

Due diligence - forestry block land acquisition

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Introduction

Prospective purchasers of land often contract to purchase the land 'subject to due diligence'. This means that the obligation to purchase is conditional upon the purchaser:

- a. carrying out a due diligence investigation of the land and the matters relevant to the land, within a set time period; and
- b. satisfying itself, within the time period, as to all matters that may be relevant to its decision to purchase the land.

Put simply, due diligence is about 'making sure' that a decision to purchase is a fully informed decision and that there will be no future 'surprises'. The purchaser is relying on its own investigations and judgement as to whether or not the land is a sound investment.

A due diligence investigation should form part of any decision to purchase land regardless of vendor warranties (which are only as good as the person giving it). Such an investigation can be carried out pre-contract or post contract (where the contract to purchase is conditional on the purchaser being satisfied with a due diligence investigation of the land).

The due diligence investigation will only be as good as the resources provided and used by the purchaser. The prudent purchaser should draw upon the skills of a range of experts who owe a professional duty of care and who can be looked to for recompense if there is in fact a surprise in the future.

Below we focus on some of the land aspects of a due diligence investigation that should be considered when contemplating buying a forestry block (which includes land intended to be converted for forestry purposes). We also briefly canvass some other important issues that are also often relevant. The issues raised below are not an exhaustive list of matters to be addressed in any particular due diligence investigation - each investigation will depend on the particular situation.

Title

Searching the title to the forestry block in question will provide a purchaser with an idea of how 'clean' the title is. A title search will show the formal restrictions affecting the block, which in the worst case scenario may be prohibitive to



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developing a successful forestry operation. The title search will also disclose any formal benefits in favour of the land, for instance, the right to convey water over an adjoining property.

Often a title search will disclose that a mortgage is registered against the land, which should usually be discharged by the vendor on settlement. Sometimes a title search may reveal that a caveat is registered against the land, which will require surrendering or consent from the caveator before the purchaser can formally be recorded on the title as the legal owner of the land. A title search may also reveal that the block is subject to a claim under the Treaty of Waitangi.

Access to and from a forestry block is an important consideration. If the forestry block in question does not have direct access to a public road, then the title should be looked at to see whether the block has formal access rights over adjoining properties in order to obtain access to a public road. If the forestry block does have the benefit of a vehicular right of way over another property then the terms and conditions of the same should be examined to see whether the right of way permits harvesting vehicles to travel over the area concerned. Maintenance provisions relating to the right of way will also be relevant as these may oblige the user of the right of way to meet any maintenance or restoration costs associated with use of the right of way - which could be expensive. Purchasers should be very wary of a forestry block that does not have direct access to a public road nor formal access to a public road over neighbouring properties, as future harvesting operations may be in jeopardy.

And bear in mind, legal access may not be practical access - and physical access may not in fact follow the legal access way. All this should be crosschecked.

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Resource Management

A prudent purchaser should obtain and review a Land Information Memorandum (LIM) relating to the forestry block, which can be obtained from the Council with jurisdiction in the particular area. A LIM is intended to disclose all relevant information held on the Council's files about a particular piece of land, which may be relevant to a party contemplating acquiring an interest in the land.

A LIM will usually provide information on the following relating to the land in question:

- The zoning of the land. It is important that proposed forestry operations are consistent with the zoning of the land, otherwise the Council may not allow forestry operations to proceed on the land - a disastrous start for the unwary purchaser!
- The classification of any proposed activity under the District Plan is often an important consideration. If the proposed activity is classified under the District Plan as a "controlled activity" then it is likely that an application for consent will not be publicly notified. However, it is likely that an application for consent to carry out a "non-complying" activity will be publicly notified, which could have timing and cost implications.
- Other use restrictions imposed on the land. For instance, the Council may have imposed restrictions on part of the land relating to vegetative clearance or land disturbance in order to prevent soil erosion and siltation.
- Whether any resource consent or permits have been issued in relation to the land. For instance, the owner of the land may have a water permit to extract water from a river (such rights should be transferred to the purchaser on settlement). If there are no such rights then this may be a relevant consideration to the purchaser.
- Whether any building consents have been issued for the land. If building consents have been issued post 1991, the purchaser should seek confirmation that a code compliance certificate (which certifies that the building work complies with the building code) has been issued for the work specified in the building consent.
- The availability of services and amenities to the land (for example, details on water supply, electricity supply, quality of roading to the block, drainage, and soil stability).
- Whether any heritage orders, archaeological sites or wahi tapu sites affect the block, which, if so, may mean that restrictions are imposed on activities on the land.

Maori Interests

The purchase of Maori freehold land is often a more involved process than the purchase of non Maori freehold land. The Te Ture Whenua Act 1993 regulates the "alienation" (which includes the purchase of Maori land) of Maori freehold land.

The intention of this Act is "to promote the retention of land in the hands of its owners, their whanua and their hapu.

The Act imposes restrictions when dealing with Maori freehold land, to help achieve the intention of the Act. Usually, before an interest in Maori freehold land can be offered to a party, a class of people known as the "preferred class of alienee" must first be given the right to accept that offer.

The preferred class of alienee comprises persons such as children of the block owners', and other beneficial owners of the land who are members of the hapu associated with the land (which can be numerous).

Accordingly, the purchase of Maori freehold land can be a complex and drawn out process. The purchaser should consider obtaining advice as to the hurdles that must be passed in order to become the recognised owner of a block of Maori freehold land.

Arrangements affecting the property

The block owner may have granted a lease or licence to a third party to use the block, or part of it. The terms and conditions should be examined to determine the extent of the third party's rights, and the extent of the block owner's obligations to the third party, under such arrangements.

If a forestry operation is established on the block, the vendor may have in place a number of existing contracts or arrangements for the provision of goods and services relating to the operation. There may be presales.

The purchaser should review these contracts or arrangements to see if it would like the vendor to transfer such arrangements on settlement.

Further considerations

- Value assessment and forecasts - this aspect focuses on the adequacy of the proposed purchase price and the performance of the property as an investment asset over a certain period. The quality of existing trees and/or the prospects for growth need to be assessed.
- Purchaser's plans - this area focuses on the purchaser's actual plans and reasons for the proposed investment. Even if all the other principal areas are found to be satisfactory, a prudent purchaser will still have to carry out a careful analysis of its needs in respect of the

block and its plans for the property in the future.

- Vendor company or trust - if a company or trust is selling the block to a purchaser, the purchaser should be satisfied that the persons representing the vendor, and the vendor itself, are authorised to sell the property. If the vendor is a company and is selling assets worth more than half the value of the assets of the company, the purchaser should ask the vendor to provide evidence that the necessary special shareholders' resolution approving the sale has been passed.
- Neighbouring properties - the purchaser

should consider the activities carried out on neighbouring properties, and the likelihood of neighbours objecting to the purchaser carrying out forestry operations on the block. In the likely event that a resource consent will be required for harvesting, neighbours' may have the ability to object to the resource consent, which may limit the block owner's ability to successfully harvest the block.

The value of a due diligence investigation of a forestry block should not be underestimated. It is an important element to confirm the appropriateness of the purchase.

Indigenous forest research body goes forward

Ten months ago a steering committee was formed with the aim of setting up an organization to obtain funding for further research into indigenous forest planting and sustainable management, the dissemination of that information to land owners and the removal of impediments to growing native trees for timber.

The Steering Committee, which represents a wide range of interests, is made up of the following people:

Ian Barton (Chair, Forestry Consultant, Kauri Researcher; Peter Berg, Institute of Forestry and Forest Owners Assn; David Bergin (alt Greg Steward), Indigenous Research Scientist at Forest Research; Bill Brownell, Director, Ecoquest Education Foundation; Bruce Burns, Scientist, Landcare; Mark Dean, Naturally Native New Zealand Plants Ltd; Mike Dodd, Scientist, AgResearch; John Kneebone, Farmer; Maggie Lawton, Regional Manager for Landcare Research; Roger MacGibbon (Sec, Natural Logic Ltd; Neil Olsen (alt Tony Oliver), Manager, Recreation, Auckland Regional Parks; and Murray McAlonan, Ministry of Forestry.

The vision statement and objectives of the Trust are:

"To see the majority of New Zealand landowners successfully planting and sustainably managing indigenous trees for productive, aesthetic and biodiversity purposes and to ensure the future availability of native timber."

The group intends to meet this vision by:

1. promoting indigenous forestry by advancing the state of knowledge of indigenous forest establishment and tree growth
2. improving the establishment techniques for indigenous trees and optimising their growth.
3. expanding our knowledge of the uses of indigenous plants and the number of species which

can be managed.

4. reducing the cost of indigenous tree establishment to affordable levels.
5. resolving those legal and political obstacles currently serving as disincentives to indigenous tree planting and management.
6. Disseminating information about sustainable indigenous forest management as widely as possible.

The Steering Committee has successfully applied to the Sustainable Farming Fund for a grant to upgrade existing trial areas to be used for demonstration purposes and compile practical bulletins on native tree growing. We will also begin work on a planted indigenous forestry strategy.

A scientific sub committee has begun to determine a programme of work. The species worked on initially will probably be kauri, totara and puriri. Emphasis will be on establishment problems such as soil amelioration by ripping and fertilizing, irrigation, the use of nurse crops and the conversion of poor exotic stands to natives using the shelterwood system. Riparian areas are sites which offer major growing advantages for native timber trees and will be the focus of early trials. It is anticipated that, once established, plantations will be managed as natural stands using the continuous cover system.

The organization will be launched at an all day workshop and field trip, on Saturday 8th September, at Waharau Regional Park on the Firth of Thames. Interested members of the Institute of Forestry are welcome to attend but, as space is limited, registrations will be accepted on a first in first served basis.

For further information contact Ian Barton, telephone 09 2924 825 or email ibtrees@ihug.co.nz.

Ian Barton