

HAMERTONS

BARRISTERS AND SOLICITORS

Our Ref: Bill Jones: 11125/01

Your Ref:

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6 May 1999

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re: **TAKING OF LAND FOR PUBLIC WORKS**

We have been asked by the Advisory Trustees of the Whakapaupakihi No. 2 Trust to provide them with a legal opinion on various issues arising from the taking of land by the Crown for public works from the owners of Whakapaupakihi lands at Motuhora. Following research we now set out our legal opinion on issues relating to firstly, the historical and current status of the land taken, secondly statutory offer-back requirements in respect of land taken which has subsequently been sold by the Crown and thirdly, compensation considerations.

A. STATUS OF LANDS:

Quarry

1. This land comprising 31 acres 2 roods 2 perches was acquired from the original Whakapaupakihi No. 2 Block by the Crown by Proclamation at 1937 NZ Gazette, page 2363 pursuant to the Public Works Act 1928 for the purposes of a quarry.
2. The land was originally acquired subject to memoranda of lease or grants of profit a prendre over the land at the time but the land acquired is no longer subject to those interests.
3. The land remains Crown land. It is presently subject to a Mining Permit No.41-482 issued to Eastworks Limited on 21 December 1998 giving that company the exclusive right to mine the land for greywacke for 40 years from that date. That permit was issued under the Crown Minerals Act 1991, was signed by the Manager of Crown Minerals and contains reference to the relevant Instrument of Title as being the original Proclamation vesting the land in the Crown.

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4. We have obtained a Companies Office search of Eastworks Limited. It is a private company. Its present directors are David John Faulkner and Sandra Maree Dodds.
5. Pursuant to the terms of the Mining Permit Eastworks Limited is obliged to pay royalties to the Crown for the mining of the land.
6. The issue of the Mining Permit by the Crown for commercial return to the Crown is within the powers of the Crown pursuant to section 45 of the Public Works Act 1981. The Permit effectively confers on Eastworks Limited a licence to occupy the land previously acquired by Proclamation. Section 45(1) of the Public Works Act 1991 empowers the Minister (or controlling local authority as the case may be) to grant a licence to occupy any land held for a public work on such terms and conditions as he or it may think fit. All profits derived from royalties paid under the Mining Permit must be paid into the general revenues of the Crown or the controlling local authority as the case may be.
7. In our opinion, there is no legal basis for the Whakapaupakihi No. 2 Trust to claim ownership of the quarry site from the Crown. The quarry land was acquired by the Crown under statutory public works procedures and remains vested in the Crown today with the Crown having statutory power to grant licences to occupy the quarry to third parties on commercial terms.

Motuhora School Site

1. This land comprising 5 acres was acquired by the Crown from the original Whakapaupakihi No. 3 Block at NZ Gazette No.10 on 30 January 1919 and was vested in the Education Board of the District of South Auckland pursuant to the Public Works Act 1908 for the purposes of a public school.
2. Pursuant to NZ Gazette No.71 on 3 October 1957, page 1737 the land (which was at that stage referred to as being vested in the Hawke Bay Education Board as a site for a public school) was vested in the Crown, freed and discharged from any educational trust affecting the land. That vesting was pursuant to section 5(6) of the Education of Lands Act 1949 by virtue of the school site no longer being required for that purpose.
3. Subsequently, the Crown issued a Certificate under section 116 of the Land Act 1948 evidencing the entitlement of Annette Robyn Bailey to the land with effect from 15 November 1965. That Certificate records a purchase price of £110.00:0 paid to the Crown. The Certificate was registered in the Land Titles Office, Gisborne and on the basis of that Certificate a fully constituted Certificate of Title 1A/1016 was issued for the land by the Land Titles Office on 21 December 1965.
4. Since the issue of Certificate of Title 1A/1016 to Annette Robyn Bailey the land has been transferred twice, first to Francis William Wade Murphy in 1984 and secondly to Kim Alexander Jackson in 1998.

5. In our opinion, there is no legal basis for the Trust(s) now administering the adjoining Whakapaupakihi No.6 and No.7 Blocks to claim ownership of the land formerly acquired by the Crown for a school site now comprised in Certificate of Title 1A/1016. That land is now in private ownership and such ownership cannot be overturned.

Railway Land

1. The area of land taken by the Crown by Proclamation for railway purposes is now comprised in Certificate of Title 119/33 (Gisborne Registry).
2. The total area of land in Certificate of Title 119/33 is 31 acres 2 roods 18 perches. Of this area 1 acre is land not formerly comprised in the Whakapaupakihi Blocks. The balance area of 30 acres 2 roods 18 perches was acquired by the Crown pursuant to various Proclamations for the purpose of the Gisborne - Rotorua railway as follows:
 - NZ Gazette No.20, 24 February 1916 under the Public Works Act 1908 (Proclamation No.274)
 - NZ Gazette No.146, 27 September 1917 under the Public Works Act 1908 (Proclamation No.294)
 - NZ Gazette No.52, 31 July 1952, page 1280 under the Public Works Act 1928 (Proclamation 1220).
3. Of the total areas acquired by the Proclamations referred to in item 2 the relative areas acquired from each of the Whakapaupakihi Blocks were as follows:

Whakapaupakihi No. 1	-	16 acres 3 roods 25 perches
Whakapaupakihi No. 2	-	5 acres 0 roods 37 perches
Whakapaupakihi No. 3	-	8 acres 1 rood 36 perches
4. On 3 March 1960 the Crown directed that all of the land formerly acquired by Proclamation Nos. 274, 294 and 1220 be sold, such land being no longer required for the public works for which it was taken. That direction was published in 1960 NZ Gazette No.15, page 284.
5. On 10 May 1960 the Minister of Railways issued a Certificate that the land had been sold by the Crown to F.D. McIntosh & Sons Limited for £1,496.00.0. That Certificate was registered in the Land Titles Office, Gisborne as a Transfer under No.64798 and on 18 May 1960 the Land Titles Office issued the current Certificate of Title 119/33 for the land.
6. Since the current title issued the land has been transferred to Motuhora Quarries Limited in 1978, Rock Products Limited in 1981 and the Mangatu Incorporation in 1983. The land is also now General Land by Status Order of the Maori Land Court.

7. In our opinion, there is no legal basis for the Trust(s) now administering the adjoining Whakapaupakihi No.2, No.5 and No.6 Blocks to claim ownership of the land formerly acquired by the Crown for railway purposes now comprised in Certificate of Title 119/33. That land is now in private ownership and such ownership cannot be overturned.

B. "OFFER BACK" OF LAND ACQUIRED FOR PUBLIC WORKS TO OWNERS:

1. The quarry site remains Crown Land.
2. The former Motuhora school site was sold by the Crown in 1965.
3. The former railway land was sold by the Crown in 1960.
4. Under section 40 of the Public Works Act 1981 the Crown (or the controlling local authority as the case may be) has a primary obligation to offer any land acquired for a public work which is no longer required for that public work to the current owner(s) of the land from which it was originally acquired. We emphasise that this is a requirement of the Public Works Act 1981. The emphasis is important because at the time of the sale of the former school site and railway land by the Crown the relevant Act was the Public Works Act 1928.
5. The equivalent provision in the Public Works Act 1928 under which the former school site and railway land was sold was section 35 of that Act. That section did not compulsorily require the Crown to offer land taken for public works back to the owner(s) of adjoining land from which the land was originally taken. Under section 35 of the 1928 Act the Governor General was empowered to sell any land taken for Government works without any requirement to first offer the land back to the owner(s) of the land from which it was originally acquired. The Governor General directed the sale of the former railway land pursuant to NZ Gazette, 3 March 1960 No.15, page 284.
6. Under section 5(6) of the Education Lands Act 1949 the Governor General was empowered by Proclamation to declare that any school site no longer required for that purpose shall vest in the Crown. The Governor General issued such a Proclamation in respect of the former Motuhora school site in NZ Gazette, 3 October 1957, page 1737. Pursuant to that Proclamation the former school site then became Crown land subject to the Land Act 1948 and it was then sold by the Crown under that Act. There was no requirement under that Act for the Crown to offer the land back to the owner(s) of the land from which the school site was originally acquired.
7. In our opinion, the Trust(s) now administering the adjoining Whakapaupakihi Blocks from which the former railway land and the former Motuhora school site were originally acquired have no legal basis for any claim against the Crown for the subsequent sale of those areas of land to third parties.

C. COMPENSATION:

1. The quarry was acquired by the Crown pursuant to the Public Works Act 1908.
2. The Motuhora school site was acquired by the Crown pursuant to the Public Works Act 1908.
3. The railway land was acquired by the Crown pursuant to both the Public Works Act 1908 and the Public Works Act 1928.
4. We have not yet obtained a copy of the Public Works Act 1908. However, there is nothing in our research to suggest that the compensation provisions of that Act were more favourable to owners of Maori freehold land taken for public works than the compensation provisions of the Public Works Act 1928. Section 104 of the 1928 Act conferred on the Crown full discretion as to whether or not compensation was assessed and provided that, if the Crown wished to ascertain compensation, then it could apply to the Maori Land Court for the Court to ascertain what compensation ought to be paid. We stress that this was a discretionary provision. There was no statutory obligation on the Crown to arrange for the assessment of compensation.
5. The owners of the Blocks affected would have had an entitlement to claim compensation for land taken for public works. This right was set out in section 42 of the Public Works Act 1928 and we understand there was an equivalent provision in the 1908 Act.
6. Research of old Crown records would be required to establish whether any compensation was paid by the Crown for the taking of the quarry, school site and railway. As stated, it appears there was no obligation on the Crown to arrange any assessment of compensation. It may well be that the Crown left it to the owners of the affected Blocks to make claims for compensation. If no such claims were made at the time then the owners could not make any compensation claims against the Crown now. The reason for this is that there was a time limitation period for affected owners to make any compensation claims. Under the 1928 Act that limitation period was five years after the date of the Proclamation taking the lands. There was a corresponding provision in the 1908 Act but we have not yet obtained a copy of that Act. However, it is probable that the limitation period under the 1908 Act was similar to the period in the 1928 Act.
7. In our opinion, the Trusts now administering the Whakapaupakihi Blocks from which land was formerly acquired by the Crown for quarry, school site and railway have no valid claim against the Crown for compensation unless it can be established firstly, that such a claim was made at the time of taking or within the relevant limitation period, secondly, that compensation was assessed as being payable pursuant to such claim and thirdly, that any assessed compensation was not then paid by the Crown.

We trust this preliminary opinion is of assistance to the Trusts of the affected Whakapaupakihi Blocks and we shall await your further instructions.

Yours faithfully
HAMERTONS

per:

A handwritten signature in black ink, appearing to be 'AS', written over a thin horizontal line.

WHJ:mjc
18jm723