

**RESOURCE PLANNING AND DEVELOPMENT COMMISSION
STATE POLICIES AND PROJECTS ACT 1993, s.21**

LAUDERDALE QUAY DEVELOPMENT

**CLOSING SUBMISSIONS TO INITIAL HEARING
ON BEHALF OF THE CLARENCE CITY COUNCIL**

Introduction

1. The Council's overall position is as outlined in its opening statement. It neither supports the proposal, nor is it against it.
2. These submissions are made in the context outlined in paragraph 1.2 of the Council's initial submissions to the Commission.¹ ("the initial submissions").

Corporate body

3. The Council is a corporate body. Its corporate views are expressed by resolution and not by statements of individual aldermen. Accordingly, statements received by the Commission from individual aldermen should not be taken to express the views of the Council, unless they are consistent with the views expressed by the corporation.

The present process

4. The state government chose to declare the proposal a project of state significance. Accordingly, the provisions of the Clarence Planning Scheme were suspended,² and the Commission, as a state instrument, has been charged with the assessment of the proposal.³ This is not to say that the Council has no role in the process. However, having taken responsibility for the assessment the state should make proper and adequate resources available to the Commission to ensure that the assessment is fully carried out.

¹ *Submission: Draft Integrated Impact Statement on Lauderdale Quay Proposal (Project of State Significance)*, 30 March 2009

² SPPA, s19

³ SPPA, s20

5. The Commission has embarked an integrated assessment of the project.⁴
6. The present stage of the process involves an investigation of the proposal, which is contained in the DIIS. The Commission has elected to proceed with its assessment by way of a formal hearing. This is but a part of the Commission's investigation. The Commission's task, in consultation with the Council and the agencies notified under the SPPA, s.21(1), is to prepare a draft integrated assessment report. The task is, essentially, inquisitorial.
7. The process should not be confined to the hearing room. It should involve a wide ranging investigation. For example, the Council would urge the members of the panel to inspect other canal developments and investigate whether they have been successful, or not, and their ongoing management, maintenance and costs.

Council's role

8. The Council has a consultative role in the present process.⁵
9. The Council continues to make enquiries in other jurisdictions. It will continue to make any relevant information that it gathers to inform the Commission to draft its report.

Statutory scheme

10. The scheme of the SPPA is quite clear. It envisages that the draft report, together with the submissions received under s.21(2),⁶ will be exhibited and advertised for at least 28 days. Any person may then make representations to the Commission *in relation to the draft report*. This is as distinct from the representations that have been received to date about the DIIS.⁷ The Commissions must consider the representations received under s.23,⁸ and *for*

⁴ *State Policies and Projects Act 1993 ("SPPA")*, s.21

⁵ SPPA, s.22

⁶ SPPA, s.22(a) and (b)

⁷ Which don't seem to find a place in the statutory scheme.

⁸ SPPA, s.24(1)

that purpose it may hold a hearing.⁹ Within that statutory framework, the Commission may be required to afford procedural fairness to one or more of the parties.

11. Accordingly, the Council would urge the Commission to pursue its current investigations to the best extent possible and to continue to search for and receive relevant information, including information about the success or failure of canal developments in other states of Australia, when compared against the proposals with which they were commenced.

The Council's submissions

12. The Council provided the Commission with the initial submissions required under s.21(2). Under clause 1.2, the Council set out the key principles that have guided it in the process, namely that
 - there should be no unreasonable impost on the Clarence community arising from the development.
 - the level of cross subsidisation between public and private benefit within the community is minimised and is transparent.
 - the community is protected from responsibility for unforeseen adverse maintenance and environmental outcomes.
 - any maintenance responsibilities should lie with the appropriate party or the party best placed to deliver them.
 - any management responsibilities assumed by the Clarence community are reasonably capable of being carried out.
13. The following issues are still a cause for concern.

Jurisdiction

14. The Council's municipal area does not presently extend beyond the low water mark of Ralphs Bay.
15. The Council repeats the concerns outlined in its submission¹⁰ and adds the following matters.

⁹ SPPA, s24(2). The Commission's power to hold a hearing arises under this section. It does not arise elsewhere. For present purposes, the Commission's functions and powers arise under the SPPA: see the *Resource Planning and Development Commission Act 1997*, s.6(1).

¹⁰ At paragraph 2.5

16. The main issue is whether the proposal can be achieved under the current legislative framework.

Legislation

17. The *Local Government Act 1993*, (“LGA”) s.16 provides:

16. Municipal areas

- (1) The State is divided into municipal areas.
- (2) A municipal area is an area specified in Column 1 of [Schedule 3](#).
- (3) A municipal area includes –
 - (a) any accretion from the sea adjoining it; and
 - (b) any part of the sea-shore to the low-water mark adjoining it.
- (4) The Local Government Board, whether or not as a result of a review under [Part 12A](#), may recommend to the Minister that a boundary of a municipal area be adjusted if–
 - (a) the adjustment is of a minor nature; and
 - (b) any council affected by it consents; and
 - (c) the Board has considered any objections received in relation to the matter.
- (5) The Governor, by order and on the recommendation of the Minister, may –
 - (a) adjust a boundary of a municipal area on the recommendation of the Local Government Board; and
 - (b) if the municipal area is divided into electoral districts, adjust any boundary of any electoral district as may be necessary.
- (5A) A council affected by an adjustment under [subsection \(5\)](#) is to pay the costs associated with that adjustment.
- (5B) Each municipal area is defined by reference to the relevant plan or plans specified in Column 1 of Schedule 3.
- (6) The Governor, on the recommendation of the Minister, may amend or substitute any item in column 1 of [Schedule 3](#) or substitute that Schedule in an order made under [section 214E](#) relating to municipal areas to give effect to that order.

18. Schedule 3 identifies Clarence City Council by CPR 2976.

19. The municipal boundary of Clarence does not presently include any part of Ralphs Bay beyond the low water mark.

20. The Council is, however, entitled to exercise its powers under the *Land Use Planning and Approvals Act 1993* (“LUPAA”) in relation to areas beyond its municipal area. LUPAA, s.7 provides:

7. Municipalities may exercise powers in respect of accretions from sea, &c.

A municipality may exercise its powers under this Act in respect of –

- (a) any accretion from the sea, whether natural or unnatural, adjoining its municipal district; and
- (b) any part of the sea-shore to the low-water mark adjoining its municipal district; and
- (c) all bridges, jetties, wharves, boat-houses and other structures partly within its municipal district and partly in or over the sea adjacent to its municipal district; and
- (d) any area of the sea directly adjoining its municipal district in, on, over or under which any use or development is related to, or affects, the use of any adjacent land, subject to [section 20\(7\)\(c\)](#) and [\(d\)](#).

21. The Commission will need to bear this in mind for the following purposes:

- (a) The formulation of the conditions it recommends to the Minister under SPPA, s.26(2) and the specifications under ss.26(2)(b) and (c).
- (b) The amendment of the planning scheme under SPPA, s.27A

22. These matters are not at large. They must relate to and be consistent with the jurisdiction and powers of the various bodies, including the Council, to which they refer.

Accretions

23. The Macquarie Dictionary defines “accretion” as:

- noun 1.** an increase by natural growth or by gradual external addition; growth in size or extent.
- 2.** the result of this process.
- 3.** an extraneous addition: *the last part of the legend is a later accretion.*
- 4.** the growing together of separate parts into a single whole.
- 5.** *Law* increase of property by gradual additions caused by acts of nature, as of land by alluvion.
- 6.** *Pathology* conglomeration; piling up of substances. [Latin *accrētio*]

24. The meaning to be assigned to accretion under LUPAA s.7 is qualified by the words “whether natural or unnatural”. It is not so qualified under the LGA, s.16.

25. Accretions from the sea have an understood meaning in law. In *Southern Centre of Theosophy Inc v South Australia*¹¹ Walters J said:

Generally, alluvion is the increase made to land by the washing of the sea or rivers. Land formed by alluvion, or gradual and imperceptible accretion from the sea, and land gained by dereliction, or gradual and imperceptible retreat of the sea, or change of the bed of a river, belongs to the adjoining owner. The principle was succinctly stated by Lindley J. (as he then was) in *Foster v. Wright*. Applying the law laid down in the early cases of *Rex v. Lord Yarborough* and *In re Hull and Selby Railway Co.*, his Lordship observed (at pp. 446-447):

"Gradual accretions of land from water belong to the owner of the land gradually added to: *Rex. v. Yarborough* ; and conversely, land gradually encroached upon by water, ceases to belong to the former owner: *In re Hull and Selby Ry. Co.* The law on this subject is based upon the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water. The history of the law shews this to be the case."

The essential characteristic of alluvion is the gradual and imperceptible increase—"not from hour to hour, from day to day, from week to week, nor in fact at all, [but] by comparing its position of late years with its position many years before" (*Foster v. Wright*, per Lindley J. at p. 446). Likewise, the judgment of Lord Tenterden in *Rex. v. Yarborough* defines the word "imperceptible" as meaning imperceptible in progress, and not in result—that is to say, where the increase cannot be observed as actually going on, though a visible increase is observable every year. In deciding whether an accretion to land might be considered as imperceptible, one might well ask—to use the words of Callis, in his Reading on the Statute of Sewers (23 H. 8, cap. 5), 2nd ed. (1685)—whether "if one had fixed his eye on a whole day thereon, it could not be perceived". Thus, an accretion becomes gradual if it cannot be traced from day to day, though it may be possible to trace it after an interval of time. It seems to me that it makes no difference, even though it may be possible to shew by maps and plans exactly where the accretion began. The law, as I have stated it, would appear to hold good, whether the accretion is caused by natural or artificial causes, provided it does not arise from acts done with a view to the acquisition of the land alleged to be accreted (*Attorney-General v. Chambers*, per Lord Chelmsford L.C. at pp. 68, 69)."

26. It is very difficult to equate the doctrine of accretion with an artificial island joined to the land by a bridge.

LGA, s.16

27. The issue of the Council's jurisdiction and powers over the development do not depend only on its planning powers under LUPAA. Under the LGA, s.16 the municipal area is far more confined than LUPAA. Giving the word "accretion" its ordinary meaning, it means a "natural growth" or "gradual external addition".

¹¹ (1978) 19 SASR 389 at 393-4

28. The general rule relating to accretion is that it will not apply to reclaimed land.¹²
29. Similarly, unlike LUPAA, s.7(c) the Council does not derive, under the LGA, jurisdiction over bridges, jetties, wharves, boat houses and other structures partly within its municipal area and partly over the sea. An accretion must adjoin land. The creation of a bridge to an island will not make the island an accretion for the purposes of the LGA.

LUPAA, s.7

30. The issue noted above is not cured by the word “unnatural”. Even if an accretion is constructed, if it does not adjoin the municipal district it is not an accretion for the purposes of s.7. It would appear that a provision of this kind *can* apply to reclaimed land. However it will not apply to structures below low water mark.¹³ Building a bridge to an artificial island does not make the island an accretion. The Council may have planning powers over the bridge, but unless the island could properly be described as an accretion the powers will not extend over it.
31. In order for s.7(d) to have any effect the “use of adjacent land” must be affected by the development. Use is defined in LUPAA, s.3 as the manner of utilising the land. If the land adjoining the development is crown land used for the highway, that use will not be affected by the development. It will still be used as a road.

Canals

32. If it is possible to use the existing legislative structure to ground the Council’s powers, the Council would not have jurisdiction over the land under the canals. There is no current proposal that it should own this land. Even if there was, the Council would need to consider whether it would take a transfer in the land, having regard to the ramifications that ownership would

¹² Halsbury 4th Ed. Vol 49, [297] referring to *Attorney General of Southern Nigeria v John Holt & Co Ltd* [1915] AC 599

¹³ Halsbury 4th Ed. Vol. 49 [291] fn.4

present. The Council is not compelled to take a transfer of the land in the canals.

Other matters

33. There is a plethora of legislation under which the Council derives power to administer its municipal area. The *Acts Interpretation Act 1931*, s.46 defines “municipal area” as a common phrase in all statutes as having the meaning given under the LGA.
34. The Commission has no power to enhance the Council’s jurisdiction under the SPPA. It can only make conditions by reference to existing legislation.¹⁴

Fundamental nature

35. The Council submits that the resolution of the issue of its jurisdiction for the ongoing governance of the proposal is fundamental. The Commission must be convinced by the proponent that the issue can be satisfactorily resolved within the ambit of the powers given to the Commission.

Delineation of Responsibilities and Land Management

36. It has been the frontispiece of the proposal that the development can successfully be managed under a Part 5 agreement. Connected with that proposal was (amongst other things):
 - (a) the management company, Lauderdale Quay Management Services Pty Ltd (“LQMS”);
 - (b) the ownership of land the land not taken up for building lots;
 - (c) on going maintenance, including canal dredging.
37. The proposed Part 5 agreement has now been abandoned. The Council has not received any detail of the proposed way of dealing with these on going issues.

¹⁴ SPPA, s26(2)

The Council reserves its position

38. The parties should not be required to address these issues on the run. The orderly disposition of the matter entails that the proponent should give the Commission sufficient detail in order to understand the new structure it is proposing. That should be done with sufficient time for the parties to consider the proposal and make further submissions.
39. The Council is, however, in a position to indicate some broad areas of concern.

Community Development Scheme

40. If it is proposed to deal with the matter by a community development scheme under the *Strata Titles Act 1998*, the proponent will have to produce the constituent documents under s.52 of that Act. A cursory consideration of the provisions will demonstrate the need for a careful and diligent assessment of the documents and comments and submissions from interested parties.

Part 5 Agreement

41. If the proposal includes an expectation on the part of the proponent that the Council will enter a more limited Part 5 Agreement under LUPAA, the proponent should:
 - (a) provide a draft Part 5 Agreement for the examination of the Commission and the parties; and
 - (b) explain how it proposes to proceed if the Council will not agree to it.

LQMS

42. With the withdrawal of the Part 5 Agreement the structure and functions of LQMS in the future management of the development is not clear. The views expressed in the initial submissions¹⁵ remain unanswered.

Funding

43. The Council repeats paragraph 2.8 of its initial submissions. Ongoing maintenance funding of the proposal is a matter of the utmost concern to the Council, having regard to the guiding principles outlined above.

¹⁵ Para 2.4.1.3

44. To date the proposal has not sufficiently identified answered:
- (a) the extent of responsibility for funding maintenance of the canal system.¹⁶
 - (b) the extent of public contribution.¹⁷
 - (c) the capacity of the community to pay.¹⁸
 - (d) the preferred funding model.¹⁹
45. To complicate these issues is the fact that the developer contends that dredging will not be necessary until well into the future.
46. The most effective way of ensuring ongoing maintenance is to set up a fund with sufficient money at any given time to secure payment for the works. In medium term at least, this may require a bond or performance guarantee from the proponent.
47. The question remains, where the cash for the fund will be found. If it is suggested that the Council can use its rating powers to ensure the fund will achieve a sufficient level of cash, the proponent should be required to explain precisely how these powers are to be exercised. The Council has identified the possibility of a separate rate,²⁰ or a variable rate.²¹ Both are attended with considerable limitations.
48. Generally, the LGA limits the Council's power to raise and expend revenue. The question of how revenue raised now for expenditure for unascertained liabilities which may accrue in 50, or even 10, years time must be explained in the context of the current statutory scheme.
49. The Council will respond to these issues in more detail, once the proponent's intentions are better understood.

¹⁶ Council's initial submissions para 2.8.1.2

¹⁷ Ibid, 2.8.1.3

¹⁸ Ibid, 2.8.2.1

¹⁹ Ibid, 2.8.2.2.

²⁰ LGA, s.100

²¹ LGA, s.107

Bonds and Performance Guarantees

50. The Council remains concerned about the provision of performance bonds and guarantees. First, as to the proper calculation of the amounts to secure the developer's obligations and, secondly, as to any part of the works for which the Council may be left with responsibility.
51. The proponent should not be entitled to leave the matter on the basis that the bonds and guarantees can, or will be calculated in due course. It should be in a position to provide the Commission with appropriate estimates based on the costs of the development and ongoing maintenance requirements in accordance with its present modelling.
52. The Council is not convinced that there are sufficient heads of power to ensure that, if it is left with the need to undertake remedial work, it will be entitled to draw on a bond or guarantee. At present the provision of bonds and guarantees appears reserved to the State.²²
53. Council also has a general reservation about the extent to which evidence on many issues of concern for future liability rest on modelling and predictions by the developer's expert advisers. Perceived risks have either been assessed as negligible or, should they eventuate, as being manageable by those who are proposed as being responsible for them; in many cases the future residents of the development.
54. Council is generally aware of problems being encountered in canal estate developments in Western Australia which continue to impose significant on-going costs on councils, inhabitants and developers; both financial and in terms of amenity. If these problems have been either unforeseen or underestimated by the relevant authorities, developers and their advisers this further underscores the risk in relying purely on modelling and expert assurances without more rigorous examination of the potential risks and a quantification of the cost of worst case scenarios.

²² See the proposed permit, Schedule G, par.5.

Conclusion

55. The Council adheres to the key principles set out in its initial submissions. It urges the Commission to continue to investigate the matter, applying appropriate precautions. The Council will continue to provide the Commission with relevant assistance during the current consultative process.

16 July 2009

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