

PORT PROTECTION STRATEGY

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1 OBJECTIVE

The overall outcomes of the Port Protection Strategy are to:

- Acknowledge the Port operations and their importance to the region;
- Make initial and subsequent buyers of residential properties abundantly aware of the proximity of the Port and its potential for amenity impacts. ;
- Limit the rights of residents and the Body Corporate's rights to complain or sue the Port through the tort of nuisance; and
- Regulate the building design and construction to incorporate measures to mitigate any potential nuisance impacts.

Collectively it is expected that these measures will ensure the Port's operation, now and in the future is not restricted by the proximity of the development of the Future Development Area (FDA) identified in the *Breakwater Island Casino Agreement Amendment Act 2006* (BICA).

While the measures cannot prevent an individual from taking action against the Port any acknowledgment they execute (on buying or moving into the precinct) can be used as an estoppel defence in any such action. Where the Port is acting lawfully, the abundant disclosure and the proposed dispute resolution processes are designed to protect the Port. .

2 BACKGROUND

The Strategy was conceived back in 2004 when the State undertook an investigation into the viability of the Townsville Ocean Terminal Project.

By 2005 when the negotiations commenced with Tabcorp and Consolidated Properties as the preferred developer, the protection of the operation of the Port was at the forefront of the negotiations and an agreement between the developer, the Port and the State was identified as a condition precedent.

BICA reinforced this approach by requiring Port Protection Codes for the development in the Surplus Casino Land (SCL) and in the FDA.

The Development Agreement executed by State and the relevant developer parties requires the execution of a Port Protection Agreement for the SCL and the execution of a Port Protection Agreement for the FDA as a prerequisite to construction works

An Agreement between the State, the Port and the Developer to ensure that the development in the SCL takes account of the amenity impacts of the Port has been executed and a Port Protection Code for the SCL (as envisaged by BICA) has also been made. This agreement and the code have been followed in regard to the development of the SCL.

The Port Protection Agreement for the FDA (hereafter referred to as the PPA) will be executed after the completion of the EIS process.

3 PORT PROTECTION MEASURES

The Port Protection Measures for the FDA (hereafter the PPM'S) therefore operate on two levels.

First and foremost there are the building codes to mitigate the potential impacts from the activities in the Port – the FDA Port Protection Code (hereafter the PPC).

Second, there are the administrative arrangements established in the PPA to reinforce the importance of the current and future operations of the Port.

4 THE PORT PROTECTION CODE

The PPC will be included in the FDA Scheme – which will act like a Local Area Plan to supplement the provisions of the Townsville Planning Scheme. BICA requires the FDA Scheme be made by the relevant Minister at the conclusion of the EIS process and before any construction work begins.

The code details the specific development requirements necessary to ensure any potentially negative impacts from the operations of the Port do not cause nuisance to the residents of Breakwater Cove. For instance, to screen out any infrequent loud noises from the Port, all buildings will be required to be designed and constructed to afford the occupants an appropriate level of amenity – bedrooms would need to be the most protected area in a dwelling.

Such provisions are quite common today in new developments adjacent to sources of noise, for example, along major roads and near railway lines.

A draft of the FDA Scheme was included in the EIS which went on public exhibition late in 2007.

5 THE PORT PROTECTION AGREEMENT

The PPA establishes a contractual tie between the Developer, the buyers of any of the residential lots, the State and the Port.

The Port's objectives in entering into the PPA include:

- Minimise complaints and the prospects of a claim in respect of Amenity Impacts being brought against the Port and to minimise its liability in respect of such claims and/or the potential impact of such claims on the operations of the Port;
- Establish a framework to disclose Amenity Impacts and obtain appropriate acknowledgements and releases of liability in respect of the Amenity Impacts;
- Establish a framework for the Port to review and approve proposed development in the Future Development Area to ensure compliance with the Future Development Area Scheme, the Port Protection Code and the CTS Design Code and that the proposed Development appropriately takes into account Amenity Impacts; and
- Allow the Port to operate efficiently, within the law and in compliance with relevant environmental standards.

The Developer's objectives in entering into the PPA include:

- Implement reasonable and appropriate measures to achieve the Port's objectives;
- Establish with the State and the Port an efficient and well understood process for approval of proposed Development in the Future Development Area;
- Establish with the State and the Port an efficient process for approval of Community Titles Scheme and Body Corporate documentation; and

The PPA has seven (7) substantive operative provisions.

First, it annexes indicative Community Title Schemes (CTS) for the various layers of the development. The FDA Scheme, like the SCL Scheme is expected to require that all lots created must be community titled under the *Body Corporate and Community Management Act* (BCCMA). This means that all lots are part of the Body Corporate and that individual lot owners are bound by the rules of the Body Corporate.

The CTS are required to include the necessary provisions:

- To give effect to the requirements of the Port Protection Code;
- Put in place the Design Codes which incorporate the provisions of the PPC and any specific amenity provisions that may be imposed and the process for review of designs by the Architectural Review Committee (ARC);
- To establish the ARC and define its role;
- To require each lot owner to obtain from any buyer or occupier a covenant in accordance with the Deed of Covenant and Release attached to the PPA;
- To require the Body Corporate to provide additional mandatory material about the PPM's when issuing disclosure certificates; and
- To put in place a process whereby if an owner/occupant has an issue in relation to the operation of the Port, they do not complain directly to the Port or other authorities but via the Body Corporate.

Second, it requires that the developer to submit the first CMS for approval by the State and the Port.

Third, it provides that the developer must create the design standards for the various elements for the development having regard to the PPC and submit them for the approval of the State and the Port.

Fourth, it provides that any development proposal which is not consistent with the FDA Scheme must be referred to the State and the Port for amenity considerations prior to formally lodging any applications with Council.

Fifth, it details the additional disclosure material required to be given by the developer under the BCCMA, viz:

- The Port's current and proposed operations and the potential for amenity impacts;
- Details of the CTS Design Code;
- The Port Covenant;
- Details of the required Deed of Covenant and Release; and
- Details of any Infrastructure Agreements

Sixth, it provides that in each contract of sale for a lot, the developer must obtain from the buyer a covenant in the form of the Deed of Covenant and Release and that copies of same are provided to the State and the Port. It also provides that the State may register statutory covenants over the FDA if they become lawful.

Finally, it provides that the Port will own a lot in the principal body corporate in order for it to control subsequent changes to the CMS.

6 BUILDING/DESIGN STANDARDS

When building, the buyer/owner lodges plans first with the ARC. The design must consider PPM and the FDA Scheme. Then:

- The ARC reviews to ensure compliance with the PPC;
- Thereafter, the buyer obtains approvals from the TCC or a private certifier;
- Upon completion the buyer obtains a certificate of classification which will include confirmation of compliance with the PPC; and
- The buyer lodges the certificate of compliance with the ARC.

7 DEED OF COVENANT AND RELEASE

The PPA (reinforced by the CTS) requires that the developer in the first instant obtains from a buyer (of any lot in the CTS) an agreement (in the form of a Deed of Covenant and Release) that the buyer agrees to be bound by the terms of the PPA as they applied to the developer and to release the developer from such compliance. Importantly, it requires the purchaser to acknowledge the presence of the Port and its continued operation.

By executing the Deed, the purchaser also agrees to the following:

- To not transfer its interest in the Property unless it obtains an agreement from the purchaser on the same terms;
- To release the Port and the State from any claims or losses arising from the amenity impacts from the Port;
- To not take any action to disrupt, impede or interfere with the lawful operation of the Port;
- To obtain a release and acknowledgment from any tenant or occupier of the lot; and
- That the State may register a statutory covenant over the lot.

8 PORT COVENANT

The Port Covenant is a Deed between the Port Authority and the Body Corporate in which the Body Corporate agrees to be bound by the Port Protection Measures.

9 CONCLUSION

The suite of measures which collectively comprise the Port Protection Measures are graphically illustrated in Figure 1 attached.

The legal relationship between this comprehensive package of initiatives are quite unique in land use planning terms and if supported by statutory covenants which make assignment or transfer of property by an owner pre-conditional to the execution of the Deed of Covenant and Release will deliver on the overall objectives and ensure that the continued operation and growth of the Port is not impeded.

10 THE PORT PROTECTION MEASURES

