

Owner-initiated acquisition in cases of hardship

These minimum requirements provide direction for the acquisition of land following an application for owner-initiated acquisition due to hardship under the *Land Acquisition (Just Terms Compensation) Act 1991*.

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1 Context

1.1 Purpose

The minimum requirements:

- **apply to all authorities** that acquire land under the *Land Acquisition (Just Terms Compensation) Act 1991* (the **Act**)
- **define the minimum expectations** for the assessment of applications and compensation following owner-initiated acquisition in cases of hardship.

The minimum requirements and supporting guidelines aim to ensure:

- transparency in the assessment of applications for hardship
- consistency in the assessment of compensation
- procedural fairness to property owners.

1.2 Scope

The minimum requirements and guidelines apply to all acquiring authorities that acquire land under the Act.

Land that may be acquired following an owner-initiated application can be the whole of the land, or part of the land.

These requirements do not apply to the acquisition of state owned land, or land owned by a public company or a subsidiary of a public company, including if the public company is a charity, as provided in section 22 of the Act.

1.3 Property Acquisition Standards

The minimum requirements for owner-initiated acquisitions in cases of hardship will assist agencies meet the following [Property Acquisition Standards](#):

- Standard 1
Property owners will be treated fairly and with empathy and respect.
- Standard 2
Property owners will be provided with clear information about their rights.
- Standard 4
The acquisition process will be consistent across projects and acquiring authorities.

1.4 Background

The 2013 review of the Land Acquisition (Just Terms Compensation) Act 1991 conducted by Mr David Russell SC recommended that the Act be changed to include a review mechanism for property owners where an acquiring authority rejects their hardship application.

Consistent with this recommendation, section 27A was inserted by *the Land Acquisition (Just Terms Compensation) Amendment Act 2016* and commenced on 1 March 2017.

The objective behind this change was to improve transparency and fairness in hardship matters by ensuring that property owners can access a low cost independent review of decisions made by an acquiring authority.

In addition, the NSW Government committed to improving the process by supporting property owners when preparing hardship applications and developing guidelines which acquiring authorities must follow.

2 Minimum requirements

2.1 Inform the property owner of the outcome of their hardship application

If an acquiring authority decides to reject the hardship application it must communicate in writing:

1. the reasons for the decision
2. that the property owner has a right to seek a review of the decision
3. that a property owner seeking merits review must apply within 28 days of receiving the written decision
4. the Centre for Property Acquisition (**CPA**) factsheet on Owner-Initiated Acquisition in Cases of Hardship.

2.2 All heads of compensation must be considered

- An acquiring authority must consider whether each head of compensation should be paid to ensure fair and just compensation to the landowner.
- An acquiring authority must be able to justify why any head of compensation has not been awarded.
- If relevant, any offer of compensation made by the acquiring authority must specify the amounts being awarded for special value, severance, disturbance and disadvantage resulting from relocation.

2.3 If a head of compensation has not been awarded, provide reasons to the property owner

An acquiring authority must provide in writing to the property owner:

- reasons to explain why any special value, severance, disturbance and/or disadvantage resulting from relocation have not been awarded
- the information which the acquiring authority relied on when making its decision.

2.4 Inform property owners that they have the right to seek a determination of compensation by the Valuer General

- An acquiring authority must provide property owners with a copy of the CPA fact sheet on owner-initiated acquisition in cases of hardship when the hardship application is accepted.
- An acquiring authority must provide property owners with a copy of the claim for compensation form when the hardship application is accepted.

3 Guidelines

3.1 Application requirements

Property owner issues notice (s.23) To make an application for hardship, a property owner must issue the acquiring authority with a Notice Requiring Acquisition of Land. A property owner may issue the Notice if the land is designated for acquisition by that authority for a public purpose, and the owner considers that they will suffer hardship if there is any delay in acquiring the land.

The Notice Requiring Acquisition of Land is a form approved by the Minister administering the Act and is available on the [Property Acquisition website](#).

Who is a property owner (s.22) For the purpose of the hardship provisions, an owner is defined as someone who:

- owns the title to the land (has a fee simple estate in the land); or
- has become entitled to exercise a power of sale over the land

but is not:

- a public company, or subsidiary of a public company, as defined by the *Corporations Act 2001* (Cth); or
- an authority of the State.

When there is more than one owner (s.23) All property owners are required to complete the Notice. Only one of the owners needs to suffer hardship.

When a notice is received Upon receiving a Notice Requiring Acquisition of Land, the acquiring authority should:

1. check whether the land is designated for acquisition by that authority for a public purpose
2. check whether the designation is still required
3. assess whether the property owner has provided sufficient information to demonstrate hardship.

When there is insufficient information

Where more information is required to assess the hardship application, an acquiring authority should contact the property owner without delay to inform the property owner:

- that more information is required
- to specify the type of information required
- to agree to a date for when this information is to be provided
- to agree to extend the 90 day period for which land is to be acquired.

3.2 Designation over land

Check whether the land is required (s.21)

A hardship application can only be made over land that has been designated for acquisition or reserved by an environmental planning instrument pursuant to section 21 of the Act.

A property owner is able to make a hardship application for all, or only part of the designated land. However, an acquiring authority is only required to acquire as much of the land that is needed for the public purpose for which the land was designated.

Acquiring authority may lift designation (s.27)

An acquiring authority may remove the designation over the land within 90 days of the property owner issuing the Notice Requiring Acquisition of Land.

To remove the designation, the authority must give the property owner written notice that the land is no longer designated for future acquisition.

Where an acquiring authority has, in connection with an application for development consent, notified the consent authority that the land has been designated for future acquisition for a public purpose, the acquiring authority must provide written notice to the owner that the land is no longer designated for future acquisition.

Where land has been reserved under an environmental planning instrument, the acquiring authority must provide the property owner with a written undertaking that it will use its best endeavours to remove the reservation.

3.3 Assessing hardship

What is hardship (s.24)

To demonstrate hardship, a property owner must be able to meet one element from each of the two categories below:

1. because of the designation, the owner is:
 - unable to sell the land, or
 - unable to sell the land at market value.

2. It is necessary for the owner to sell all or part of the land without delay:
 - for a pressing personal reason, a pressing domestic reason, or a pressing social reason, or
 - to avoid the loss of income, or
 - to avoid the substantial reduction in income.

When an owner is a corporation (s.24(3))

If the property owner is a corporation, it must be able to demonstrate that it has become necessary for the corporation to sell all or any part of the land without delay:

- for pressing personal, domestic or social reasons of an individual who holds at least 20 per cent of the shares in the corporation, or
- in order to avoid the loss of (or a substantial reduction in) the income of such an individual.

How an owner can show they are unable to sell the land

A property owner must be able to demonstrate that, because of the designation:

- they are unable to sell the land, or
- they are unable to sell the land at market value.

An inability to sell the land is different from an unwillingness to sell the land.

The inability to sell the land can be demonstrated by, for example:

- an opinion in writing from a licensed real estate agent setting out the reasons why a sales campaign would be inappropriate (e.g. because the designation limits potential purchasers, or prevents successful sale as the only realistic purchaser under the circumstances is the acquiring authority), or

- receipt or notice from a licensed real estate agent or appropriate website demonstrating a marketing campaign attempting to sell the land which has proved to be unsuccessful in attracting any potential purchaser as a result of the designation.

How an owner can show that it is necessary to sell the land without delay

A property owner must be able to demonstrate that it is necessary to sell all of the land, or part of the land, without delay, because of any one of the following:

- a pressing personal reason, or
- a pressing domestic reason, or
- a pressing social reason, or
- to avoid the loss of income, or
- to avoid a substantial reduction in income.

Examples of reasons that demonstrate a necessity sell the land may include any one of the reasons below:

- need to move interstate for work reasons
- need to relocate to a retirement facility
- need to relocate for other family or personal reasons, including medical reasons
- the property owner is unable to afford to keep the property.

Examples of evidence to support these reasons may include:

- a written statement from the property owner explaining why they must sell the land without delay
- an opinion from a treating doctor or other medical professional
- a written statement from the property owner explaining how the sale of the property will prevent loss or reduction of income
- a copy of financial statements, a letter from an accountant, or a copy of relevant income tax returns.

3.4 Merits review of a hardship application

Property owner can apply for review of decision (s.27A)

A decision by an acquiring authority to not accept an application for owner-initiated acquisition can be reviewed.

Section 3.3 above described the types of information that the reviewer may consider when making their determination.

A property owner can make an application for merits review:

- within 28 days after an acquiring authority has rejected their application for owner-initiated acquisition, or
- where an acquiring authority has not acquired the land or removed the designation for acquisition over the land 90 days after the request for owner-initiated acquisition was made.

To lodge a merits review appeal, please send your application via email to the Department of Planning, Industry and Environment at hardship@planning.nsw.gov.au

Reviewer's decision will be made on the papers

The Department of Planning, Industry and Environment (DPIE) facilitates the merits review. DPIE allocates one of the independent experts appointed by the Minister that they retain to conduct the merits review.

The reviewer conducts their assessment 'on the papers' by examining:

- the application made by the property owner for owner-initiated acquisition
- the decision from the acquiring authority
- other relevant correspondence or information relating to the application.

Reviewer's decision is final (s.27A(5))

The reviewer may decide to either confirm the decision of the acquiring authority not to acquire the land, or to quash the decision of the acquiring authority and compel them to acquire the land. The Act provides that the decision of the reviewer is final.

3.5 Method and timing of acquisition of land

Compulsory acquisition is default method (s.25)

The Act provides that compulsory acquisition is the default method for owner-initiated acquisition where the Valuer General determines the amount of compensation payable. A proposed acquisition notice is not required.

However, this does not prevent the acquiring authority and property owner from reaching an agreement on compensation.

Land to be acquired within 90 days (s.23(2)) Unless the application is rejected, the acquiring authority must acquire the land within 90 days unless otherwise agreed between the owner and the acquiring authority. The 90 day period commences from the date the property owner submits the Notice Requiring Acquisition of Land.

3.6 Assessing compensation

Compensation must be on just terms (s.26) The Act provides that compensation payable under the Act is required to be on just terms.

Section 26 provides an acquiring authority with a discretion to not take into account the following heads of compensation:

- any special value of the land
- any loss attributable to severance or disturbance
- disadvantage resulting from relocation.

However, an acquiring authority should only exercise this discretion on a case by case basis.

If an acquiring authority determines that compensation under one or more of these heads is not payable, it must justify why it is fair and reasonable in the circumstances.

Acquiring authority should ensure fairness The discretion in section 26 is designed to ensure fairness.

When exercising this discretion an acquiring authority must ensure that compensation is on just terms. An acquiring authority should always consider whether all of the heads of compensation should be paid.

An acquiring authority should award these heads of compensation unless there is good reason not to. This follows the approach of the Land and Environment Court.

Land and Environment Court decisions The Land and Environment Court has awarded disturbance and/or disadvantage in the following circumstances:

- Disturbance items were awarded where a property owner purchased the land in full knowledge of the designation over the land, however later needed to sell the land because of financial difficulties unrelated to the acquisition.

- Disturbance and disadvantage resulting from relocation were awarded in circumstances where the designation for road work was causing noise and dust that exacerbated existing health problems.

Intention of Parliament

The Second Reading Speech for *the Land Acquisition (Just Terms Compensation) Act 1991* contemplates that it may not be appropriate for an acquiring authority to offer special value, severance, disturbance or disadvantage resulting from relocation where a property owner has to move for reasons unrelated to the designation over the land.

Valuer General's approach

When assessing compensation, the Valuer General considers each case on its merits. The general position taken by the Valuer General in awarding compensation is to resolve any reasonable doubts in favour of the property owner.

Refer to the Valuer General's policy on [Compensation Following Compulsory Acquisition](#).

4 References

4.1 Laws and guidelines

Governing law *Land Acquisition (Just Terms Compensation) Act 1991*

4.2 Definitions

The Act *Land Acquisition (Just Terms Compensation) Act 1991*

CPA Centre for Property Acquisition

Property owner A person that has an interest in the land as defined under section 22 of the Land Acquisition (Just Terms Compensation) Act 1991

4.3 Useful resources

Factsheet CPA factsheet on Owner-Initiated Acquisition in Cases of Hardship

Forms Notice requiring acquisition of land form
Claim for compensation form

Website [Property acquisition website](#)

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Any enquiries relating to these minimum requirements and guidelines may be addressed to the Centre for Property Acquisition at info@propertyacquisition.nsw.gov.au

Author: Centre for Property Acquisition

Disclaimer

The Centre for Property Acquisition has prepared these minimum requirements and guidelines, however, they are not intended as a substitute for legal advice. Users should obtain their own advice when making decisions that draw upon this document.

Centre for Property Acquisition

Address: 231 Elizabeth Street, Sydney NSW 2000

Email: info@propertyacquisition.nsw.gov.au

Phone: 1300 029 146