PROPOSED RESERVE FOR PARK AND RECREATION PURPOSES OVER LOT 16 AND 18 ON SP155099, PART OF CAIRNS ESPLANADE, CAIRNS (DIVISION 5)

Liam Nicholas: 19/3/3 – 95: # 3068976

RECOMMENDATION:

That Council:

- requests the Department of Environment and Resource Management to consider creating a Reserve for Park and Recreation purposes over Lots 16 and 18 on SP155099 and appointing Cairns Regional Council as trustee subject to the surrender of the parcels from Perpetual Lease 216617 held by Cairns Ports Limited; and

- upon receipt of the approval of the Minister administering the Land Act 1994, instructs its solicitor that Council is prepared to negotiate an Indigenous Land Use Agreement with the Yirrgandji People and Gimuy Walubarra Yidinji People to obtain the consent of the native title holders for the creation of a Reserve for Park and Recreation purposes over Lots 16 and 18 on SP155099, the appointment of Council as trustee of the Reserve and use and development of the Reserve in accordance with the Reserve purpose.

Furthermore, Council delegates authority to the Mayor and Chief Executive Officer in accordance with section 257 on the Local Government Act 2009 to negotiate, determine and finalise any and all matters associated with the proposed reserve.

INTRODUCTION:

At the Council meeting held on 28 October 2009 it was resolved:

“That Council instruct Preston Law on its behalf to proceed to compulsory acquire any and all native title rights and interests over Lots 16 and 18 on SP155099, Cairns Esplanade, and to create a Reserve for Park and Recreation purposes.
Furthermore, the Mayor and Acting Chief Executive Officer being delegated authority pursuant to section 472 of the *Local Government Act 1993* to deal on any and all matters associated with the proposed compulsory acquisition of native title rights and interests, including but not limited to the service of the Notice of Intention to Resume, attendance at any required objection meeting, consideration of objections and the creation of a Reserve for Park and Recreation purposes.

A Notice of Intention to Acquire Native Title Rights and Interests was issued by Council’s solicitor and objections to the acquisition of the native title were raised from:

- Mr Seith Fourmile as a representative of the Fourmile Family of the Gimuy Walubarra Yidinji;
- North Queensland Land Council on behalf of Mr Seith Fourmile and on behalf of the Gimuy Walubarra Yidinji;
- Ms Jeanette Singleton as a representative of the Yirrgandji People.

As objections to the acquisition of native title have been received it was considered that it would not be prudent to proceed with the acquisition. It is not necessary to extinguish native title rights and interests for the dedication of a reserve under the *Land Act 1994*, however, native title rights and interests need to be addressed for this action.

To address native title rights and interests for the creation of the Reserve for Park and Recreation purposes, it is possible for Council to enter into discussions with both native title parties to negotiate an Indigenous Land Use Agreement to obtain consent to the dedication of the reserve, the appointment of Council as trustee of the reserve and use and development of the reserve in accordance with the reserve purpose.

**BACKGROUND:**

Cairns Ports Limited currently holds Perpetual Lease No 216617 for port and transport related purposes over a number of parcels of land including Lots 16 and 18 on SP155099. The entire area of Lot 18 on SP155099 is below the high water mark.

A Land Management Plan (Cairns Esplanade North Parklands Secondary Use Management Plan) has been prepared and outlines how Council as trustee will govern and manage the use of the esplanade area. The Land Management Plan has been approved by a delegate of the Minister administering the *Land Act 1994* and in doing so the Department has supported the proposal for Lot 16 and 18 on SP155099 to become Reserve for Park and Recreation purposes.

It has been determined that native title rights and interests continue to exist over Lots 16 and 18 on SP155099.
COMMENT:

Precincts & Facilities

Precincts & Facilities as the asset owner for the proposed Reserve for Park and Recreation purposes over Lot 16 and 18 on SP155099 have considered the matter and have recommended that the reservation should proceed.

Property Services

Preston Law on behalf of the Property Services section of Council have advised (see Attachment 5) that the relevant native title holders are the Gimuy Walubarra Yidinji People and the Yirrgandji People. It is therefore proposed that negotiation commence with these parties.

CONSIDERATIONS:

Corporate and Operational Plans:

This report has been prepared in accordance with the Cairns Corporate Plan: Goal 2 – Building Vibrant Communities. Improve the quality and opportunities for use of public space across the region.

Statutory:

The issue of tenure for Reserve for Park and Recreation purposes would be in accordance with the terms of the Land Act 1994.

Policy:

N/A

Financial and Risk Assessment:

Financial - Should tenure issue over the proposed area for a Reserve for Park and Recreation purposes with Council as Trustee, Council would be responsible for costs associated with the maintenance of the area. However Council is currently managing the area so no additional costs are anticipated once the reserve is created.

Assets - Should tenure issue for reserve over the subject area there would be an increase in the amount of Council's open space portfolio.

Sustainability:

The Cairns Regional Council Sustainability Scorecard has been completed in relation to the proposed reserve and not the overall project. In undertaking this analysis officers answer a series of questions based on the four sustainability principles. The table shows how many of these questions generated a positive rating (green), a neutral rating [or not applicable] (blue) or a negative rating (red) to each question.
The question with a positive rating (green) on the Sustainability Scorecard is as follows.

● The activity will deliver additional open space or improve the amenity of existing open space area?

In general the action undertaken with regards to the subject of this report will have a mainly neutral effect on Council’s Sustainability.

**CONSULTATION:**

Council and Ports Corporation have discussed the proposed tenure and have agreed to the proposed reservation of the Reserve for Park and Recreation purposes. There have been informal discussions with the Department of Environment and Resource Management in regard the proposed reservation, in order for the matter to proceed Council is required to make a formal application to the Department.

**OPTIONS 1**

That Council:

- requests the Department of Environment and Resource Management to consider creating a Reserve for Park and Recreation purposes over Lots 16 and 18 on SP155099 and appointing Cairns Regional Council as trustee subject to the surrender of the parcels from Perpetual Lease 216617 held by Cairns Ports Limited; and
• upon receipt of the approval of the Minister administering the *Land Act 1994*, instructs its solicitor that Council is prepared to negotiate an Indigenous Land Use Agreement with the Yirrgandji People and Gimuy Walubarra Yidinji People to obtain the consent of the native title holders for the creation of a Reserve for Park and Recreation purposes over Lots 16 and 18 on SP155099, the appointment of Council as trustee of the Reserve and use and development of the Reserve in accordance with the Reserve purpose.

Furthermore, Council delegates authority to the Mayor and Chief Executive Officer in accordance with section 257 on the *Local Government Act 2009* to negotiate, determine and finalise any and all matters associated with the proposed reserve.

**OPTIONS 2**

That Lots 16 and 18 on SP155099 is retained as part of Perpetual Lease No 216617 for port and transport related purposes with the Cairns Ports Limited.

**CONCLUSION:**

The benefit of the proposed Reserve for Park and Recreation purposes would increase the availability of a public open space portfolio for the community.

**ATTACHMENTS:**

Appendix 1 – Locality Map Lot 18
Appendix 2 – Locality Map Lot 16
Appendix 3 – Aerial Photo
Appendix 4 – Survey Plan
Appendix 5 – Letter from Preston Law dated 23 December 2010

Linda Kirchner
*Manager Corporate Performance*

Sarah Philpot
*General Manager Corporate Services*
Appendix 1
Locality Map – Lot 18 on SP155099
Appendix 2
Locality Map – Lot 16 on SP155099
Our Reference
Direct Email
Partner Responsible
Your Reference

23 December 2010

Chief Executive Officer
Cairns Regional Council

ATTENTION: LIAM NICHOLAS

BY EMAIL Lnicholas@cairns.qld.gov.au

Dear Liam

Cairns Esplanade – Acquisition of Native Title Rights and Interests

We refer to the above matter and to recent discussions between Andrew Kerr of our office, Ms Linda Kirtner and Mr Liam Nicholas of Council.

We confirm that the Notice of Intention to Acquire Native Title Rights and Interests was issued by Council on 2 July 2010 to the North Queensland Land Council who is the Aboriginal representative body under the Native Title Act 1993 (Cth) ("NTA") for the Cairns region.

The Notice of Intention to Acquire identified, amongst other things, the land included and that objections to the proposed acquisition of native title rights in relation to Lot 16 and 18 on SP155099 could be lodged with Council on or before 5 August 2010.

During the objection period, objections were received from:

1. Mr Seith Fournille, for the Fournille Family of the Gimuy Walubarn Yidinji;
2. North Queensland Land Council on behalf of Mr Seith Fournille for and on behalf of the Gimuy Yidinji People;
3. Ms Jeanette Singleton on behalf of the Yirrgandji People.

We note that both the North Queensland Land Council and the solicitors acting for Ms Singleton on behalf of the Yirrgandji People have also raised a number of procedural issues with the Notice of Intention to Acquire.

We are happy to provide a further report to Council in relation to the procedural issues however, our preliminary view is that the grounds are not substantiated and are unlikely to invalidate the Notice of Intention to Acquire.

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We refer Council to our report dated 11 August 2010 which outlines the progress of the matter and objections received.

Council will recall that a number of mechanisms were identified for addressing native title in relation to the project area. These mechanisms included the following:

1. the negotiation of a Indigenous Land Use Agreement under the NTA;
2. acquisition of native title under the Acquisition of Land Act 1967;
3. the lodgement of a non-claimant application under the NTA.

Each of these mechanisms were considered by Council and it was resolved to proceed to issue the Notice of Intention to Acquire. The primary reason for adopting this mechanism was the high degree of uncertainty as to the identity of the relevant native title parties for the project area given that there was no current registered native title claim in relation to the area. Council would also be aware that there is a high level of dispute between the Yirrgandji People and other indigenous groups who assert native title in relation to the Cairns CBD area.

The issue of the Notice of Intention to Acquire has served to crystallise the identity of potential native title parties with whom Council could negotiate.

Based upon the objections received and further discussions with the North Queensland Land Council, the relevant native title parties are the Gimuy Yidinji People and the Yirrgandji People.

It is not possible at this stage to determine whether both of these groups hold native title rights and interests in relation to the area or whether native title is held by one of these groups. We understand from our involvement in indigenous issues in the Cairns region over a number of years that a dispute between the two groups is longstanding and there has been no recent anthropological research undertaken or proposed by the North Queensland Land Council in relation to identification of the correct native title parties for the Cairns CBD area.

As discussed recently, the intention of the project is to attempt to resolve long standing tenure issues relating to the project area which is currently included within a lease in perpetuity to the Cairns Port Authority.

We understand that Council's intention is to seek to have the entire esplanade area under a uniform tenure namely, community purpose reserve under the Land Act 1994 (Qld).

One of the primary grounds for objection is the proposed extinguishment of native title rights and interests. It is not necessary for Council to seek and obtain the extinguishment of native title for the State Government to dedicate a reserve under the Land Act.

It is a current State Government requirement for native title to be either extinguished or surrendered where freehold title is sought over land.

Given that Council only seeks the dedication of a reserve over the area and the appointment of Council as the trustee for the area, it is possible for Council to enter into discussions with both native title parties in relation to obtaining their consent to the dedication of the reserve, the appointment of Council as trustees of the reserve and use and development of the reserve in accordance with the reserve purpose.
In our view, this is likely to address the concerns of the native title parties to the project.

As discussed, we recommend that Council have discussions with the Department of Environment & Resource Management in relation to the status of its consideration of tenure issues on the Esplanade.

It is not clear from correspondence on the file whether or not Council, or indeed the Cairns Port Authority, have had any discussions with the Department of Environment & Resource Management in relation to the freeholding of the project area, or alternatively, the dedication of a reserve over the area.

In the circumstances, we suggest that Council provide us with instructions to contact each of the native title parties to ascertain their preparedness to participate in abbreviated negotiations for consent to the dedication of a reserve over these areas.

We are optimistic that an offer to negotiate an indigenous land use agreement, as opposed to proceeding with the acquisition of native title rights and interests, is likely to be an attractive proposition to the native title parties.

It is unclear at this stage whether or not negotiations with both parties will be able to proceed at the same time or whether separate discussions and ILUAs will be required to be negotiated.

We look forward to hearing from Council as to whether it is prepared to commence discussions in relation to an indigenous land use agreement and the outcome of discussions with the Department of Environment & Resource Management about the prospects of the areas being declared recreation reserves.

Should you have any queries please do not hesitate to contact Andrew Kerr of our office.

Yours faithfully

[Signature]

Andrew Kerr
Partner
for PRESTON LAW