



LAGOONS ESTATE REPORT 07 APRIL 2016



FACTS AND TIMELINE - LAGOONS ESTATE DEVELOPMENT

Disclaimer: This information has been collated from Public Court Documents obtained by TRRA Inc. in an attempt to shed some light on this convoluted and complex dispute for the long suffering ratepayers who will be picking up the tab for the legal fees, possible compensation and remedial work required to fix this mess. Some of the documents were more than 50 pages and contain highly technical legal arguments between experts in hydrology and many convoluted references to previous case law. This is our interpretation for our membership in a form that a layman can understand and is **not** a legal document. It is accurate to the best of our ability.

1. Lagoons Estate comprises 8.44 hectares of land at Nelson Bay in the Port Stephens Council LGA. The land is bounded by Dowling Street to the east and south, and is substantially the low point in a catchment area of about 68 hectares.
2. The land was owned by Mrs. Margaret Anne Coventry from about 1950, until it was purchased by Brien Cornwall, Solicitor (Melaleuca Estate) under a contract for sale dated 26 July 2000. The sale was completed in August 2002.



3. The land was separated from the sea at Nelson Bay by a large dune system, (Magnus Street) and its lower 2.2 hectares was a dunal swale supporting a melaleuca paper bark forest and some swamp mahogany trees. This area was described as an ephemeral wetland, meaning that it was from time to time inundated as the water table rose with prolonged rainfall but was dry when the water table fell.
4. There was ponding when the groundwater rose above 8m AHD (a particular height datum). Rain falling on the land and in the catchment was readily absorbed and became groundwater, and the ponding largely came from the rise in the water table rather than from surface flow to the lowest point of the land.
5. In the 1970s the Seabreeze Estate was developed to the east of Dowling Street. The Council approved the development and carried out road drainage works. These included a pipe system of two stormwater pipes, with associated headwalls, ditches, gutters and channels, one of which intruded on to and discharged onto the land and the other of which discharged at the Dowling Street boundary of the land. The topography was such that the stormwater discharged at the boundary ran onto the land to the wetland area.
6. Noxious weeds began to grow near these drains, from seeds brought onto the land by the water, and the water flowed in channels seaward across the surface of the land rather than being absorbed.
7. The ponding of water in the wetland area was increased, and when ponded it was often covered in duckweed. In 1977 the Council provided labour to help eradicate the noxious weeds. In response to Mrs. Coventry's complaints, it told her that there was "no question of the artificial drainage being removed", and she would "have to be realistic and cope with development", but that "Council would be willing to limit the amount of water coming onto your land to the 9 metre mark and if necessary Council would install a pumping station". It did neither.
8. In 1993-4 the Council carried out roadworks involving Dowling Street. A small part of the land was resumed, and an additional pipe system was constructed discharging at the Dowling Street boundary of the land. The Council's approval of its own development application for the works included that "The stormwater drainage system should be directed where possible to the low area on the land". This water also flowed over the land and the ponding was further increased.
9. It was foreseen that these works would increase the water affectation. In December 1993 the Council wrote to Mrs. Coventry noting that preliminary

studies indicated that a degree of extra flooding was likely on the land; the letter included

10. "Council will complete this part of the assessment to ensure your land is not adversely affected, and a commitment is hereby given to contain peak flood levels to an area approximately as shown on the current zoning maps. (Extra depths of water to those of the original/natural system are anticipated, containment to areas which do not adversely affect the development potential of your land is seen as a requirement for Council.)"
11. The Council told Mrs. Coventry that it would construct pollution control basins, and in the meantime would not use the new pipeline "until we have reached a satisfactory solution". Pollution control basins were not constructed. The pipeline was used although a "solution" had not been reached.
12. In 2004 **Melaleuca Estate** took the **Council** to the NSW Supreme Court claiming negligence and nuisance alleging it has caused excess water to come onto its land by reason of drainage works undertaken in the 70's and the 90's.
13. **DECISION:** Plaintiff's claim against defendant in negligence and nuisance dismissed - Plaintiff to pay defendant's costs of the proceedings.
14. In 2005 - 6 **Melaleuca Estate** appealed the NSW Supreme Court decision to the NSW Court of Appeal.
15. **NSW Appeal Court DECISION 30 Sept 2006:**
 - (1) Appeal allowed;
 - (2) Set aside the orders of Cripps AJ made on 19 May 2004;
 - (3) Make orders –
 - (a) Granting an injunction restraining the respondent from continuing to discharge upon the appellant's land storm water in excess of the natural flow that would flow upon the land;
 - (b) that the respondent take such measures as may be necessary to preclude the coming onto the land of storm water containing high levels of nutrients and waste materials; and
 - (c) that the injunction set out in paragraphs (a) and (b) be stayed for eighteen months pending the implementation of a drainage system by the respondent for the Seabreeze Estate

which enables the storm water to be controlled within the catchment or disposed of by a thrust bore drainage line or gravity drainage line, to the next catchment in Port Stephens;

(4) Order that the respondent pay the appellant's costs of the trial and the appeal;

(5) Order that the respondent have a certificate under the Suitors Fund Act if otherwise qualified.

16. Following on from the Supreme Court ruling the PSC agreed to pay Melaleuca Estate approximately \$1.5M to take the stormwater from Seabreeze Estate into Lagoons Estate. However, after that company got into financial trouble the PSC reneged on the agreement

17. This system involved reducing the total catchment area of the Seabreeze Estate from over 68 Hectares to 31 hectares by diverting the water where possible from the higher areas into alternative existing drainage systems to take it toward Nelson Bay.

18. The rest of the design involved the construction of infiltration pits within and along the roadways to convert the surface flow into ground water which was to flow away through the aquifers below ground.

19. The effectiveness of this strategy is being disputed now by the developer and the residents, who have allegedly recorded videos and still photographs major inflows, even in relatively minor rainfall events, causing washouts and other damage which would suggest that the Council has not complied with the Court Orders. They claim that it is not just the surface flow of the water but the nutrients and petrochemicals from the roads and seeds etc. that cause problems in their lagoon and drainage system.

20. In the original consent, Port Stephens Council (PSC) required the original developer of Lagoons Estate (Melaleuca Estate Pty Ltd – Brien Cornwell) to install 1600 Drainage Wicks that would enable Lagoons Estate to take the stormwater from Seabreeze Estate. The developer of Lagoons Estate, installed 554 wicks. These wicks were of an upgraded design and had a capacity equivalent to that of the initial 1600 Wicks

21. **Shoal Bay Developments Pty Ltd / Snoogal Pty Ltd v Port Stephens Council, Land and Environment Court 2015, Application to Modify Development Consent.** A separate action to modify the development consent was also opposed by the Council.
22. In April 2015 Mr. David Vitnell the current owner/Developer of Lot 114, the undeveloped portion of Lagoons Estate, took PSC to the Land and Environment court regarding the requirement to install 1600 Wicks as part of his original development application. PSC legal counsel's questioned the number of wicks, size of the catchment area, ponding capacity and natural flow vs surface flows.
23. The court was not convinced that the calculations and models produced by the hydrologists and experts about the capacity of the system could be relied on, and that the monitoring since the system had been completed was inconclusive due to insufficient data.
24. **DECISION** The appeal was dismissed, the application to modify the Development Consent was refused
25. **Lagoons Estate Community Association v Port Stephens Council** The Community Association allege that PSC Storm Water Management System for Seabreeze Estate is failing and discharging 'excess' stormwater into Lagoons Estate in contravention of the Orders of the Supreme Court of NSW.



26. The Executive Committee (EC) of Lagoons Estate Community Association has attempted to engage the Councilors to negotiate a settlement and avoid

additional legal expenses for the ratepayers. TRRA has sighted these letters and the response from PSC.

27. The EC has advised PSC and the Councilors that they have no faith in the Executive Management Team of the PSC and have attempted to engage the Councilors to resolve this issue. Even though the Councilors can be attached to any action against PSC, because PSC has not acted in good faith, to date only one Councilor has contacted the EC regarding this issue.
28. The EC say that they have photographic, video and eyewitness evidence that the PSC is discharging stormwater into Lagoons Estate in contravention of the Supreme Court Orders. PSC staff have viewed damage on Lagoons Estate during an onsite visit by the Commissioners during the Shoal Bay Developments Pty Ltd / Snoogal Pty Ltd v Port Stephens Council case.



29. The EC have written to the Minister for Local Government, Local MPs and each individual PS Councilor with their concerns and received perfunctory acknowledgements from all except one Councilor.
30. Lagoons Estate Community Association (including Vitnell, who holds 1/3 of the entitlements) is prepared to take separate action if necessary seeking compensation for damage to community property from stormwater – which they need to pay for additional sewerage infrastructure – as Hunter Water will not be able to cope with sewerage from Lot 3 development (already problems with

existing load – particularly during April 2015 storm when Hunter Water pump failed and some sewerage overflowed into the lagoon).



31. They parties have now in 2016 combined to take PSC on in the **Supreme Court** alleging that they have not complied with the 2006 injunction restraining the Council “from continuing to discharge” ... “stormwater in excess of the natural flow that would flow upon the land”. They have retained a highly experienced Consultant Hydrologist, (Drew Bewsher) who has provided them with advice concerning the Councils compliance with the Court Order.
32. In the latest stage of this costly legal saga, PS Council’s defense has just been thrown out the window because the \$750,000 deed of agreement with South Canterbury Bank which they used to shut down an appeal back in 2014

has just been rejected by the Judge in the current case. Council is potentially no longer able to use the deed as any sort of reason to argue it has fulfilled its roll re the drainage requirements to prevent excess to overland flow pouring into the Lagoons estate.

33. PSC are on track for a potential judgment which could cost PSC ratepayers anything up to ten million in compensation, including the cost to build additional wick drainage which PSC insists is required, suggesting their infiltration drainage system is 100% successful. This doesn't include any sort of compensation that the Lagoons Community Association will be seeking in damages for storm water impact to its estate buildings and infrastructure and future proofing against further damage.

34. This whole matter has been kept under the radar over all this time and like the tens of millions ploughed into the Samurai Resort, we have not heard much about it. It is only discussed in Confidential Briefings at Council meetings. With all the hoo-hah about how Port Stephens Council is Fit for the Future and the best managed Council in NSW, It may be that Newcastle City Council will have to bail **us** out if this goes south..... Watch this space for further developments as they come to hand. Next Directions Hearing 08 April 2016

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