

CHAPTER 3

THE RIGHT OF THE STATE TO TAKE LAND BEFORE 1840

The right of the state in New Zealand to take private land for public purposes is based on English legal tradition that in 1840 was already centuries old. The principles imported into New Zealand had evolved over previous centuries to reflect the balance of power between the English sovereign and the powerful English landed class and in 1840 that evolution was still continuing to meet new developments.

The accepted ancient prerogative power of the English sovereign to take private land had been increasingly restricted through the centuries as landowners became more powerful and ensured that the sovereign right was balanced by certain protections for landowners. Principles were developed that recognised certain obligations towards the owner whose land was taken. The most important of these were that full compensation had to be paid for land taken, and that takings could only be made under legislative authority.

The restrictions on the prerogative power of the English King have been traced back as early as 1215, when Magna Carta prohibited the deprivation of freehold interest by royal prerogative. ‘No free man shall be . . . disseised of his freehold or liberties or free customs but . . . by the law of the land.’¹

The development of the balance between prerogative power and individual rights was further described by the judges of England in 1606. The right of the sovereign power to take private property for the common good was balanced by necessity, such as in times of emergency and great danger:

by the common law every man may come upon my land for the defence of the realm . . . and for the commonwealth, a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire; and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action.²

The continuing development of public land takings principles confirmed the strict protections required for owners of private property when takings were made. In 1765, in his *Commentaries*, Blackstone described the high regard held for private property and the extraordinary care that had to be taken if private property had to

1. *Magna Carta*, c 29

2. *The Saltpetre Case*, 12 Co Rep, p 12, quoted in J Else-Mitchell ‘Do Existing Acquisition Acts Really Provide For Just Compensation in All Cases’, *Valuer*, vol 23 (1974), p 2

be taken by compulsion – in particular the need for legislative authority, and for ‘full indemnification and equivalent’ for the land taken. He said:

So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the community. If a new road for instance were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land. . . . In this and similar cases the legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce . . . Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him full indemnification and equivalent for the injury thereby sustained . . . All that the legislature does, is to oblige the owner to alienate his possession for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.³

This right of the state to take privately owned land or interests in land for public purposes is commonly termed the right of ‘eminent domain’. A variety of alternatives to the word ‘taking’ have also developed in public works terminology. In English legislation it was common to have provisions for land to be either acquired by willing purchase or by ‘compulsory purchase’. Other terms variously used in commonwealth and North American countries are ‘appropriation’, ‘compulsory acquisition’, and ‘resumption’ (of the Crown right to the land). All these terms have been used at various times in New Zealand with ‘compulsory acquisition’, ‘compulsory taking’, or in later years simply ‘acquisition’ perhaps being the most common.

These major principles of public works takings were later imported into New Zealand including the important balancing principle of the right to compensation for land taken. The principle was also eventually affirmed that legislative authority was required before land could be taken for public purposes. The New Zealand authority, Hinde, McMorland, and Sim, notes for example that ‘compulsory acquisition is now invariably effected under statutory powers’. While there may still be some prerogative power of the Crown to take land, its extent is ‘uncertain’, and it is now likely to arise only in wartime and even then most cases will be dealt with under existing or special wartime legislation.⁴

When it came to the application of the principles, it seems that, in practice, the right to compulsorily take land for public purposes such as roads was relatively infrequently used in England until the great changes of the industrial revolution in the eighteenth and nineteenth centuries. Harold Perkin, in his book *The Age of the Railway*, notes that pre-industrial Britain was largely unchanged for centuries in its system of towns and roading. In 1760 for example, communications in Britain were little better than in the days of the Romans. Roads were being maintained rather than built, and repairs that were made were infrequent and largely inadequate.⁵

3. Blackstone, *Commentaries* 1, 139

4. Hinde, McMorland, and Sim, *Introduction to Land Law*, Wellington, Butterworths, 1986, 2nd edition

5. Harold Perkin, *The Age of the Railway*, David & Charles, 1970, p 15

The taking of private land for public works really took off in the eighteenth and nineteenth centuries, with the great transformation of the industrial revolution. The English landowning class were a major influence in this as they took advantage of opportunities to increase their wealth. Perkins has described the English landowning class at the beginning of the industrial revolution as tiny, about 1.2 percent of the population. However they were not only the richest class but they were also in the strictest sense a ruling class. The King's Ministers were, with few exceptions, great landowners or their relations. The civil service consisted of their appointees from among their friends and relations, and the House of Lords was to all intents and purposes a House of Landlords. Four-fifths of the House of Commons comprised landowners and their relations, and the rest were chiefly their friends and dependants. It was only in the greater cities that men such as merchants and lawyers could control their affairs and even as their power grew, they too aspired to join the ranks of landowners.⁶

English landowners were also in a unique position to play a major role in the industrial revolution. Following the English Civil War in the mid-seventeenth century, feudal tenures were abolished and the English landed class turned lordship into landownership with the establishment of the modern freehold. As real owners of the land, the landed class were free to do what they liked with it and their keen interest in any kind of economic development helped enormously in the industrial and transport revolution.⁷

Although railways and other works were promoted as providing undoubted improvements for the general public, in England they were developed, promoted, and owned by private interests, in many cases until well into the twentieth century. These were typically combinations of wealthy entrepreneurial landowners and industrialists. In order to promote and build their works, and often to compulsorily obtain land required, they had to obtain the special Acts of Parliament required to authorise the work and the necessary taking of land. These Acts enabled them to set up a company, raise money from shareholders, and buy the required land, by compulsory purchase if necessary, to build their railways or similar works. The Stockton and Darlington Act 1825 and the Liverpool and Manchester Act 1825 were typical of these local Acts.⁸

Acts authorising takings were not always without opposition, especially from powerful landowners who might support rival canal companies and oppose having their land compulsorily 'purchased'. However, opposition was often based on support for a rival work, such as a canal as opposed to a railway, and could often be bought off or overcome by promises of shares in the new enterprise and seats on the board of directors.⁹

In fact, those promoting the works and those occasionally suffering compulsory purchase almost invariably belonged to the same numerically small landowning class with similar priorities and outlook. This class also owned most of the land. The vast majority of the population at this time was landless and there was no

6. Ibid, pp 34–35

7. Ibid, pp 36–44

8. Ibid, pp 72–73

9. Ibid, re opposition of Marquess of Stafford to Liverpool and Manchester Railway Act, p 83

widespread landownership by the middle and working classes as happened later. It was this same small landed class therefore who were interested in using rights to take land where necessary for the works they were promoting, and who were occasionally subject to takings. The role of the state at this time has been described as being more like a neutral umpire, limited to laying down the general principles and procedures for taking land and determining compensation. This included providing machinery for resolving disputes between the private promoters who had obtained compulsory powers and the landowners subject to them.¹⁰

In general the land taken was strips of farm land for rail or canal works and it was this type of land that large landowners were willing to use for development purposes anyway. Takings did not generally affect land on which the owners had homes or to which they had strong emotional attachments. The land involved represented an income-producing investment or an item of an industrial or commercial enterprise of such a nature that compensation moneys could be used to replace it with the purchase of other land and the construction of other buildings. As Else-Mitchell has noted, ‘The only effect on the expropriated owner was that the form of his investment was changed’. Even when there were instances where the land acquired would have included tenanted houses and buildings, tenants had few rights and little security of tenure, so any form of compensation to them would be minimal if they could afford to litigate the claim at all.¹¹

One of the first areas landowners became interested in was the improvement of transport systems. As roads, and in particular horse traffic, increasingly proved inadequate, landowners, in partnership with industrialists, pioneered the revolution in transport and in doing so contributed enormously to the success of the wider industrial revolution. The two great forms of transport quickly became canals and railways, with railways eventually becoming most important. George Stephenson built his first steam locomotive in 1814 and in doing so turned crude colliery engines into a revolutionary means of public transport. In September 1825 the first steam-hauled public railway opened for freight only on a railway authorised by Parliament as a public line. The Liverpool and Manchester Railway Act 1826 enabled the first modern railway carrying freight and passengers to be built, and when it opened in 1830 it ushered in what Perkins calls the ‘Railway Age’.¹²

The great railway ‘boom’ followed in the years from 1833 to 1837, with special acts enabling railways to be built throughout England. Railways continued to be a growth industry for many decades and passenger traffic continued to increase regardless of later booms or crises in the economy.¹³

The railways not only produced a revolution for freight traffic. They also had a direct impact on public passengers as they carried more people, faster and in more comfort, and before long at reduced fares, than was possible on the fastest of stage coaches. They created a new traffic for all classes, from businessmen to working

10. Justice Else-Mitchell, ‘Do Existing Acquisition Acts Really Provide For Just Compensation in All Cases’, *Valuer*, vol 23 (1974), p 2

11. *Ibid*, pp 4–5

12. Perkin, p 73

13. G R Hawke, *Railways and Economic Growth in England and Wales, 1840–1870*, Oxford, Clarendon Press, 1970, p 37

people travelling to the new suburbs made possible by rail. Rail allowed the development of new leisure pursuits in day excursions and new associated enterprises, for example Thomas Cook's first excursion, which took place in 1841. Railways also enabled England to become more suburban and in doing so enabled the development of new towns and new services required for them.¹⁴

Improvements in town planning and town amenities had also begun by this time – a new development in public works. Once again, in England, landowners played a significant role. The joint initiatives of industrialists and landowners resulted in the creation of new towns and considerable expansion in many old ones. Much of this was made possible by the development of rail transport and by the efforts of landowners and industrialists in providing land and establishing new industries on it. They laid out streets and built public amenities such as churches, schools, shops, and waterworks, and they reaped the profits from the industries the towns serviced. An example is the town of Crewe, which was built by a railway company and included company-built houses, church, and school, as well as company-provided doctor, schoolmaster, curate, and policemen.¹⁵

The growth of urban areas also resulted in health and social problems associated with congregations of such large numbers of people, or the 'encamped hordes' of the 1840s as quoted by Perkins.¹⁶ This in turn gave rise to initiatives in waterworks, sewerage, housing, and the provision of other public amenities from the late 1830s. Originally many of these were undertaken as private initiatives, again using authorities obtained under special Acts. However, responsibility was increasingly assumed by new boroughs, such as in Manchester and Liverpool.

In Manchester the new borough began obtaining a series of Improvement and Other Acts from 1838 that pioneered public and housing reform and began the development of many of the other amenities of modern urban life. For example, it established one of the first public parks in England in 1846 and the first municipal free library in 1852. The new borough in Liverpool obtained the Liverpool Sanitary Act in 1846 and over the next 12 years paved 258 new streets, built 146 miles of new sewers and reconstructed old ones, provided public baths, wash houses, and public conveniences, and adopted a town plan for reconstruction of streets and the provision of public parks. As noted by Perkins, at the time these community improvements were universally welcomed and greatly supported by ratepayers.¹⁷

As the industrial revolution brought a flood of special local Acts, many allowing land to be taken for a variety of works, two major consolidating Acts were passed in England in 1845. These were the Lands Clauses Consolidation Act 1845 and the Railways Clauses Consolidation Act 1845. It was intended that future Acts authorising particular land-taking powers could then ensure consistency in the actual taking procedures, such as in determining compensation and resolving any disputes, by incorporating the relevant provisions from these Acts.

The legislation also reflected the sensibilities of the landowners toward their own class. Rights to full compensation were scrupulously provided for, as were many of

14. Perkin, pp 184–185

15. *Ibid*, pp 126–128

16. *Ibid*, p 140

17. *Ibid*, pp 137–138

the features that have been retained in modern legislation providing for compulsory acquisition for public purposes. For example, the right to receive notice, to have the opportunity to object, and to have an independent arbitration of disputes regarding compensation. Importantly, each special Act promoting a new work had to obtain the approval of the landowners' own forum, Parliament, where its merits could be fully debated and sufficient powerful support had to be obtained before it was successfully passed. Reflecting the outlook and circumstances of the time, the provisions for compensation were entirely limited to monetary and commercial value. As will be shown, many of these assumptions and provisions were imported into New Zealand.

It can be seen, therefore, that when the Treaty of Waitangi was first signed in 1840, colonists were bringing with them the experience of English public works traditions and principles developed to that date. By 1840, England was in the late years of the industrial revolution. The great railways boom had already begun and colonists arrived in New Zealand convinced that railways were vital to economic growth. Urbanisation was also well underway in Britain with associated social problems and the early beginnings of measures to counter these, such as borough responsibility for waterworks, sewerage, and other public amenities. New Zealand was often promoted as a means of escape from these problems and colonists also brought with them a desire to avoid such problems in their new settlements.

The tradition of obtaining special Acts for particular works was already well established in England by 1840, and the consolidating legislation of 1845 was only a few years away. The protections and procedures involved in land taking were also well established but had been designed to meet the needs and interests of a small homogeneous landowning group, who regarded the type of land normally taken above all as an investment commodity.

In a new society, with new conditions, it was inevitable that modifications would be made to these imported traditions to take account of new needs. For example, it soon became apparent in New Zealand that private enterprise was not able or willing to promote and develop public works in the same way as in England. The same opportunities to create great wealth were simply not available, and many of the physical difficulties involved in building a network of roads and railways took years to overcome. An early modification therefore was an increasing assumption of central, provincial, and local government responsibility for works that in Britain at the time were more often carried out by private enterprise. This was to have important implications for the role of the Crown in the development of New Zealand public works provisions. The early lessons of the problems associated with urban development also appear to have resulted in significant attempts to provide adequate land for public needs when the first settlements were planned.

The major new feature in the colonial situation however was the existence of the indigenous Maori people, with prior rights of landownership recognised by the British Crown, and with protections included in a Treaty that the Crown had declared itself honour-bound to uphold. This provided another opportunity for further modification of public works taking principles to meet the needs and include the interests of a new landowning group. This report essentially traces the major features in the rejection of this opportunity.