

THE LAY OF THE LAND

Christchurch Lawyer Margo Perpick looks at the issues of acquisition and compensation for the owners of property needed for the city's key civic projects

Many central city properties have been designated for anchor projects under the Central City Recovery Plan. What is the process for acquisition and compensation under the Canterbury Earthquake Recovery (CER) Act?

Negotiation

Cera has the ability, under the Act, to compulsorily acquire land. However, it has been in voluntary negotiations with landowners to buy land at an agreed value. If that occurs, then compulsory acquisition will not be necessary. If such agreements cannot be reached, Cera is likely to start the process of compulsory acquisition, leaving owners to make claims for compensation.

Cera's Christchurch Central Development Unit (CCDU) has indicated that negotiations for voluntary acquisition may run until the end of December. If agreement has not been reached by then, it intends to take the land under compulsory acquisition. The CCDU has said these timings are indicative only – there is nothing in the law which imposes such a deadline.

Cera has already issued a Notice of Intention to Take Land, to some owners. This is to ensure that compulsory acquisition can occur without delay where voluntary agreements cannot be reached.

There is considerable uncertainty surrounding valuations, which is making the negotiation process difficult. Unlike the residential red-zone buy-up which uses 2007 rating valuations, values for central city acquisitions will be post-quake. This is because the compensation for compulsorily acquired land is the current market value at the time of acquisition, that is, after both the quakes and the designation.

Compulsory Acquisition

The process is as follows. First, the Minister for Earthquake Recovery issues a Notice of Intention to Take Land, under section 54 of the Act. The notice must be published in the Gazette, publicly notified twice, and served on the owner of the land and anyone else with a registered interest in it.

Then the Registrar General of Land registers the notice against the land title, the Minister recommends that the Governor General issue a proclamation to take the land, and the Governor General declares by proclamation that the land is taken.

Finally, the proclamation is published in the Gazette and publicly notified within a month, and 14 days later the land is vested in the Crown.

So, once the process of compulsory acquisition has been started, it could occur quite quickly. If all of the above steps are taken promptly, the land could be taken in as little as a month after the notice is issued.

Once land has been compulsorily acquired, anyone who has suffered loss as a result may lodge a claim for compensation from the Crown within two years.

Compensation

The basis for deciding compensation is quite uncertain.

Section 64 of the Act says that claims for compensation are to be determined by the Minister, having regard to the current market value of the land at the date of the acquisition, as determined by a valuation carried out by a registered valuer. The Minister must also, as far as practicable, determine compensation in accordance with the relevant provisions of the Public Works Act 1981.

There is a large body of law relating to compensation for land taken by compulsory acquisition under the Public Works Act. However, the CER Act appears to have created quite a different regime for compensation.

The Public Works Act says the landowner is entitled to full compensation when land is taken for any public work. The courts have held that such compensation should put the claimant back in the position they would have been in otherwise. The Public Works Act explicitly allows payment for loss or damage, such as disturbance payments, business loss, loss on mortgage repayment, compensation for tenants, and compensation for land for which no general demand exists. Assistance to buy a new property is also available.

In contrast, the CER Act confines compensation to "actual loss", and specifically excludes a loss by an insurer, a loss that was or should have been insured, a consequence of regulatory change, cancellation of existing resource consent already exercised, cancellation of an existing use right, economic or consequential loss, loss of personal property worth over \$20,000, business interruption, and any other loss the Minister reasonably considers unwarranted and unjustified.

The flavour of the compensation provisions in the CER Act seems to be a step away from the more generous regime available under the Public Works Act. Determining compensation under the Act will be challenging.

For example, it may be argued there is no real market for land designated for the anchor projects, so value at the time of acquisition could be much less than before the earthquakes. Under the Public Works Act, there is specific provision to disregard any reduction or increase in the value of land which has been created by the prospect of the public work. Arguably, under the CER Act, that difference could be excluded from the definition of recoverable loss on the basis that it is a consequence of regulatory change.

If that approach is taken by Cera, then payment being offered through the voluntary acquisition process may be well below what property owners will find acceptable, and that may prevent voluntary sale agreements being reached. Property owners in that situation are likely to have their land compulsorily acquired, and will then have to claim compensation.

The compensation claim process could only yield a higher payout if there were sound legal and evidential reasons to dispute the amount of actual loss, including the valuation relied upon by the Minister. A claimant may appear before the Minister to make representations before he determines the compensation, and his decision may be appealed to the High Court.