PRIVATE WATERWAYS IN RESORT DEVELOPMENT

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In recent years Queensland has been the location for several integrated or destination resort developments. These can be broadly defined as holiday communities containing residential components in their varying forms (condominium, hotels, serviced accommodation) and a variety of resort or leisure activities - golf courses, tennis courts, shopping facilities and marinas. The concept is not new and its success overseas has been the impetus for such developments here. They are however undergoing continual refinement. Developers and marketing agents looking for points of difference are underwriting this evolution.

A new selling point

An important feature to emerge recently is the private waterway component of integrated resorts. The point of difference is that a private waterway in a resort, unlike a canal or harbour as those terms are used in Queensland legal parlance, remains under the control of the resort proprietors. Those proprietors can restrict or regulate the use or movement of vessels on, over, through or beneath the private waterways, powers especially important when the waters are connected to public tidal systems. These rights are enshrined in s 97A of the Harbours Act 1955-1987 (Qld). A corollary of the exercise of these rights is that the proprietor has the obligation to maintain the waterways and any works thereon at his own expense. He must also suitably mark across the water the boundaries of the private waterways, that is, where the private land boundary has been inundated.

The Integrated Resort Development Act 1987 (Qld)

The provisions of s 97A are substantially repeated in the Integrated Resort Development Act 1987 (Qld) ("IRDA"). This legislation is a refined version of the Sanctuary Cove Resort Act 1985 (Qld) but with more general application. The purpose of IRDA is, first, to provide for the approval of a scheme of development for a resort site which when gazetted becomes the exclusive town planning or land use instrument for the resort and, second, to allow an integrated resort the subject of an approved scheme to benefit from the body corporate and management systems available under the legislation.

IRDA expressly provides that the resort site may include land that is or which may become inundated by water subject to tidal influence and that such inundation does not affect any estate or interest held in the land before the inundation (ss 25 and 47). Section 52 of IRDA repeats the provisions of s 97A regarding the regulation of vessels on the private waterway. Section 55 of IRDA also mirrors the provision in s 97A that, where the private waterway is tidal, the Harbour Board does not have any power to grant leases or licences, or use or occupation rights, in respect of the waterway.

Subdivision a possibility

IRDA however goes further than s 97A in some important respects. Section 48 states that a private waterway which is tidal may be subdivided by way of a building units plan or a group titles plan in the usual way. The only qualification to this is that each subdivided lot must have permanent above-water access to one of the major private roadways within the approved resort scheme. Further, the construction of floating dwellings is not to be regulated under the Harbours Act or Marine Act, but is to be designed and constructed in accordance with the standard building and other relevant by-laws so far as they are applicable (ss 49 and 53). These provisions are complemented by s 30D of the Building Act 1975-1984 (Qld) which empowers the local authority to oversee the approval and construction of building work on foreshores and adjacent waters. Finally, IRDA provides that inundated land which has been subdivided shall nevertheless continue to be liable for rates and land tax as if it had never been inundated (s 54).

Building while awaiting approval

A particular problem facing the developer of an integrated resort is to determine how he may lawfully commence construction of waterways within his site while he is involved in the long and sometimes arduous task of obtaining approval of his resort under IRDA. Under the present legislative framework there appears to be only one practical avenue available (a theoretical possibility under sub-sections 86(3A)-(5A) of the Harbours Act being of very little, if any, application to large scale resorts). This involves obtaining approvals under the Canals Act 1958-1979 (Qld). The procedure is to obtain a provisional approval from the Department of Harbours and Marine and then gazettal of a final approval within a specified time before construction can commence.

However a developer so proceeding must be careful to stop short of the certification and dedication procedures stipulated by the Canals Act, the consequence of which is to give over to the Crown title in the inundated land. While not entirely free from doubt, the better view of the interaction of IRDA and the Canals Act is that once given over, the inundated land ceases to be eligible for inclusion in an approved scheme under IRDA. A developer would be well advised to arrange for the rescission of his provisional and final approvals under the Canals Act after obtaining IRDA approval and this can and should be negotiated and documented with the Department of Harbours and Marine in connection with his IRDA application.

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