



Wairarapa Water Use Project

**Landowner Engagement and Property
Acquisition Framework for the Wairarapa Water
Use Project**

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1. INTRODUCTION

The Wairarapa Water Use Project (“WWUP”) is a multi-purpose regional water scheme for the Wairarapa valley. The project has recently completed an ‘options refinement’ phase where it will be looking to focus its investigations on a limited number of preferred damming and reservoir sites. Prior to commencing the next phase of the project, the following advice is provided on the following matters:

- Engaging with directly affected property owners (and other affected property owners) during this stage of the project and,
- Property advice to enable WWUP to fully consider the various options available and make key project decisions for future phases of the project.

This advice will enable the project to consider and make key property related decisions. This report details the various types of property interests that will be required for the project, acquisition methodology option, timing and compensatory frameworks. It will also touch on future actions that WWUP should consider during this next phase of the project.

Running parallel to this advice is Resource Management Act (“RMA”) consenting advice.

2. LAND INTERESTS REQUIREMENTS

A significant number of property interests, predominantly lifestyle and rural use, will be required for this large scale infrastructure project. The exact numbers are yet to be determined and will not be known with any certainty until the dam/reservoir sites and distribution networks are confirmed following the completion of the project's investigative phases.

The property requirements will be twofold, in that the properties that currently make up the proposed dam/reservoir sites will need to be acquired; as well as the necessary property interests needed to secure the distribution network of pump stations, pipes and canals to transfer water to the eventual end users.

Certain properties will be acquired for the project to proceed. While property acquisition actions are some time away, it is important that WWUP takes time in advance to consider the methodology options, and to make informed decisions as to the best overall processes.

A consideration should be given to provide RMA (Resource Management Act 1991) consenting advice. This advice will play a part in determining the acquisition methodology and timing.

2.1. Property Tenure

A number of different property interests will be required during the lifecycle of the project.

These include: entry agreements, acquisition of part and total properties, easements and rights to install infrastructure in legal road.

2.1.1. Entry agreements

An entry agreement is a relatively simple deed agreed between a property owner and WWUP that will allow WWUP to undertake actions of a temporary nature. Depending on the extent of the actions a fee may be payable.

In terms of WWUP the application for entry agreements are likely to be limited to:

- As part of the investigative phases of the project, entry may be required to assist with feasibility and design. In these cases an entry agreement should be negotiated.
- During construction temporary access to properties may be required for construction equipment or work on adjoining properties.

In some cases where the work is non-invasive and minor in nature (such as a property walkover), a simple permission from the owners is generally all that is required. Where the work to be undertaken is considered long term or invasive, such as drilling bore holes and digging test pits, it would be usual to secure entry agreements with the owners.

2.1.2. Total (fee simple) properties

This is the acquisition of properties required in their entirety for the project. This would generally relate to the actual inundation/dam sites.

2.1.3. Part acquisition of properties

In some cases, the impact on a property could be considered minimal and as such a partial acquisition of a property could be negotiated. This is a relatively simple task; others may require formal subdivision of the land.

2.1.4. Easements

An easement is a registered property interest that can be secured for a certain purpose. It is essentially a right held by one property owner (or entity) to use the land of another for a limited purpose. Common applications of easements are for shared access ways (rights of way) and protection of utility infrastructure as it passes through private land.

In terms of WWUP, easements will likely be required to cover situations where the project's primary distribution network runs through private land.

Easements may also be required in some instances over the secondary distribution network to protect the long term integrity of infrastructure. This may occur where the secondary network passes over multiple properties or when subdivision occurs.

2.1.5. Legal Road

It is likely that parts of the primary and secondary distribution network, where possible, would run in road reserve.

In terms of road ownership, the State Highway network is administered by the NZ Transport Agency and local roads by the respective local Councils.

There may be some instances where the road reserve will not be available. If there are planned roading projects involving realignment of the road corridor, NZTA or the local council may not permit any new infrastructure to be installed in road reserve until the realignment work is complete.

In some instances the road reserve will not be suitable for physical reasons, whether this be a lack of space due to other utilities already in situ, or other physical reasons that make installation in road reserve uneconomic.

3. PROPERTY INTERESTS APPROACH

A number of options are available the project to acquire property. A full understanding of each of the options available is necessary, along with how they interact with other areas of the project, such as RMA requirements. This will enable an informed decision to avoid prejudicing any of the available options.

The options available to the project include:

1. Commercial Negotiation (section 3.1)
2. Public Works Act 1981 (“PWA”) (section 3.2)
 - a. Acquisition by agreement (section 3.2.1)
 - b. Compulsory acquisition (3.2.2)
3. Hybrid methodology (section 3.3)

In terms of the PWA and Hybrid methodologies, the project will need to attain/qualify for ‘Requiring Authority Status’ under the RMA; without this, the project will be limited to Commercial Negotiations.

3.1. Commercial Negotiation

Under this method the project could seek to acquire properties on a commercial or market basis. This is very much how a private entity would acquire land for large scale private developments, such as housing and supermarkets. In such cases due to fewer constraints and increased flexibility, innovative arrangements can be reached to suit both parties.

Commercial negotiations tend to work well when undertaken between willing buyers and willing sellers. Generally, market forces to keep negotiations within certain bounds.

Under this method there is an opportunity for relativity issues to arise between compensation settlements. “Confidentiality” agreements can be used, but hold limited benefit.

The issue of ‘relativity’ can be managed to an extent if set structures are placed around negotiations and premiums.

3.1.1. Option Agreements

‘Option Agreements’ allow landowners to purchase a property at a future point in time and is generally conditional on a particular event/s occurring. A typical use is to acquire Options where elements of a project are uncertain. Once all Options are gained, and planning consents held the right to purchase can be exercised.

3.1.2. Timeframe to complete

Under this methodology there is no set timeframe for negotiations to conclude. A minimum allowance of 18 months should be made to allow sufficient time to acquire all property interests.

3.1.3. Who would undertake negotiations?

There is no limitation on who could undertake the actual negotiations as no specific accreditation is required. The project should engage a property consultancy with significant negotiation experience to complete such agreements.

3.1.4. Characteristics of Commercial Negotiations

- i. **Less complex and more flexible.** This methodology is simple to understand and given its flexibility some innovation can be shown around negotiations to reach settlements.
- ii. **Landowners will receive market value** at the very least, and there is no set ceiling on what they could ultimately negotiate.
- iii. **Specialist knowledge not required.** Under alternative more complex methodologies (such as the PWA with its LINZ accreditation requirement) specialists are required to complete negotiations given the statutory framework and compliance obligations.
- iv. **Speed.** Agreements can be reached quickly particularly where both parties concur on a package.
- v. **No certainty.** Negotiations could be on-going for a significant period of time and agreement may never be reached.
- vi. **Cost.** This is likely to be significantly more expensive than the other methodologies detailed.
- vii. **Precedents for later schemes.** If the project is to be completed in multiple stages compensation deals completed in earlier stages may set precedents.
- viii. **Relativity between agreements.** If agreements are to be completely negotiated on this basis there are likely to be differing levels of compensation negotiated.
- ix. **Funding perception issues.** If funding is from public sources, it is important that all components of spending such funds are very transparent and used as efficiently as possible.
- x. **Less structure.** Because there is less structure around commercially negotiated settlements, a “wait and see” approach can be adopted.

3.2. Public Works Act 1981

The Public Works Act 1981 is a statutory means of dealing with land interests required or already held for public works. The PWA is heavily used particularly by Crown entities for major infrastructure projects, and is seen as a key element in providing some certainty around property acquisition timeframes and levels of compensation. These are key elements particularly in high cost projects where land requirements are largely inflexible.

The PWA, while predominantly used by the Crown and local authorities, is also available to private entities who undertake essential services or projects that fit “the Public Work” criteria. Private entities are required to obtain ‘requiring authority status’ under the RMA.

While the PWA is well understood, and backed by case law, it is still unknown to those with little experience in this area. There is a common misconception that the PWA immediately means compulsory acquisition powers will be invoked. In most circumstances, this is simply not the case. While the PWA does give certain rights to a requiring authority, similarly it provides protection to the landowners to ensure they are treated fairly and placed in a “no better no worse” situation than they presently enjoy. It also preserves some residual rights in the property should the project not proceed and the owners’ former properties are made surplus.

The idea of the PWA is to give essential projects some certainty (in the greater public good) and ensure an affordability threshold is met through fair and reasonable compensation. The PWA is not simply an acquisition vehicle; it contains many tools to deal with property rights throughout the project lifecycle including investigations, designation, and use of the economical and expedient gazettal process (as opposed to subdivision).

Acquisitions under the PWA can be completed in two ways “Acquisition by Agreement” and ‘Compulsory Acquisition’. These methods are set out in detail below.

3.2.1. Acquisition by Agreement Under the PWA

The PWA contains a number of tools to assist requiring authorities with their projects. These are not just limited to compulsory acquisition powers. Property interests can also be acquired/negotiated by agreement between the owner and the requiring authority.

Under the PWA, a requiring authority is necessary to negotiate in good faith to acquire the necessary property interests needed to complete its public work. The entitlements to compensation are very well defined in the act itself, as well by case law and practising guidelines released by Land Information New Zealand (“LINZ”).

Numerous projects are completed in NZ where all land purchase agreements have been secured by negotiation without any need to use any compulsory powers. The compensation regime is well established and based around what is fair and reasonable and placing the owners in a situation which is “no better no worse” than they presently enjoy.

A major benefit of this method is that even if compulsory acquisition is not used, just having that ability available can motivate fair and reasonable agreements.

While established frameworks are a strength of this method, it can also be considered a weakness in that the rigidity of this method can preclude some innovative solutions from transpiring as they may not “fit the rules”.

Timeframe to complete

Under this methodology there is no set timeframe for negotiations to conclude but typically take 18 months.

Who would undertake negotiations?

If this method is adopted, it will be necessary for negotiations to be undertaken by a company holding Land Information New Zealand accreditation. Such companies are qualified to carry out a range of property work on behalf of LINZ. In the case of WWUP, the company would need to have expertise and experience associated with PWA acquisition and associated processes.

Characteristics of the Public Works Act:

- i. **Structure.** PWA acquisitions follow a well-defined process backed by significant case law and LINZ operating standards and guidelines. No negative precedents will be set for later phases of the project.
- ii. **No relativity issues.** Ensures all owners are treated on fair and reasonable terms i.e. relativity between agreements will not be an issue.
- iii. **Fair compensation only.** Ensures owners are compensated fairly but are not able to profit from the project.
- iv. **PWA Tool Kit.** Access to other PWA tools such as the gazettal process for legalisation utilising New Zealand Gazettal system (enables subdivisions for part property acquisitions without the usual RMA processes).
- v. **No certainty.** Negotiations could be on-going for many years.
- vi. **Complex and reasonably inflexible.** This methodology is moderately complex initially as it is governed by statute and case law. It can take some time for a landowner to fully understand the processes and methodology.
- vii. **Landowners will receive fair compensation** under this process, but they will not be able to profit from the project.
- viii. **Specialist knowledge required.** Under this methodology, given the statutory framework and compliance obligations (such as the PWA and LINZ accreditation requirement) specialist negotiators qualified in this area are required to complete negotiations.
- ix. **Complex disposal methodology.** If land becomes surplus to project requirements, the land will need to be cleared through Crown protocols including the PWA prior to being available for disposal.

3.2.2. Compulsory Acquisition

The compulsory acquisition process is used on large scale infrastructure projects - particularly by Crown Agencies and Local Authorities. It ensures property can be acquired within a reasonable period to protect the integrity of project timelines. The use of the compulsory process places strict statutory timeframes around the acquisition process to help provide a level of certainty associated with property and allow the project to advance work streams in confidence.

Projects including WWUP require significant capital outlay and the simultaneous planning of a number of different and complex work streams to ensure they can be completed within the desired timeframe. When one of these inputs, such as land acquisition, lags behind others, such as consenting and construction tendering, it can cause the project significant difficulties and lead to delays and penalties. This can be mitigated by having a well planned acquisition strategy which incorporates the use of the compulsory acquisition powers provided for in the PWA.

A prudent way to plan a project where compulsory acquisition is being considered is to work back from the proposed/preferred construction date. While compulsory acquisition will provide statutory timeframes around negotiations it will not necessarily guarantee that all properties can be acquired in a set timeframe. Property owners will have rights to object to (Environment Court) the notices albeit on points of law only. It is important that the process is undertaken correctly and timed to fit in with the RMA consenting process to help minimise. This is commented on in detail in a later section of this report “Acquisition Negotiation Timing”.

After a reasonable period of negotiations to acquire a property by agreement under the PWA (as detailed immediately above), has passed and agreement has not been reached, a requiring authority can apply to LINZ to commence a compulsory process. LINZ will then allocate this compulsory work to an Accredited Supplier. This would likely be the same supplier who carried out the initial negotiations, although this is not necessarily the case.

In terms of the extent of use of these powers, there are generally two schools of thought. Historically the use of compulsory acquisition was reserved to counter dealings with only the few particularly difficult property owners affected by a project (with the balance of negotiations completed by agreement). This worked well in some cases; however it tended to run into problems where unforeseen issues occurred late with other owners. This ultimately necessitated the need for further compulsory acquisition and resulted in further delays. More recently projects have taken a view that once it is decided that compulsory acquisition is to be used, all owners will be included in that programme to give all parties the most certainty possible.

Timeframe to complete

Under this methodology there are a number of statutory timeframes for differing stages of the process to conclude. An allowance of 18-24 months should be allowed.

Who would undertake negotiations?

For this method it will be necessary for negotiations to be undertaken by a company holding LINZ accreditation. Such companies are qualified to carry out a range of property work on behalf of LINZ.

Characteristics of Compulsory Acquisition:

- i. **Certainty.** This method will provide the most certainty possible. As noted above there are however rights of objection to the Environment Court.
- ii. **Structure.** PWA acquisitions follow a well-defined process backed by significant case law and LINZ operating standards and guidelines. No negative precedents will be set for later phases of the project.
- iii. **No relativity issues.** The PWA's fair and reasonable regime will ensure all owners are treated on the same terms i.e. relativity between agreements will not be an issue.
- iv. **Fair compensation only.** This regime also ensures owners are compensated fairly but are not able to profit from the project.
- v. **PWA Tool Kit.** Access to other PWA tools such as the gazettal process for legalisation utilising New Zealand Gazettal system (enables subdivisions for part property acquisitions without the usual RMA process).
- vi. **Complex and reasonably inflexible.** This methodology is very complex as it is governed by statute and case law and demands absolute accuracy. It can take some time for a landowner to fully understand the processes and methodology.
- vii. **Landowners will receive fair compensation** under this process, but they will not be able to profit from the project.
- viii. **Specialist knowledge required.** Under this methodology, given the statutory framework and compliance obligations (such as the PWA and LINZ accreditation requirement) specialist negotiators qualified in this area are required to complete negotiations.
- ix. **Complex disposal methodology.** If land becomes surplus to project requirements, the land will need to be cleared through Crown protocols including the PWA prior to being available for disposal.
- x. **Expensive Process.** This process is long winded, complex and expensive to implement.

3.3. Hybrid Process

An alternative to the above options would be a hybrid of commercial negotiations and compulsory acquisition. If an agreement has not been secured by a certain cut off point all offers previously made are withdrawn and phased compulsory acquisition process is implemented to acquire all outstanding property interests.

In order to avoid relativity issues some firm parameters will need to be placed around the commercial negotiation element of this process.

The 'hybrid' process provides the project with some certainty around project timelines. There is also some motivation/incentive for an owner to enter an earlier agreement where the compensation package would be more generous than what would be achievable under the PWA's "fair compensation" regime.

As the two components (commercial/PWA) of this regime will largely be incompatible being based on differing parameters, the negative impacts of compulsory actions will be magnified. This methodology will need to be discussed in detail upfront with the property owners to ensure they fully understand each method.

Careful thought will need to be given as to the implementation of each phase to ensure complications do not occur that leave property owners out of pocket.

This method will share some (but not all) of the characteristics of the above two methods.

Timeframe to complete

Under this two-stage methodology, the project should allow around 6-8 months for the initial commercial negotiation stage and a further 12-24 months for the compulsory acquisition element.

Who would undertake negotiations?

Under this method, there would be no restrictions on who could undertake the initial landowner negotiations. It will however be necessary in respect to the compulsory acquisition process for a company holding LINZ accreditation to carry out this work.

It would, however, be beneficial for consistency purposes that both stages of negotiations are undertaken by the same company.

Characteristics of the Hybrid Process:

- i. **Certainty.** This method will provide some certainty given the PWA 'backstop'. As noted above, there are however rights of objection (under the PWA process) to the Environment Court.
- ii. **Quick agreements.** In some cases agreement can be reached quickly particularly where generous compensation packages are available.
- iii. **Acceptable approach.** Owners may see this as a fair approach, it may be favoured over the pure PWA methodologies as compensation is likely to be higher.

- iv. **Complication of two structures.** There are likely to be conflicts between the structures as they will be based on different parameters. Significant thought will need to be given upfront to ensure all eventualities are considered and 'grey' areas minimised.
- v. **Specialist knowledge required.** Under this methodology, given the statutory framework and compliance obligations (such as the PWA and LINZ accreditation requirement) specialist negotiators qualified in this area are required to complete negotiations associated with the PWA element of this structure.
- vi. **Expensive process.** Given the two methods, it is likely that this process will be expensive, although if it is carefully thought out and the uptake of the initial approach is significant then the costs could be relatively economical.

4. ACQUISITION NEGOTIATION TIMING

The decision of when to commence the main acquisition program differs largely between schemes; often based on a number of important elements of a particular project. Points that need to be considered are:

When will the project proceed? It is impossible to definitively confirm that a project is a certainty until a number of key milestones are achieved. Property acquisition will need to be based on actions completed to date, along with professional advice on future actions.

What land is required? If progress on land requirements are not known, it is too early to commence negotiations.

Project funding The purchase of property and ancillary compensation will require significant funding.

How long will it take to acquire property? It can take time to acquire property. These timelines will be included in the projects programme.

When will construction commence? This is perhaps the major determining factor as the acquisition process can take a reasonable period of time to complete. In order to protect the project timeline, negotiations may have to commence much earlier than WWUP had considered.

RMA consenting. Property acquisition and the RMA consenting process are intertwined and the timing of both need to be considered. This is essential, particularly with Compulsory Acquisition methods, where the timing of this process needs to be carefully phased with the RMA planning process to limit the extent of objections.

5. COMPENSATION FRAMEWORK

Each of the three acquisition methodologies will have quite different frameworks when it comes to compensation packages. We have set out below the likely components of each methodology:

5.1. Commercial Negotiations

The components of any compensation package require a consistent approach that is fair and reasonable to remove the “uncertainty” weakness of this method.

The current market value of the property should be determined by registered valuers and then commercial negotiations are developed from this point.

It is unlikely that current market value alone will be sufficient to motivate all property owners to enter negotiations. An incentive/premium will be required to begin negotiation. The scale of such a premium will need to be considered to ensure it is at a sufficient level to fairly compensate owners; but not significant that it could be viewed as a financial windfall at the tax/rate payers’ expense.

Owners may feel the need for advice from their solicitor or professional advocate negotiator. There may be an expectation that these fees will be reimbursed by the project. Various methods can be put in place to mitigate this situation and take a personal interest in the costs when it comes to advice, for example, an allowance in any premium payment to cover fees.

To summarise the process for Commercial Negotiations:

1. Market Value
2. Premium/enticement
3. Cost allowance (professional fees, relocation costs etc.). This could be included in the premium

5.2. Public Works Act 1981 Acquisitions

Whether the land is acquired by agreement, or compulsorily acquired, the compensatory entitlement under the PWA is the same. As noted earlier, compensation is based around a fair and reasonable regime.

The owners may be entitled to the following on a typical full property acquisition. The entitlements for a part acquisition are quite different but not relevant here for comparison purposes.

1. Market value of property
2. Reimbursement of reasonable professional fees relating to negotiations (generally valuation and legal fees)
3. Solatium (if the property is a principle place of residence)
4. Relocation Costs to new premises
5. Reimbursement of Legal and Valuation fees associated with a property they may acquire in substitution
6. Cost relating to the reconnection of any non-refundable utility connections

These entitlements do not necessarily apply in all cases and are provided for information purposes.

5.3. Hybrid method

This two stage method will allow flexibility in how compensation is assessed as part of the commercial negotiation phase. The compulsory entitlements remain consistent with those mentioned above.

As noted earlier for this method to work, there needs to be an incentive in the compensation package. Structures will also need to be in place to keep negotiations consistent.

Stage 1 – Commercial Negotiations

1. Market Value
2. Premium/enticement
3. Cost allowance (professional fees, relocation costs etc.). This could be included in the premium

Stage 2 – Compulsory Acquisition

1. Market value of property
2. Reimbursement of reasonable professional fees relating to negotiations (generally valuation and legal fees)
3. Solatium (if the property is a principle place of residence)
4. Relocation Costs to new premises
5. Reimbursement of Legal and Valuation fees associated with a property they may acquire in substitution
6. Cost relating to the reconnection of any non-refundable utility connections