatement elsewhere of works that were located on land which has been compulsorily acquired for any of the above works
- Z. include the following more general descriptions:
 - i. works for disposal by way of sale, lease, license or tenancy to any person
 - ii. every use of land for any of the above works
 - iii. anything required directly or indirectly for those works
 - iv. the maintenance of, replacement and upgrades to, the works

Agree / Disagree

- g **agree** that the UDA also be empowered to seek the compulsory acquisition of land for any other work (including any commercial or industrial activity that is not a specified work) that meets the definition of 'public work' in the Public Works Act 1981

Agree / Disagree

- h **forward** a copy of this briefing to the Minister for Land Information and the Minister for the Environment

Agree / Disagree

- i **consult** the Minister for Land Information and Minister for the Environment on the recommendations in this briefing

Agree / Disagree

Di Anorpong
Manager, Construction and Housing Policy
Housing and Urban Branch, MBIE

Hon Phil Twyford
**Minister of Housing and Urban
Development**

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Background

1. In our briefing to you dated 30 November 2017 (1297 17-18), we explained that under the existing legislation on compulsory acquisition it can sometimes be unclear whether a particular work is eligible for compulsory acquisition. This is because (with a few exceptions) eligibility does not depend on the type or nature of a work. Instead, eligibility depends on whether a work meets generic definitions that can be vague and uncertain. These definitions are outlined in Annex 1.
2. Our advice was aimed at removing this uncertainty. Accordingly, we recommended listing the types of works that would be eligible in the new legislation ('specified works').
3. At the meeting on 7 December 2017 Ministers were broadly comfortable with that approach. However, Ministers had reservations about several of the types of works we had proposed to include in the list, especially commercial and industrial works, and urban renewal (referred to in the previous paper as 'revitalisation or improvement'). You asked us to advise on developing a public benefits test to ensure there are wider benefits that would justify any taking of land.
4. Minister Parker also had concerns about the use of the 'catch-all' provision we had recommended to cover types of works that are not foreseen at the time when the legislation is drafted. His preference was for the list to be thorough enough to capture all of the works required by the UDA.
5. This briefing responds to these matters, providing advice on a public benefits test and on the list of specified works for which land can be compulsorily acquired.

Ensuring sufficient public benefits

6. Compulsory acquisition is a powerful tool and not to be used lightly. It is important to ensure that it is only used for works that have sufficient public benefits to justify its use.
7. The proposed process for establishing an urban development project area provides some assurance that the project will generate public benefits. As set out in our 'Fundamental

Issues' briefing (1262 17-18), the proposed process will involve two rounds of public consultation, when stakeholders will have the opportunity to input to the establishment of the project and development plan. In addition, the UDA will have to set strategic objectives for the project area that will include specifying expected benefits from the development.

8. While an urban development project area as a whole can be expected to generate public benefits, this is distinct from the question of whether a particular work within that area will in itself generate public benefits. For this reason, it is important that the UDA legislation includes safeguards to ensure that there are public benefits from each work for which land is compulsorily acquired.

Public benefits test

9. One way of ensuring public benefits from each work would be to introduce a public benefits test that the UDA would have to meet on a case-by-case basis. Ministers requested advice on such a test at their meeting on 7 December.
10. We have identified two main options for a public benefits test:
 - A. Have a general requirement that the Minister for Land Information must be satisfied that there are expected public benefits that justify the taking of the land. This option would allow the Minister greater discretion in weighting different types of public benefits, but may reduce consistency in decision-making.
 - B. Have detailed decision criteria which specify types of benefits which a work must be expected to provide (eg amenity, transport, economic, social). This option would provide greater transparency, but would add complexity and could create difficulties around definitions and how to quantify and weight expected benefits.
11. The public benefits test could be applied:
 - A. To all compulsory acquisition applications by the UDA – as a **universal public benefits test**. This would provide a more consistent approach, but would increase delays and uncertainty from imposing a public benefits test.
 - B. Only to types of works where the benefits of acquisition may not be clear in all cases (such as commercial or industrial activities and urban renewal) – as a **limited public benefits test**. This option acknowledges that some works can generate substantial private benefits and provides an additional safeguard to ensure that they also provide sufficient public benefits that justify the acquisition. This option would reduce the impact of delays and uncertainty from applying the test to all other compulsory acquisitions.
12. MBIE and LINZ officials do not recommend introducing a public benefits test for all compulsory acquisition applications. We consider that applying a public benefits test across the board could:
 - A. create costs and delays for the UDA in gathering evidence about the benefits that works would have (cutting across the objective of streamlining the development process)
 - B.

s 9(2)(g)(i)
 - C. add complexity to the acquisition process by imposing an additional test above the existing law.

13. On the other hand, some types of works may merit additional safeguards to ensure that they will generate public benefits. A limited public benefits test (option B, paragraph 11) would provide additional assurance for types of works that may not deliver clear public benefits in all cases. We consider that a public benefits test may be justified in such circumstances.
14. We recommend that the test take the form of a general requirement that the works enhance the wellbeing of the local or regional community. This would effectively be judged by the Minister for Land Information, who will decide whether to progress compulsory acquisition applications. However, the legislation would not explicitly refer to the requirement for the Minister to consider this matter (this is in line with the existing provisions of the PWA, which do not expressly require the Minister to consider whether a work has a public purpose).
15. As noted earlier, Ministers considered that works for commercial or industrial activities and urban renewal may not generate public benefits in all cases. Accordingly, we recommend applying the limited public benefits test to acquisitions for these works.
16. The risks of a public benefits test outlined above (paragraph 12) will still apply to the limited public benefits test. However, by confining the test only to commercial and industrial activities and urban renewal, the scale of these potential impacts will be mitigated.
17. The proposals above would mean that the new legislation would take a three-pronged approach to ensuring public benefits:
 - A. Types of works that have a public purpose are included in a list of specified works. The UDA would not have to meet a public benefits or public purpose test to compulsorily acquire land for these specified works.
 - B. Works for commercial or industrial activities and urban renewal would be specified in the list, and would be subject to the limited public benefits test as an additional safeguard.
 - C. Any other types of works will be dealt with under the existing PWA tests – via the ‘catch-all’ provision, discussed later. Among other things, this means that compulsory acquisition will only be available in cases where there is a ‘public purpose’.

Recommended list of specified works

18. To reflect our above approach, we have revised the recommended list of specified works for which land can be compulsorily acquired.
19. The revised list draws heavily on legislation that names types of works that land can be compulsorily acquired for (without requiring the government to show that there was a public purpose on a case by case basis). Annex 1 provides definitions of the terms used below. The legislation is:
 - the list of ‘essential works’ that was included in the PWA between 1981 and 1987
 - the definition of ‘state housing purposes’ in the Housing Act 1955
 - the definition of ‘urban renewal’ in the Local Government Act 1974
 - the definition of ‘urban renewal’ in the Greater Christchurch Regeneration Act 2016.

20. However, we have reformulated the descriptions used in the legislation to:
- tighten the description of 'urban renewal' and introduce a limited public benefits test for these particular works, as explained in more detail below
 - add references to other works that will deliver the same or similar public benefits (eg replacing 'river control' with a broader reference to 'works to avoid, remedy or mitigate the risks of natural hazards and climate change'). Note that this means that the list will expand on the range of works that have been authorised by name previously.
21. Importantly, many of the terms used in the list are open to interpretation and will need to be defined in the new legislation to ensure clarity (note that definitions were included in the legislation referred to above). For example, the term 'roads' will need to be defined in a way that only covers public roads.
22. Legislation on compulsory acquisition always attracts significant interest from the public. A list does represent a departure from the status quo, and would be likely to generate debate. It will be important to test the list with a range of stakeholders, including through the usual Select Committee process.
23. We now recommend that the list of specified works include the following (with significant changes relative to the previous list (briefing 1297 17-18) marked in bold text):
- A. drainage
 - B. stormwater
 - C. sewerage
 - D. water supply
 - E. waste disposal and recycling
 - F. **works to avoid, remedy or mitigate the risks of natural hazards or climate change**
 - G. soil conservation
 - H. energy infrastructure¹, including:
 - i. the production or distribution of electricity, gas or other energy
 - ii. the construction, acquisition or holding of any associated pipes and network infrastructure
 - I. hospitals or health care facilities
 - J. education facilities, including tertiary institutions (universities, **wānanga**, polytechnics), schools, kindergartens, early childhood centres and **kōhanga reo**
 - K. roads, accessways, carparks or service lanes
 - L. pedestrian malls, cycleways or walkways
 - M. railways, **light rail**, terminals, busways or other public transport facilities
 - N. airports
 - O. communications infrastructure

¹ Minister Sage has expressed some reservations about allowing for large energy infrastructure works in urban areas. Officials agree that in some cases works covered by the list could have significant adverse environmental or social effects. However, we consider that those issues are best dealt with in the context of the planning regime. Like the PWA, the list should be focussed on whether or not works will have a public purpose, to avoid creating complexity or duplication. This will enable land to be acquired for that work, with the planning regime addressing adverse effects.

- P. emergency services, including:
 - i. police facilities
 - ii. fire stations
 - iii. **ambulance stations and helipads**
 - iv. **civil defence facilities**
- Q. **works for marine transport including:**
 - i. **quays, docks, piers, wharves, jetties and launching ramps**
 - ii. **dredging and other activities to facilitate access or remove obstructions**
- R. prisons and other correctional facilities
- S. housing, including:
 - i. dwellings
 - ii. **papakāinga**
 - iii. **retirement villages**
 - iv. **supported residential care facilities**
 - v. **night shelters**
 - vi. **boarding houses and hostels**
 - vii. structures that are ancillary to any of the above items
- T. commercial or industrial activities that:
 - i. **are ancillary to housing (as described in paragraph S above); or**
 - ii. **involve the demolition, repair, replacement, reconfiguration or repurposing of existing use and development of any type in the project area, provided that the works enhance the wellbeing of the local or regional community**
- U. **community facilities for educational, recreational and cultural activities, including but not limited to commercial facilities for these purposes**
- V. public open space and **public memorials**
- W. **cemeteries, crematoria and urupā**
- X. **works to demolish, repair, replace, reconfigure or repurpose existing use and development of any type in the project area to enhance the wellbeing of the local or regional community, including but not limited to remedying or mitigating health or safety risks**
- Y. **the reinstatement elsewhere of use and development that were located on land which has been compulsorily acquired for any of the above works.**

24. As noted above, Ministers have expressed particular interest in commercial and industrial activities, and urban renewal. The following sections discuss our approach to these purposes.

Urban renewal (item (X) on the specified works list)

25. Urban renewal was referred to in the previous briefing (1297 17-18) as 'revitalisation or improvement'. Item (X) is intended to cover some of the types of works that are covered by the definitions of 'urban renewal' that are included in the Local Government Act 1974 and the Greater Christchurch Regeneration Act 2016.

26. The key changes (relative to our previous proposal) are to:
- remove the references to 'improvement'. This is a subjective test that leaves room for argument about what is covered
 - introduce a requirement that the works enhance the wellbeing of the local or regional community.
27. MBIE considers that the wording used will help to ensure that compulsory acquisition can only be used for urban renewal projects that will deliver sufficient public benefits. The determination on wellbeing would be made by the Minister for Land Information, who would effectively have discretion in deciding whether the application for acquisition meets this test.
28. In addition, the compulsory acquisition will still need to meet the tests in the PWA and be subject to a legal right of objection to the Environment Court.
29. LINZ officials consider that the option of allowing the UDA access to compulsory acquisition for urban renewal should be approached with particular caution. In other countries, the use of compulsory acquisition for urban renewal has often been contentious. This is because:
- the public benefits of urban renewal works can be relatively indirect and intangible (especially if they are limited to generating a revenue stream through taxes on economic activity)
 - urban renewal projects often involve the transfer of land from poorer people (who tend to own the land that is most 'ripe' for redevelopment) to wealthier developers. To compound that problem, there is also evidence that the original owners of the land can struggle to afford replacement properties.
30. One example of an urban renewal project for which we think compulsory acquisition may be appropriate (if an owner refused to sell voluntarily) is in shopping centres which have been established in an ad hoc manner. These areas may contain a combination of public works, and commercial and light industrial works but be disconnected from the wider community and not easily accessible by transport links. Acquiring some of the properties in these areas may facilitate connection to the wider community through better public transport and roading, better infrastructure services, and the configuration of commercial properties that are better integrated into the surrounding environment.

Commercial or industrial activities (item (T) on specified works list)

31. At the meeting on 7 December 2017, Ministers indicated that they wanted to include commercial and industrial activities as specified works, provided that these activities can be expected to generate sufficient public benefits.
32. In line with this feedback, we have revised the wording for this list item. Commercial or industrial activities must now be:
- A. ancillary to housing
 - B. for 'urban renewal' purposes, as re-defined above to include a limited public benefits test.
33. In addition, we recommend that any commercial or industrial activity that is not part of a specified work be covered if it meets the existing tests under the PWA. This would mean that

a building would only be covered if it had a 'public purpose'. This approach would not change the law, because land can already be compulsorily acquired for commercial and industrial activities that meet the definition of a 'public work'.

34. We consider that the simplest way of drafting the legislation would be to use the 'catch-all' clause we have proposed previously to cover these activities (as well as the unforeseen works that the catch-all was originally intended to deal with). We recommend expressly referring to 'commercial or industrial buildings that are not specified works' to avoid any doubt that they can be eligible even if they are not part of a specified work.

Commercial community facilities (item (U) on specified works list)

35. Item (U) on the list above relates to community facilities and explicitly refers to commercial facilities used for educational, recreational or cultural activities. This is a departure from the historic list of 'essential works' that was included in the PWA between 1981 and 1987.
36. When the public works regime was first enacted, the government was directly responsible for providing most, if not all, public works on land that it acquired and owned for that work. In addition, the Ministry of Works often built the works, rather than the private sector. There was not much private profit making involved.
37. Over time, the government has passed responsibility for delivering many types of public works on to commercial entities that provide services for a profit (eg electricity and telecommunications infrastructure and airports). Even where the government retains a direct responsibility for providing works, private contractors are often involved in the construction or operation of them (eg the contractors who build roads for the New Zealand Transport Agency or operate some prisons). In short, the provision of public works now often generates private profits (though generally, the government retains ownership of the underlying land).
38. Officials consider that there is no basis for treating community facilities any differently to other public works in that regard. Provided that a facility delivers sufficient public benefits, it does not matter that it is run for profit.
39. If you agree that community facilities should be included as a specified work, we will prepare a definition of the term that ensures that sufficient public benefits will be delivered.

Catch-all clause

40. Minister Parker has asked officials to reconsider whether it is necessary and appropriate to include a 'catch-all' provision in the legislation to cover any works that are not specified works but would qualify as a 'public work' under the PWA. His preference was for officials to ensure that the list of specified works was full and complete.
41. Officials have endeavoured to identify everything that the UDA is likely to do. However, we still consider that a catch-all provision is advisable to 'future proof' the legislation so that it can support new technologies.
42. As previously explained, a 'list only' approach to specifying works has been used in the past, but it was abandoned because it was impossible to predict what new types of public works might be needed in the future. A good example of this is the new technologies that are now used to facilitate communications (such as the internet and mobile phones), which were not foreseen at the time when the original list of 'essential works' was enacted.

43. As noted above, the catch-all provision can also be used to enable works that would qualify as a public work under the PWA, even if they are not on the list of specified works. This means that land can be acquired for commercial or industrial activities under this provision, provided that they meet the existing PWA tests.
44. For these reasons, officials still recommend the inclusion of a catch-all provision in the new legislation.

Next steps

45. Officials recommend that you forward this briefing to the Minister for Land Information and the Minister for the Environment. We suggest that you consult both Ministers on the options set out in this briefing, before making decisions on the recommendations you will make to Cabinet. The proposals on land acquisition affect the Minister for Land Information's portfolio interests, since she will be responsible for making decisions on any compulsory acquisitions that are sought by the UDA.
46. You are scheduled to discuss the recommendations in this briefing at your meeting with Ministers Sage and Parker on Tuesday 13 February. Officials from MBIE, LINZ and MfE will be in attendance to support your discussion.
47. Feedback from you on this briefing, and from the Ministers' meeting, will enable officials to draft a Cabinet paper on land acquisition and assembly that will form part of the series of Cabinet papers for the establishment of the national UDA.

Annexes

Annex 1: Definitions of terms in legislation.

Annex 1: Definitions of terms in legislation

Definitions of works in the Public Works Act 1981

There are different ‘tests’ for works depending on whether they are carried out by the Crown or local government:

- a ‘Government work’ is covered if it is, “to be constructed, undertaken, established, managed, operated, or maintained by or under the control of the Crown or any Minister of the Crown for any public purpose”; or
- a ‘local work’, is covered if it is, “constructed or intended to be constructed by or under the control of a local authority.”

The definition of ‘state housing purposes’ in the Housing Act 1955

State housing purposes means the erection, acquisition, or holding of dwellings and ancillary commercial buildings by the Crown under this Act for disposal by way of sale, lease, or tenancy; and includes the acquisition of land by the Crown—

- a. as sites for dwellings and ancillary commercial buildings:
- b. for schemes of development and subdivision into sites for dwellings:
- c. for motorways, roads, streets, access ways, service lanes, reserves, pumping stations, drainage and water works, river and flood protection works, and other works upon or for the benefit of the land so acquired or the occupiers thereof.

Reference to any motorway, road, street, access way, or service lane shall be deemed to include every carriage way, cycle track, bridge, culvert, kerb, drain, channel, footway, crossing, fence, barricade, entrance thereto, exit therefrom, or other thing belonging thereto, or lying upon the line or within the limits of the land having that status.

The definition of ‘urban renewal’ in the Local Government Act 1974

Urban renewal means the conservation, repair, or redevelopment of any land, or of any building on any land, within any urban part of the district (or the encouragement thereof), the standard of which should in the opinion of the council be improved; and includes the improvement, reconstruction, extension, development, and redevelopment of the utility services, roading, the landscape, and community and social facilities and services within that part.

The definition of ‘urban renewal’ in the Greater Christchurch Regeneration Act 2016

This definition was used in the list included in our briefing of 20 November 2017.

“urban renewal means the revitalisation or improvement of an urban area, and includes—

- a. rebuilding:
- b. the provision and enhancement of community facilities and public open space.”

