

Ministerial # 19 MPL 1050 / 73687

Submission register
E. Kibble

**BOTTEN
LEVINSON**
Lawyers

Our ref: TLC/219195

13 December 2019

Hon. Stephan Knoll MP
Minister for Planning
45 Pirie Street
Adelaide SA 5000

By email: ministerknoll@sa.gov.au
Copy to: [REDACTED]

Dear Minister

North Haven Marina

We act for BC Whitem Nominees Pty Ltd, the owner of 23 Alexa Road, and allotment 4 Alexa Road, North Haven (**Whitem land**).

We write to emphasise the importance of a boat repair and services facility at the North Haven Marina and to request that appropriate planning policy changes be made to recognise and protect this existing use when the Planning and Design Code comes into force.

Our clients wish to meet with representatives of your Department to discuss their concerns and desires for policy amendments.

The background to our client's request and their associated concerns about the current planning policy and proposed re-development plans by others for the North Haven Marina are set out below.

Background

The Whitem Land and the adjacent property, Lot 2 Alexa Road¹ (formerly controlled by Blue Sky Marine but now owned by Latitude 35 Marina Pty Ltd) (**Lot 2**), have historically been used as a chandlery shop (offering a full range of boating parts and accessories, trading as "North Haven Marine"), a refuelling facility and boat repair yard.

The Whitem Land also enjoys registered rights of way for access over Lot 2, to ensure access to the boat refuelling facility.

The Whitem Land and Lot 2 are strategically located to provide the vital services described above, to a large number of marine vessel operators in the North Haven Marina basin, including the Cruising Yacht Club of South Australia.

The facility also provides services to the nearby Royal Adelaide Yacht Squadron and to the public generally, noting there is also a public boat ramp nearby.

¹ Allotment 2 in DP 37279 (CT 6123/80).

Level 1 Darling Building
28 Franklin Street, Adelaide
GPO Box 1042, Adelaide SA 5001
t. 08 8212 9777
f. 08 8212 8099
e. info@bllawyers.com.au
www.bllawyers.com.au

The continuance of these activities were historically protected by way of clause 4 of a Memorandum of Encumbrance registered over Lot 2 and portion of the Whitem Land.²

However, my clients were extremely disappointed to learn that in 2015, DPTI purported to remove waive clause 4 as it affected the use of that land.

Subsequent to your Department's purported waiver of clause 4 of the Encumbrance, an interstate consortium (Latitude 35 Marina Pty Ltd) purchased part of the Marina and certain additional land immediately adjacent to the Whitem Land, namely:

- CT 6123/80 ("**Lot 2**" as defined above); and
- CT 6123/92 (Unit 2, Alexa Road, North Haven) (**Unit 2**); and
- CTs 6123/237-241 inclusive (51-59 Alexa Road, North Haven comprising some marina berths and associated areas) (**Marina Land**).

(collectively, "**Latitude 35 Land**")

Latitude 35 Marina Pty Ltd has made it very clear to my client that it wishes to establish residential and commercial type activities on Lot 2 and possibly the Marina Land that will conflict with the existing and desired uses of the Whitem Land.

For the reasons that follow below, boat repair and slipping facilities are **critical to the proper operation of the Marina**. Future planning policy in this locality must recognise the critical role that those facilities play and protect them from incompatible development.

As we will expand upon below, our client requests that the Planning and Design Code be amended to make any re-development of the Whitem Land or Lot 2 for a use other than marina, boat repair and slipping facilities a Restricted Development within the meaning of the *Planning, Development and Infrastructure Act 2016 (PDI Act)*.

I now turn to assess the existing planning policy as it applies to the Marina's locality, before emphasising why our client says it is critical for that policy to recognise and protect boat services and repair facilities.

Current Development Plan

According to the City of Port Adelaide Enfield Development Plan, Lot 2, the Whitem Land and the Marina land are all within the Coastal Marina Zone.

Lot 2, Unit 2 and the Whitem Land (and some adjacent land) are located in "Policy Area 2 – Business".

A small portion of the Whitem Land and the Marina Land (which is largely land located over water), is located in "Policy Area 1 - Boat Haven".

We acknowledge that in Policy Area 2, the Plan acknowledges the types of activities carried out on the Whitem Land, including by making the following developments envisaged forms of development:

- chandlery business for vessels;
- marine-related emergency service;

² Executed 4 July 2002, registered at the Land Titles Office on 1 August 2002.

-
- repair and maintenance areas;
 - slipping facility, inclusive of a mechanical vessel lifting device.³

Further, Policy Area Objective 3 provides that the Policy Area accommodates "a range of business and service activities to service the marina and the boating public that is compatible with existing developments."

My client wishes to ensure that such uses are protected. That is best achieved by:

- continuing and enhancing the express planning policy desire for those types of activities in Policy Area 2; and
- introducing additional policies that limit development that may curtail any such operations, including making land uses other than boat repair yard and slipping facilities a **Restricted Development**.

Importance of boat repair and service facilities

The Development Plan makes it reasonably clear that activities of the kind carried out by my clients are appropriate and envisaged.

However, 35 South Marina has made it very clear to my client that it wishes to establish residential and commercial type activities on the Latitude 35 Land that will deprive the marina users of critical facilities.

Indeed, a development application for similar facilities was lodged in about 2009. That application included a retirement village on the land now controlled by 35 South Marina.

The Council refused the application and the matter was appealed by the applicant for consent to the ERD Court. The ERD Court ultimately dismissed the appeal expressing concerns about the suitability of the proposed use having regard to the then development plan provisions.

In determining the appeal, the Court took an extensive view of the land and heard expert evidence in relation to the activities that occur on the Whitem Land and Lot 2, including the boat repair facilities. It is clear that that facility generates noise but it is a necessary part of the operations of a boat repair facility that significant noise be generated from time to time.

The ERD Court, in rejecting the developer's appeal, noted the concerns about the incompatibility of the noise from the then operations of Blue Sky Marine that could result in incompatibility between the proposed residential use and the existing operations carried out on Lot 2 and the Whitem Land.

Importantly, the ERD Court's decision⁴ expressly recognises the desirability of maintaining the uses now established on the Whitem Land, and the potential incompatibility with residential type uses in this locality.

Indeed, the operations on the Whitem Land and Lot 2 provide critical services and facilities for a substantial proportion of the boating public, who use the public facilities or moor vessels at North Haven, whether in the Cruising Yacht Club of South Australia, the 35 South Marina, the public North Haven Marina or the Royal South Australian Adelaide Yacht Squadron.

³ See PDC 1.

⁴ *Crown Marina v City of Port Adelaide Enfield* [2009] SAERDC 3.

If 35 South Marina's re-development of the area proceeds, these critical facilities will be lost, jeopardising the marina's ability to operate and causing serious inconvenience for all of its users. There are no other suitable locations anywhere around the marina capable of providing these services, which are critical to any marina.

Encumbrance and protection of boat repair and slipping facilities

The importance of boat repair and slipping facilities on Lot 2 has previously been recognised by you in your letter to Susan Close MP (State Member for Port Adelaide) dated 27 July 2018.

Your letter stated that while clause 4 of a registered encumbrance affecting Lot 2 had been lifted, you stated that:-

...any development on the land requires the approval of the Minister, under the remaining terms of the encumbrance, as such, this provides for the necessary marine facilities to be protected.

Our client does not consider that the Minister's approval under the encumbrance alone is sufficient to adequately protect the necessary and important "marine facilities", including a boat repair and slipping facility on Lot 2.

For example, if a development is approved that conflicts with or prevents the use of Lot 2 and/or my client's land for these critical services (e.g., a development for exactly the kinds of residential or tourist facility planned by the current owner of Lot 2) because of insufficiently strong planning policy, then this will impose an unreasonable constraint on the Minister's discretion under the encumbrance.

As such, particularly given your previous recognition of the need to protect necessary marine facilities at the marina, robust planning policy change is required to reinforce the long-term presence of these facilities including boat repairs and slipping facilities on Lot 2 and the Whitem Land.

The Planning and Design Code, which is presently on consultation until 28 February 2020, presents the perfect opportunity to achieve such appropriate planning policy. We deal with this further below.

Planning and Design Code

Our clients say that the future Planning and Design Code must contain appropriate provisions that recognise the importance of the boat repair, refuelling and marine services operations on Lot 2 and the Whitem Land, to ensure that those operations continue to provide their essential services to the marina without being impeded or prevented by incompatible land uses.

As mentioned, our clients are acutely aware that 35 South Marina plans to establish commercial and short-term accommodation type uses at the 35 South Marina land.

My clients are extremely concerned that the Code may make further planning policy changes that facilitate the use desired by 35 South Marina while not adequately recognising the fundamental importance of boat service facilities at the 35 South Marina.

Our client wants to guard against such changes and instead seeks that the Code introduces appropriate policies that safeguard the continuance of the important boat repair facilities and services in the future.

My clients believe it is important to bring these matters to your attention at this stage, to ensure that the essential boat services operations can continue given the extent of the vessels berthed in both the North Haven Marina areas and the Royal South Australian Yacht Squadron.

These facilities must be able to continue to provide an invaluable service to the boating community at large.

There is a real risk of compatibility if the wrong forms of development are established on adjacent land. We emphasise, this can be controlled by ensuring appropriate planning policy provisions are incorporated into the future Planning and Design Code.

Request for meeting

Our clients request to meet with appropriate representatives from your office to discuss this matter and to work together ensuring that the appropriate policies are introduced into the Code to protect the uses established on the Lot 2 and the Whitem Land.

We look forward to your response to these matters and our client's request for a meeting.

Yours faithfully



Tom Crompton
Senior Associate
BOTTEN LEVINSON

Email: [REDACTED]