

Legal minefield in long battle for Byron

THE AUSTRALIAN, THURSDAY MARCH 25, 2004, PAGE 52

BYRON Bay's beachfront is in the news again. Public submissions on the Byron Coastal Management Strategy closed recently, and Byron Shire Council and the New South Wales Coastal Commission have to decide what to do about it.

Property owners across Australia should watch closely because there are some important legal issues at stake.

Belongil Spit is a narrow strip of land to the north-west of Byron that fronts the Pacific Ocean to the north and Belongil Creek to the south. There are houses on the spit: some old, some new; some have seawalls, some don't.

Fifteen years ago, Byron council called for a pause to building seawalls in an attempt to protect the spit from erosion. All good. But the by-law used, Part J of the local Development Control Plan has somehow become equated with an avowed policy of "planned retreat under private ownership".

The idea seems to be that if nobody can build seawalls, the houses will fall down and be replaced by a beach. Of course, that's nonsense. Lots of the houses have approved seawalls. Lots were built prior to DCP(J), and even if the beach eroded elsewhere, these would become perfectly legal island homes. And in between, there would be a hazardous wasteland of rusty rubble with no public access, not a smooth golden beach.

Some say that Byron council does not want to abandon a long-held policy. But this is a completely different council from the one that introduced DCP(J) in 1988, and it is dealing with a different town, different people, much better information and a much higher rate base. The last thing it needs is protracted legal battles all the way to the High Court.

Some people blame the NSW Coastal Commission. But that is headed by an internationally-respected coastal geomorphologist who knows how scientific evidence works and how it changes. The NSWCC Peer Report reflects that.

Some say it's green politics but that doesn't make sense. First, because Belongil's conservation areas (the creek, wetlands and



Seeking light: Byron is at a crossroad

bird colonies) would be best protected if the houses remained intact to make the spit long and stable. Second, because Byron's best conservation areas are in the inland rainforests, not foreshores. Belongil Beach is certainly not a conservation issue.

The basic issue is simple: can governments remove private property rights without due compensation? Surely not. When governments want farmers to conserve trees, farmers expect payment. When governments want to acquire land for public works such as motorways, they have to pay full market values, and then only if there is no other solution. But the aim of planned retreat is to take away protection from a row of valuable beachfront houses, and then reclaim the land once it is valueless. Imagine that approach in Sydney. Neither local nor state governments would last long.

Fortunately, it is not the only option.

The BCMS presents an easy solution that should keep everyone happy. This is BCMS

Option C2, "beach nourishment with sea-walls and end control". The idea is to join the existing seawalls together to protect the houses, spit, wetlands and bird colonies. Cover the wall with a foredune. If the sand washes away, use a dredge or slurry pipe to replace it by taking some of the vast "river of sand" that has been found sweeping north past Cape Byron. And if need be, to reduce sand movement, build small rocky headlands where the road access points are. Simple. Technically feasible. Environmentally preferable. Community uniting.

But there is a problem — the price. Perhaps it is not about what to do but who should pay. The benefit-cost ratio for Option C2 is about 30:1. Imagine that as a return on investment. But high returns are not the only issue — first you need capital. But that's easy too. Just let the landholders build their walls to a uniform design.

You thought this argument was about whether local or state governments should have to pay to protect legal private property that was approved by them in the first place, right? Just as they do in every other state and local government areas? Not at all.

For 15 years, Byron council has tried to prevent landholders protecting their own properties by putting rock walls on their own land.

That's why planned retreat is still included in the BCMS; because according to the council, it represents the status quo. Of course, it doesn't really. When there is serious erosion, the state government uses its emergency powers to over-rule the council and tell property owners that they must protect their houses. And every time landholders or the Belongil Progress Association takes the Byron council to the NSW Land and Environment Court, the property owners always seem to win. So in the final analysis, DCP(J) is legally a dead duck, and so is planned retreat.

Perhaps that's why the Byron mayor, Tom Wilson, was quoted in *The Australian* on February 28 as saying that the council wants a special act of parliament from the state government. Really? He can hardly mean legislation to take away property owners' rights, since that would be suicidal



Ralf Buckley

With half a billion dollars of real estate at stake and the law on their side it's unlikely that land owners will walk away

Planned RETREAT

PROF.

for any elected government. So perhaps he means an act of parliament for the state government to pay for a seawall and beach nourishment. But that doesn't need an act of parliament: state governments carry out projects like that all the time. And besides, the estimated annual cost of BCMS Option C2 is less than the annual rates paid by Belongil residents. Not to mention a comparable amount paid to the state government in land taxes. It's no wonder Belongil property owners are pumping up their legal funds.

So perhaps it's not price, but politics. We know that Option C2 works because that's what holds the Gold Coast together.

The fundamental legal issue, the one that could go to the High Court, is depriving property owners of rights without due compensation. There's a huge body of law on that issue and little doubt as to the eventual outcome: the Belongil landowners will win.

But lawyers could make a lot of money and there would be a lot of preliminary legal skirmishes. For example, is the BCMS valid? The community consultation was badly flawed, and so are the benefit-cost calculation and legal analyses. Is DCP(J) valid? Probably not, and even if it is, its interpretation by the Byron council probably isn't. Has the council compromised its legal position by building its own seawalls in town and at roadheads? Perhaps. So it's all a horrible minefield, pretty much like Belongil Beach would look if planned retreat went ahead.

Perhaps the council hopes that Belongil landowners will walk away. But with half a billion dollars of real estate at stake, and the law on their side, that's unlikely. Indeed, we can foresee the outcome. Belongil beachfront landowners are getting multi-million dollar offers from investors who believe that DCP(J) will soon be gone and prices will double — where they would be right now if it were not for 15 years of doubts and delays.

Ralf Buckley is a director at the International Centre for Ecotourism Research, Griffith University
r.buckley@griffith.edu.au

5552 8675

BYRON PRESERVATION

BUSINESS SURVEY SERIES

The Business Survey Series is an authoritative analysis of specific and topical Australian business issues. Topics in the series are reviewed from a business-to-business perspective and are aimed at business professionals.

