Procedures Governing the Compulsory Acquisition of Land Under the Public Works Act: The Case for Reform

by

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I. Introduction: Principles of Compulsory Acquisition of Land

The procedures governing compulsory acquisition of land under the Public Works Act 1928 are presently under review by an interdepartmental committee of the Ministry of Works and Development. At issue is the need to balance the conflicting claims of public interest and private right, a problem which previous amendments to the Act have not directly confronted.[1] It is clear that within the community at large there remains unease about the procedures for compulsory acquisition; indeed "in no other kind of contact with the law does the average citizen feel the cards are stacked against him so much as when his land is required by either the Crown or a local authority."[2] The present Minister of Justice has recognized the need for reform in this area and has stated: "The Government believes that with the expansion of governmental and administrative power in today's society, it is essential that a continuous effort is made to protect the rights of the individual."[3] This paper will examine the protection presently afforded an individual whose land is compulsorily acquired, to demonstrate the need for specific procedural reforms.

[1] Public and Administrative Law Reform Committee, *Eight Report* (1975), para. 43.
[2] R. I. Barker, "Private Right versus Public Interest" [1969] N.Z.L.J. 251, 269.
[3] *New Zealand Herald*, 24 March 1976.

Discussion on the subject of compulsory acquisition of land must assume a basic acceptance that land in private ownership may be required for public purposes from time to time. Nevertheless, "the owner of private land is entitled to protection from arbitrary decisions by the executive in respect of his land."[4] The conflict between public interest and private right, and the role which procedure plays in providing a balance between the two, has been discussed by the Public and Administrative Law Reform Committee:[5]

> . . . There are two conflicting points of view to be reconciled. First there is the respect to be accorded to the rights of the individual. The second is the need for the Government to govern and in so doing determine when the public interest should prevail over the rights of the individual. This is the concern of administrative law—to balance private and public interest, including settling which official acts and omissions can and should be the subject of judicial review. It is a lawyer's natural inclination to suppose that judicial review should be encouraged, the administration's to seek greater freedom of action within the concept of the wider national interest. More and more we see procedure as the most useful tool to achieve these ends. We seek procedures which ensure that before the administration takes a decision the legitimate interests of individuals' and all aspects of the public interest are consulted and considered.

The Canadian Law Reform Commission has suggested that expropriation law should embody the following general principles:[6]

1. Equality: the same rights for all persons facing compulsory land acquisition;
2. Clarity and accessibility: all powers to take land in one statute, written in simple language and supplemented by an information booklet telling people what rights, options and procedures are available;
3. Openness: by all taking authorities in providing information about plans, rights and procedures;
4. Fairness: early notice of proposed land acquisition, impartial inquiries where individuals affected may be heard, and fair compensation for all reasonably proven losses resulting from acquisition;[7]
5. Political responsibility: for the use of the expropriation power through final approval with reasons by a political authority.

It is submitted that these principles have equal validity in New Zealand and that the provisions of the Public Works Act fail to adequately incorporate them. An examination of the Act suggests that it is weighted towards furthering the State's interest as against protecting the individual's rights.

[4] D. Brown, *Land Acquisition* (1972), 308.
[5] *Fifth Report* (1972), para. 41.
[6] Report of the Law Reform Commission of Canada, *Expropriation* (1976), 3-4.
[7] A consideration of the compensation provisions of the Public Works Act 1928 is beyond the scope of this paper.

II. Criticism of Present Procedures for Compulsory Acquisition of Land

The scheme of the Public Works Act (sections 22, 22A and 23) provides broadly as follows:[8]

1. A survey is made and a plan prepared showing the land to be taken and the names of owners and occupiers of the land;
2. A notice is published in the Gazette, and advertised twice, specifying the following details:
   (a) locality of land;
   (b) general purposes for which land required;
   (c) place where plan can be inspected;
3. A copy of the notice is served on all owners and occupiers of the land;
4. "Every person directly affected" is given 40 days, from the date of the first publication of the notice, to send a written objection (not relating to compensation) to the Town and Country Appeal Board;
5. The Appeal Board then holds a public inquiry into the objection and the proposed taking;
6. On the completion of the inquiry, the Appeal Board sends a written report, with or without recommendations, to the Minister or local authority seeking to acquire the land;
7. After due consideration of the report and any recommendations of the Appeal Board, the Minister or local authority is empowered to proceed to take the land if of the opinion that:
   (a) "The land should be used for the general purposes for which it is required;" and
   (b) "No private inquiry will be done [by the taking] for which due compensation is not provided by the Act" (section 23).

There are a number of criticisms which can be made of the present procedures in the light of the principles outlined above. First, the notice and objection procedure has no application where land is required to be taken for railway, motorway or defence purposes, or for roads in connection with such purposes, or for water, power or irrigation works or purposes (section 10(1)). Although it has been argued that projects of national importance should be freed from the notice and objection procedure,[9] there is a need for public participation

[8] The taking authority and the owner concerned may enter into an agreement to take the land, in which case the notice and objection procedure has no application: s. 32(1) Public Works Act 1928.

[9] Barker, *loc. cit.*, 253.

in the decision-making process leading up to such takings of land. This is particularly true as regards the question of further motorway expansion, an issue which has taken on increasing political significance in recent years. Under the present system, there is no half-way house between *no* public hearing and the fairly circumscribed hearing envisaged by section 22A. Perhaps the legislation could be amended to provide for a procedure whereby interested parties could be brought into the planning process at an early stage. Certainly, reform in this area may help to obviate the widespread public feeling that major Public Works decisions in New Zealand smack of bureaucratic and executive decision-making.

In relation to "strip-takings" for such purposes as railways, electricity transmission lines, pipe lines, canals, motorways, and new roads exceeding 1 km in length, although the full objection provisions may be inappropriate, opportunity for public participation could be afforded by the following suggestion. In these cases no land should be taken until provision for the utility has been made by an appropriate designation in the relevant district scheme(s) under the Town and Country Planning Act 1953. Members of the public would have the opportunity to make representations concerning the proposal under the objection and appeal procedures under that Act before the construction is commenced. However, a consequential amendment to the Town and Country Planning Act would be necessary to provide that on the hearing of objections, and appeals to such designations, alternative routes for the utility may properly be raised in issue.

A second criticism is that powers of compulsory acquisition of land are presently found in a number of diverse statutes. Section 11 of the Public Works Act provides that the Minister of Works and Development or a local authority may take land required for a government public work or a local public work respectively. This power is supplemented by a further power conferred by section 62(1) of the Statutes Amendment Act 1939 to take particular estates or interests in land. Territorial Councils are further empowered as follows:[10]

> To take in the manner provided by the Public Works Act 1928 or purchase or otherwise acquire and hold any land, whether within or without the district, which may be necessary or convenient for the purposes of or in connection with any public work which the Council is empowered to undertake, construct or provide, or for the carrying out of any of the purposes of this Act.

With particular reference to district planning schemes (and regional schemes) an additional power is conferred:[11]

[10] Municipal Corporations Act 1954, s. 163(c); Counties Act 1956, s. 183(c). The taking power also applies to regional and united councils: Local Government Act 1974, s. 99.

[11] Town and Country Planning Act 1953, s. 47(1); Local Government Act 1974, s. 75(6) (regional schemes).

> . . . the Council concerned may, while a district scheme is operative, take, purchase or otherwise acquire under the Public Works Act 1928 any land it its district if in accordance with the scheme it is necessary or expedient to do so for the proper development or use of the land or for the improvement of areas that are too closely subdivided or are occupied by or appurtenant to any decadent building or for the purpose of terminating any use of any land or building that does not conform to the scheme or for the provision or preservation of amenities.

The Governor-General is specifically empowered under the Public Works Act 1928 to take any land required for state housing purposes[12] or for any of the following purposes:[13]

1. Subdivision, development, improvement, regrouping or better utilisation;
2. Provision or preservation of amenities;
3. Public safety in respect of any public work.

Section 15(1)(b) of the Reserves and Domains Act 1954 confers on the Minister of Lands a power to take land for the purposes of a public reserve, or for the improvement or extension of an existing reserve.

It is thus clear that the principle of clarity and accessibility of taking powers has not been attained in New Zealand. It is submitted that the powers of the Crown and local authorities to take land should be comprehensively stated in the Public Works Act, or, preferably, in a separate statute on land acquisition; this is too important and distinct a subject to be merged in a statute governing the powers and duties of the Ministry of Public Works and Development.

The right to object to a notice of intention to take land is limited by section 22(1)(d) to "every person directly affected." In its original pre-1973 form, section 22(1)(d) conferred an objection right on "all persons affected", and no reason for the limitation of this right appears in the Parliamentary Debates on the Public Works Amendment Bill 1973. It is somewhat illogical that the rights of objection to the taking of land are narrower than the rights conferred under planning schemes to object to the proposed work in the first instance.

The hearing of objections provided for by section 22A is directed towards an inquiry into the "objection and proposed taking" (subsection (3)(c)). However, the duties of the hearing body under section 22A(8) limit the scope of the hearing. The subsection states that:

> On the completion of the enquiry, the Appeal Board shall prepare a written report on the objection and on *whether the proposed taking is fair, sound and reasonably necessary for achieving the objectives of the Minister or local authority*, as the case may require; and shall submit the report together with such recommendations as it considers proper to make in the circumstances to the Minister or local authority, as the case may require [emphasis added].

[12] Housing Act 1955, s. 3.
[13] Finance Act (No. 2) 1945, s. 30.

This formula is derived from section 7(5) of the Ontario Expropriations Act 1968-69, which was enacted following the *First Report*, in 1968, of the Ontario Royal Commission into Civil Rights. The *McRuer Report* emphasised that it is not the function of the inquiry to consider whether the decision to undertake the particular project is right but rather whether it is sound and fair and reasonably necessary to expropriate the particular land described in the notice. This narrow view of the statutory inquiry power was inferentially adopted by Stark J. in the Canadian case of *Walters* v. *Essex County Board of Education*. The formula was seen as conveying a broad standard: ". . . having regard to the objectives of the authority is this expropriation reasonably defensible?"[14] The few reported decisions of Appeal Board inquiries under section 22A of the Public Works Act reveal no consistent approach in interpreting the formula. In *Re an Objection by D. Scandrett Ltd.*[15] the Board took a narrow view of its inquiry power. Thus, on an inquiry into an objection to the taking of land for a primary school and kindergarten, the Board stated that it was not obliged to inquire whether the site defined by the Education Board (the taking authority) was the best site available for a primary school in the vicinity of the objector's land. However, the Board stated that in judging whether the proposed taking is sound, it must inquire into whether there is a reasonable justification for having the primary school in the vicinity of the objector's land, and whether the site selected is a suitable site for that purpose. A similar approach, in reporting on the soundness of a proposed taking of land for a reserve, was adopted by the Board in *Re an Objection by Pompallier Lodge Development Co. Ltd.*[16] The Board stated that it was necessary to form an opinion on whether the objectives sought to be attained by the proposed taking were sound.

By examining the necessity of the proposed taking, the Appeal Board appears to have opted for a disjunctive interpretation of the formula "fair, sound, and reasonably necessary for achieving the objectives of the Minister or the local authority." Assuming that this interpretation is correct, it is surely absurd that the question of alternative sites cannot be considered. Furthermore, it remains open to a New Zealand Court on review to follow the approach of Stark J. in *Walters* v. *Essex County Board of Education*[17] and find, as a question of law, that the statutory formula should be interpreted conjunctively, i.e. given that the taking authority has decided that a

[14] [1971] O.R. 346, 349. The decision was affirmed by Laskin J. (1973) 38 D.L.R. (3d) 693, S.C.
[15] (1975) 5 N.Z.T.C.P.A. 283.
[16] (1975) 5 N.Z.T.C.P.A. 214.
[17] [1971] O.R. 346.

particular public work is necessary and has chosen the general location of the work, is the taking of a particular tract of land fair, sound, and reasonably necessary?

It is submitted that the need for citizen participation in two preliminary issues should be examined:

1. What is the necessity for the public work? and
2. How desirable is the proposed location of the general work?

The first question raises issues of policy and government decision-making. It is submitted that the pre-acquisition hearing may not itself be an appropriate forum for the ventilation of public debate on such issues. Acquiring land is normally the last step in project planning. The Canadian Law Commission has advocated earlier public participation in long-term planning of land use by government bodies and local authorities, but it offers no proposals whereby this goal can be achieved. Perhaps the key problem in this area is the lack of public knowledge which characterises executive decision-making; there is a need for access by interested members of the public to public works materials and files. However, this raises the larger issue of freedom of information in a democratic state which is beyond the scope of this paper. Earlier public participation of an informal kind would, it is submitted, limit the pre-acquisition hearing to issues more closely related to the proposed acquisition, thereby resulting in fewer, more focused objections. Attention is drawn to the desirability of taking authorities adopting processes of informal public discussion and consultation as a standard practice.

However, recognition should also be given to the fact that there may be some major or especially sensitive proposed developments where a full judicial enquiry should be instituted at the outset. In this respect, reference is made to the following proposal for reform:[18]

> Whenever a major project . . . is mooted, there should be an inquiry presided over by a Supreme Court judge or person of similar status to hear objections from any interested person and make recommendations to the Minister on the necessity of the scheme. Conservationists, landowners and other interested parties would then have a full opportunity to express their views before an irrevocable decision is made to proceed with the scheme. This principle should be incorporated in the Act which authorises the acquisition.

The Commission established to consider electricity general works in the Clutha Valley is an example, and the public unrest over the proposals for a power station near Auckland is symptomatic of the need for such inquiries.

The second question—the desirability of the proposed location of the general work—is obviously more appropriate to a standard hearing procedure and should clearly be a major issue at the hearing

[18] Brown, *op. cit.*, 308.

of objections. The suitability of expropriating a particular tract of land for the site of the public work in question cannot be examined in isolation; there must be an examination of alternative sites. This may, however, give rise to difficulties as to the extent of public objection, and a pre-hearing conciliation procedure is suggested below which should ensure that owners affected by suggestions as to alternative sites are brought into the ultimate hearing that takes place. In order to make debate about location of the project meaningful, the Minister or local authority should be obliged to state, in advance of the hearing, why the proposed site was chosen. This would give the citizen an opportunity to see the reasoning behind the proposed location and to tailor his objection to the expropriator's rationale.

Prior to 1973, section 22(1)(f) of the Public Works Act obliged the taking authority to advise any objector, at the hearing of his objection, of the reasons for the proposed taking.[19] No such provision, and certainly no provision for a statement of reasons in advance of the hearing, is contained in the amended legislation. Reference is made in this respect to the report of the Franks Committee in England reviewing the procedures used by tribunals and inquiries in 1957:[19a]

> Although the statutory requirements are merely to hear and consider objections, it must surely be true that an objection cannot reasonably be considered as a thing in itself in isolation from what is objected to. The consideration of objections thus involves the testing of an issue, though it must be remembered that it may be only a part of the issue which the Minister will ultimately have to determine. If so, then the case against which objections are raised should be presented and developed with sufficient detail and argument to permit the proper weighing of the one against the other. . . . We regard the various procedures concerning land as involving the testing of an issue and . . . the right of individuals to state their case cannot be effective unless the case of the authority with which they are in dispute is adequately presented.

A further criticism of section 22A is that it contains minimal provisions as to the conduct of the hearing itself. The hearing is to be held in public, unless the objector requires a private hearing,[20] and the Minister or local authority, and the objector, may be represented by counsel.[21] The Board has the powers of a Commission of Inquiry[22] and thus has the powers of a Magistrate to summon witnesses, administer oaths, hear evidence, maintain order and award costs against any party. Points of law may be reserved for the Supreme Court.[23]

[19] For an application of the former section, see the unreported decision of the Court of Appeal in *Coles* v. *Matamata County Council* (1976) No. 69174.
[19a] *Report of the Committee on Administrative Tribunals and Enquiries* (1957), Cmnd 218, 60, 67.
[20] Public Works Act 1928, s. 22A(5).
[21] Public Works Act 1928, s. 22A(6).
[22] Public Works Act 1928, s. 22A(7).
[23] Commissions of Inquiry Act 1908, ss. 4, 10, 11.

There are no specific procedural rules prescribed by section 22A. However, the Court of Appeal, in *Coles* v. *Matamata County Council*,[24] held that the terms of the Public Works Act (prior to amendment in 1973), and the circumstances in which the power of compulsory acquisition was intended to be exercised, indicate that the principles of natural justice apply to the hearing of objections. A similar decision is likely to be reached on a judicial examination of section 22A.

In *Perpetual Trustees* v. *Dunedin City* Henry J. stated: "The concept of natural justice does not require that the objectors should have more than a full opportunity to meet the subject-matter of the original proposal."[25] Thus, the objectors to the proposed taking had no right to be heard on reports compiled by the Council's officers after the hearing and dealing with an alternative scheme put forward by the objectors themselves at the hearing. This decision has been criticised.[26] However, Cooke J. in *Coles'* case did not suggest that the decision was wrong, and it would seem that a similar decision could be reached on a review of an inquiry under section 22A.

It is submitted that in an area of such importance to the individual citizen as compulsory acquisition of his land, the conduct of the hearing should be specified in the legislation itself. Section 22A has largely alleviated the element of "judge in one's own cause" which existed under the former hearing provisions, by appointing the Town and Country Appeal Board as the hearing body. However, the procedural rules governing the hearing itself, and in particular the extent of the objector's right to be heard, are not defined in the section.

A final matter deserves attention. Section 22A(8) of the present Act requires the Appeal Board, after completing its inquiry, to submit its report, together with such recommendations as it considers proper to make in the circumstances. Section 23(1) then provides for the land to be taken:

> . . . if after due consideration of the report and the recommendations (if any) of the Appeal Board received under section 22A of this Act the Minister or the local authority, as the case may be, is of opinion that the land should be used for the general purposes for which it is required and that no private injury will be done thereby for which due compensation is not provided by this Act. . . .

It is clear that objectors have no further right of objection and no right to appear before the taking authority to contest the taking or the report, although an authority could in its discretion invite further

[24] Unreported (1976) No. 69174.
[25] [1968] N.Z.L.R. 19, 25.
[26] J. F. Northey, "Natural Justice in Town Planning" [1969] N.Z.L.J. 80, 81.

submissions.[27] The New Zealand Law Society, commenting on section 23(1), considered it unsatisfactory that:[28]

> . . . objectors who may impress the Appeal Board to come down with a favourable decision may then find the Board's recommendation being ignored and the objectors have no right of appearance before the Council in this situation.

More importantly, the authority is not bound by the terms of the report or any recommendations of the Board, and this accords with the need for political responsibility for compulsory acquisition of land. In interpreting the function of the taking authority as an approving authority prior to the Public Works Amendment Act 1973, Henry J. made the following remarks, which are equally applicable to the present section 23:[29]

> [The Minister or local authority] has the wider task of deciding whether or not it is of the opinion that [the land should be used for the general purposes for which it is required]. This last-named question quite clearly opens up matters of public policy. . . . It has been said that policy is in the last resort an arbitrary decision and not a quasi-judicial matter at all.

Thus, even where the Appeal Board has reported adversely on the proposed taking, or has recommended that it does not proceed, the Minister or local authority may nevertheless proceed with the taking if after consideration of the report and recommendations it is of the requisite opinion.

To ensure that the Appeal Board's inquiry provides a real opportunity for persons affected to have their objections considered, and that due consideration is indeed given to the Board's report and recommendations, there should be a provision that where the Minister or local authority decides to proceed with the taking it must issue a public statement of the reasons for their decision. A copy of the statement of reasons should be served on every person who objected to the proposed taking.[30]

III. Proposals for Reform

It is submitted that the following specific reforms should be incorporated into the procedures governing the compulsory acquisition of land under the Public Works Act:

[27] *Walter* v. *Essex County Board of Education* (1973) 38 D.L.R. (3d) 693, 699, per Laskin J.

[28] *New Zealand Parliamentary Debates* (1973), v. 338, 5067.

[29] *Perpetual Trustees* v. *Dunedin City* [1968] N.Z.L.R. 19, 24. Cf. the comment of Moore M.P. on the Second Reading of the Public Works Amendment Bill 1973: "Under this Bill people have the right of appeal to an independent committee whose decision is binding on both the Government and the local authority." *New Zealand Parliamentary Debates* (1973), v. 338, 5074.

[30] Cf. Expropriations Act 1968-69 (Ont.), s. 8.

1. Powers of the Crown and local authorities to take land should be comprehensively stated in the Public Works Act, or, preferably, in a separate statute on land acquisition;
2. Every person affected should have the right to object to the proposed taking;
3. The authority proposing acquisition should be obliged to advise any objector, at least seven days prior to the hearing of his objection, of the reasons for the proposed taking;
4. The function of the inquiry should be to decide whether the proposed taking is fair, sound, and reasonably necessary. Alternative sites or routes should be an issue at the inquiry;
5. Specific rules as to the conduct of the inquiry should be provided in the Act. In particular, cross-examination of witnesses should be allowed and leading parties should be given a right of reply. The Appeal Board should be empowered, on its own initiative or on the application of any objector, to order the taking authority to discover and produce for inspection by the objectors and the Appeal Board any reports or other documents in its custody which may be relevant to the issues; and
6. The taking authority should be obliged to state the reasons for any decision to proceed with a taking.

In essence, the problems involved in the compulsory acquisition of land turn on the protection to be accorded the rights of the individual citizen. The issue is to arrive at a reasonable balance between bureaucratic and participatory decision-making.[31] The goal should be an open planning process whereby the needs of the public interest can realistically be assessed and weighed against the private individual's rights to the enjoyment of his land.

[31] See, for example, A. J. Gillisen, "Public Participation in Planning" (1975) 40 T.P.Q. 20.