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[redacted] Queanbeyan East NSW 2620
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28 August 2021
By hand 30 Aug. :

- Mr Tim Overall – MAYOR
- All Councillors – name below
- Mr Peter Tegart – CEO

Queanbeyan Palerang Regional Council
256 Crawford St
Queanbeyan NSW 2620

…Legal Considerations re Bungendore High School…

Dear

Crs -- you may recall my input at QPRC meeting on 28 April in regard to the closure of Majara St and relevance of Bungendore Park as a DEDICATED Crown Land Reserve.

From recent comments by several Councillors, it is clear that you are being given flimsy, flawed (or even fake) information as to what can, and can't, be done in terms of this proposed location for a new Bungendore High School. Let me clarify on the legalities involved – key Acts are:--

CLMA -- *Crown Land Management Act 2016*
EP&A -- *Environmental Protection & Assessment Act 1979*
SEPP2011– *State Environmental Planning Policy (State and Regional Development) 2011*
LA(JCT) -- *Land Acquisition (Just Terms Compensation) Act 1991*
LG Act -- *Local Government Act 1993*
DoE Act -- *Education Act 1990*
Property -- *Real Property Act 1900*
ROADS -- *Roads Act 1993*

The situation is complex. The issues are simple. The fundamentals can be summarised thus: -- unless or until QPRC can re-invent the law that prohibits the sale of dedicated Crown Land, and/or circumvent the legal limitation/s that apply throughout SEPP2011 re SSD, then the proposed location re a new High School in Bungendore is doomed to fail.

BACKGROUND

Bungendore is expanding and a new High School (**BHS**)is needed. The Dept of Education (**DoE**) was exploring various sites – this list did NOT include mention of Bungendore Park, (**B-Park**), a dedicated Crown Land (**CL**) reserve for over 130 years.

In mid-2020 John Barilaro, local MP now Deputy Premier, announced location and timing. It would be B-Park, open and ready for first term 2023.

Soon thereafter (and after internal discussions) an unsolicited proposal was put to Queanbeyan-Palerang Regional Council (**QPRC**) whereby DoE would create its High School site by –

1. buying all QPRC assets (land & council offices) on the east side of Majara St between Gibraltar St and Turallo Terrace (**Majara-1**)
2. buying that section of Majara-1 after road-closure by QPRC
3. acquiring a wide strip (the **top end**) off B-Park to then consolidate this with Majara-1 as site for footprint of actual school buildings
4. moving Mick Sherd Oval, with aim to monopolise for student use 5 days/per week
5. acquiring a large section of Turallo Creek Crown Reserve, currently the off-leash area alongside the Scout Hall (**TC-Reserve**) as the school's agri farm area
6. assisting with street works to facilitate school traffic re staff/students/buses/cars

The ramifications for QPRC admin would be considerable –

1. need for road-closure of **Majara-1**
2. need to replace QPRC office facilities
3. need to cancel Abbeyfield land-lease agreement
4. need to arrange appropriate alternative site ASAP for Abbeyfield
5. need therefore to close **Majara-2** (alongside Scout Hall to Elmslea)
6. need to demolish recently-built $80K car park next to Scout Hall
7. need to provide new car park on other side of Turallo Terrace
8. need to evict Community Centre from premises on Turallo corner
9. need to close/demolish and then rebuild Swimming Pool
10. need to separate an eastern slice off from the rest of B-Park
11. need to legitimise legal status of top-end with rest of B-Park re CLMA2016 and QPRC role as Crown Land Manager of a dedicated reserve

The consequences for the Bungendore community would be worse, and forever --

1. loss of pivotal Majara St local link between Gibraltar St, Turallo Terrace, Elmslea
2. loss of at least 1/3 of much-loved, much-used, dedicated public open space
3. loss of open-access use of Mick Sherd Oval – risk of use-creep as school grows
4. loss of community 'ownership' in the village heartland since 1884
5. loss in pride-of-place, devaluing the War Memorial and whole Park context
6. loss of community-built, summer-essential swimming pool, probably for years
7. big school buildings will dominate/overwhelm the heritage open space
8. major upheavals for both Community Centre and the Scouts
9. major disruptions and dislocations re traffic, ripple effect in main village
10. major noise/safety issues on Butmaroo re 'detour' traffic unable to use Majara-1
11. major inconvenience to tourists, travellers and non-local road-users who access/exit Kings Highway via Majara St
12. futility and despair because this site fails the future test – seen as a political 'fix' cobbled together to barely cope with current needs - no room for expansion
13. also seen as social sell-out – B-Park abandoned by re Crs who say they "can't do anything" – and aren't prepared to try !

NOW TO KEY ISSUES – HIGH SCHOOL **YES**
LOCATION **NO**

A: Land Ownership Status

Basic fact: at the moment the Dept of Education has a "proposal" but NO standing in law. It does not own any of the land involved. It does not have "Owner's Consent" re B-Park. It has no legal right to negotiate with anyone in regard to development, subdivision or any disposition of the land involved. There is no MOU, no Heads of Agreement.

Make no mistake – QPRC is Crown Land Manager for B-Park. As such, and right now, Council is responsible, and depending on action required, ONLY Council (or the CL Minister) can act re B-Park. As a QPRC Councillor, this means YOU.

Don't be fooled when someone says that DoE can "do it all" by using the clout of an SSD. They can't. In this matter, the ONLY way to go is via the Minister for Crown Land – and while that role has many powers, the sale of a dedication or reservation is NOT one of them. In fact, such sale is expressly prohibited. The following shows how, when, who, why – and why not. Ignore the 10pp length, this is seriously must-read.

B: State Significant Development

VIP NEWS ---

Last month, July 2021, the DPIE released its 44pp
STATE SIGNIFICANT DEVELOPMENT GUIDELINES.
All Crs should read it, if only as a matter of self-preservation.

As law in the EP&A Act, the SSD provisions in SEPP2011 take priority over almost all other aspects in DA-type considerations. SSD can build Barangaroo, dismantle WillowGrove, destroy 100yo Moreton Bay figs, and kill koalas with impunity.

It can do this because SEPP2011 says (many times, inc **s.7**) that SSD prevails over all other "environmental instruments". Result: the over-ride does NOT apply re any other laws.

SSD automatically includes "educational establishments" and DoE use it all the time. But I doubt they've ever used it to land-grab part of a CL Reserve dedicated *"for the public purpose of public recreation"*

Here's the nub. Crown Land can only be managed under CLMA – which says

s.1.15(1) *Crown Land must not be occupied, used, sold, leased, licensed, dedicated, reserved, or dealt with in any other way unless it is authorised by this Act*.

In short, when it comes to Crown Land, the CLMA pre-empts SSD.

Here's another negative re using SEPP2011 for B-Park. The SSD might confer big powers, but these are based on the statutory format for a DA. Such applications start with the land involved, and owner's consent. For a dedicated reserve, this is the Minister, ie the Minister Administering the Crown Lands Act – not the EP&A Minister, and
definitely not the Minister for Education.

Problem 1 -- the LAND itself.

Is it proposed to subdivide B-Park and sell the top end to DoE ??
If so – then no-go. The CLMA section on "Powers" re the CL Minister is explicit:

s.5 (5) *This section **does not authorise the sale** of Crown Land that is dedicated or reserved for a public purpose*.

The issues re subdivision are more convoluted – may be do-able, but would involve legal issues like the dedication purpose, and then either require revocation, or raise title issues with the Registrar General (ie Real Property Act), Whichever way could take years – and probably have the same negative outcome. Would have to start with CL Minister, and then get lodged as conditional in overall SEPP-DA - this unlikely to succeed given other CLMA factors + add in current community resistance. In short –no go.

Problem 2 -- Owner's CONSENT.

DoE doesn't own B-Park, and so long as **CLMA s.5 (5)** applies, never will. This means another no-go - to any SSD process, SEPP2011 or not. DoE simply cannot sign the DA application needed to start a B-Park DA or subdivision. It has no authority, and trying to railroad a signature through would invite legal challenge as fraud.

Of course, DoE could ask the CL Minister to sign owner's consent for them. The CLMA has no provision for any such proxy dealings or delegations. Other than revoking the dedication (which opens up a different can of worms) the CL Minister has no lawful way to approve the proposal. He must refuse to sign – **s.1.15(1)** says so.

C: Land Acquisition Factors

So how does DoE propose to take over the top end of B-Park ? Is it to be subdivision and then purchase, or by some form of lease arrangement ?

The issue here for QPRC is that while Council manages B-Park, it does not OWN it and thus has no say in when/if/how this dedicated Crown Reserve might be sold, either in whole or in part, to DoE or anyone.

Section 714 of the Local Govt Act 1993 should also be noted:

s.714 *Estates and Interests of the Crown in Land*

This Division does not enable the sale of ---

(a) any interest or estate of the Crown in land

(b) any interest in land owned by the Crown that may not be transferred at law

Indeed, as indicated above, CLMA .**s.1 (15)(1)** and **s.5 (5)** combine to prevent its sale. Not even by the CL Minister.

(And if any such "sale" or subdivision is purported, the Registrar General has explicit power under Property Act **s.13D (1)** and **(2)** to question and/or investigate changes to title when it involves dedicated or reserved Crown Land.)

Problem 3 --Acquire by Agreement

Other than radical change to the CLMA itself, the only way for a CL Minister to circumvent this ban would be to revoke the dedication. To do so, notice of revocation must be formally gazetted, and this placed on the table in BOTH houses of Parliament for at least ten days. If neither House acts, approval is assumed and it then takes effect. But BOTH must agree.

So if either House objects, rescinds or refuses to let the revocation proceed, then it fails. The dedication remains. No sale agreement can occur.

Note: the proposed take-over re B-Park has triggered such visceral community reaction that equivalent response is likely from MPs in at least one House, if not both. It would be a brave Minister, and/or govt, that tabled "revocation" to destroy a dedication in place since 1884.

Crs should also be aware that any move to 'revoke' will meet with widespread community revulsion, not just Bungendore. Sale by agreement would be anathema.

And a Council prepared to sit on its hands while it happens – or worse, to collude with the perpetrators – will find few friends in the QPRC region, or beyond, because Crown Land belongs to "*the State of NSW*" – ie everyone.

Problem 4 -- Compulsory Acquisition

Yes – the LA(JTC) Act does have provision for acquisition of Crown Land. But when it comes to dedications, no known instance can be found on the public record. Apart from rarity, compulsory acquisition is a question mark (and probably headed for the High Court) when confronted with CLMA **s.5 (5).**

Even if DoE could somehow succeed with compulsory acquisition of B-Park (or part thereof) LA(JTC) **s.20 (1A)** still applies. This means that any dedication or reservation goes with the land. This continuation of its "public purpose" is reinforced by reference to LG Act **s.186(3)**. In short -- DoE will lose time and legal fees, to end up with some heartland Bungendore real estate they can then only use for the public purpose of public recreation.

Problem 5 -- Tenure by Leasing

Then again, DoE may decide to avoid the issues re ownership and opt to lease the top-end of B-Park. This may be possible - but only "may" – since CLMA **s.2.19 (3) (a)** to **(f)** gives a 6-point site-specific list to ensure that ancillary or "secondary" use of CL Reserves must BE secondary. This limits size, scale, scope and impact, inc for social context.

A two-storey High School that visually dominates the remainder of its site, with a further 2/3rds usage that takes over the main oval for 5 days of every week is unlikely to qualify.

But there's another legal issue re leasing.

Does the DoE (or indeed QPRC) realise that CL **Fact Sheet 19/216495** stipulates the longest lease term legally possible right now re B-Park is maximum five years. Not 99, not even 21. The legal ref is CLM Regulation 2018 **s.70 (2)(e).**

Why is it so? Because QPRC has no operative/current Plan of Management that applies to B-Park. There's not even a valid Draft PoM. And the 2019 amended PoM for Queanbeyan Parks explicitly excludes Crown Land.

To overcome this 5-yr limit on pre-PoM lease tenure, QPRC would need to prioritise a whole new Plan of Management process. Just consider all the time, costs and work involved – the research, community engagement, drafts, revisions, and then waiting for ministerial approval.

Then, and only then, would QPRC (as CL Manager of B-Park) be in a position to negotiate a longer lease with DoE, and ONLY then, after that is in place (which not a 'given', given the CLMA 6-point list) could DoE start towards a DA, even under SSD procedures.

Not easy, not quick, and definitely not ready for 2023.

Problem 6 --Tussles re Turallo Creek

The DoE proposal also takes in a section of the Turallo Creek Reserve which slopes downhill to the east and behind the new Scout Hall. The area is much used by dog owners, and often referred to as the "Off-leash Park". DoE intend that this area be used for agricultural studies, including sheds or classroom, farm plots, with Scout facilities as student toilet amenities.

To prove that 'complex' can get even more complicated, there are also legal issues in regard to this area. The first – it's a Crown Land Reserve for public recreation - not dedicated, but still reserved from sale. Those issues re CLMA **s.5 (5)** and **s.1.15(1)** still apply.

Next, use as an agricultural study centre within the Bungendore High School context would require a change in purpose, with added wording to be something more like "the public purpose of public education".

But there's more. Turallo Creek Reserve is subject to, not one but two, Aboriginal Land Claims. These date from 2008 and 2009, and given a backlog of almost 40,000 ALRA claims awaiting decision, it unlikely that these will be resolved any time soon.

Meantime the Aboriginal Land Rights Act 1983 **s.36B (1)** means that so long as an ALRA claim is outstanding, the status quo must be maintained -- ie no development or change to format, use or function re that parcel of Crown Land without notification to, and agreement with, the aboriginal claimants involved – in this case, the Ngambri as traditional owners.

Even if the traditional owners do consent to whatever interim use until their claim is decided, this can only be in line with CLMA provisions. Moreover, since there is no Plan of Management for the Turallo Creek Reserve, the 5-year limit on tenure applies here too.

Here's one further factor for Crs to consider. It seems that DoE needs this area to meet its own rules re student/space ratios for the BHS as a whole. If the above legalities prevent/delay DoE from taking over land in Turallo Creek Reserve, then DoE are stymied.

The QPRC lots cobbled-together along Majara-1 + B-Park might create a consolidated site, but it does not qualify as adequate for building a 400-student BHS.

Problem 7 –The Future

This shortfall re size-ratio points to a huge future problem. Growth. The Bungendore Structure Plan 2048 has "medium growth" projections the current village population (around 3500) to double in 20 years, to 7500. The "high growth" estimate is triple that of today, to 12,000.

But student numbers for BHS can be expected to exceed these ratios. DoE plans seem to assume its catchment zone will be "regional", with intake bussed in from outlying areas, not just the village. If so, the school will need to provide capability to cope with at least 800 students within 10 years, then 1200 by 2040, and up to 1500 students by 2050.

The current site plan is barely adequate for an immediate cohort predicted as 400-600 students – and the heads/space-ratio for this number is ONLY possible by counting the Turallo Reserve area as part of the main School. As such, the proposed 2-in-1 land scheme is so short-sighted it's a joke – result being an under-size school at over-size cost . Compare – Jerrabomberra's 800-student High School is to cost $25.9 million, with room to grow. At Bungendore the budget estimate is $34.7 million for a 400-student "squeeze".

D: The Road Closures

Given the above legalities, the QPRC resolutions of 28 April and 26 May 2021 to close Majara-1 and Majara-2 are so premature as to be preposterous. The only saving grace is that the wording defines finality (ie gazettal) and it hasn't happened yet. – if ever. As resolved on 28 April, delay continues until "*execution of the heads of agreement and conclusion of the planning proposal*".

Problem 8 – Double-whammy in the Roads Act

First is immediate, and major. It seems NO notification was sent to an owner who will suffer such severe adverse impact from closing Majara-2 as to have NO access, with the property left land-locked – a truly stranded asset. QPRC recognises such owners as "Notifiable Authorities" with the right to formally object – refer "CONCLUSION" in the Community Engagement Report – Proposal to Close Majara Street" (mtg 28 April 2021, p.10). This means:--

a) the road notification process of Jan/Feb 2021 is invalid and of no effect
b) any *"owner or occupier of land whose land will suffer a material loss of access*" is a Notifiable Authority and may object in any new notification
c) if this happens, closure cannot proceed until such time as any objection/s are resolved, withdrawn, or overruled by Court proceedings.

Next is in the Roads Act itself - s.38E, which is about EFFECTS OF CLOSURE .

Does QPRC know (or Crs realise ?) that the rule re closing a council-owned **un-made road** is, to put it bluntly - "use it or lose it". Here's what **s.38E (2) (a)** and **(b)** say --

(a) (… a public road in respect of which no construction has ever taken place)

(b) ***becomes*** *vested in the Crown* ***as Crown land***. *(emphasis added)*

So, you can gazette the closure of Majara-2, but QPRC then loses all ownership rights in regard to that land. Forget turning it into "operational". QPRC has no say, no sale, no lease - or not quickly and not without CL Minister consent.
What then ?.

Possibility 9 – Fail-to-notify means chance to change

Given QPRC handled the road closure/s in a single Resolution, the failure to notify is probably fatal to both. Likewise, objection from a notifiable authority may refer to one or other part of Majara 1 or Majara 2, but will put pause to both.

The good news for QPRC – this notification glitch gives QPRC (ie Crs) a chance to defer any further talk of road closures until such time as DoE can provide proof of a viable land-plan for the school footprint with or without B-Park.

The above legalities will take time to re-do, if ever. Meantime, DoE is in a no-go, no-win situation in regard to any plan that relies on closing Majara-1 as a way to join up with the top end of B-Park and to then use the combined location as basis for having a new BHS ready to open for first-term 2023.

It is unlikely that any such Heads of Agreement will be forthcoming for years, if ever. QPRC is deluded if it thinks DoE can overcome the issues involved. It will not win in Court.

E: Abbeyfield - an Appalling Situation

Today is 26 August 2021. On this same date, 12 months ago, an aged care facility on leasehold Council land at 4-6 Majara St Bungendore was scheduled for approval at the QPRC meeting. Instead, Abbeyfield found its DA sidelined, with substitute item 9.1 on p.37 being for *"Bungendore Education Precinct – Acquisition Proposal, author Tegart/Tegart.*"

Fully 5 years in the planning, with EOI agreements in place for residents promised a home by mid-2021, and in one cruel night, Abbeyfield find the land literally pulled out from under them. Goodbye goodwill – and goodbye almost $250K worth of architect and development costs.

Suddenly, all of Majara St between Turallo Terrace and Gibraltar St was for sell-off to the DoE for building a new High School, with Abbeyfield as poor-cousin, shifted to the site of No.2 Majara This to be theirs, but after QPRC evicted the Community Centre there.

Already QPRC has reneged on No.2 Majara St, now opting to offer Abbeyfield a lease-site of land between the Pre-school and Scout Hall on Turallo Terrace – ie front part of the Majara-2 unmade roadway – scheduled for closure as soon as a Heads of Agreement with DoE is in place.

Also at risk for Abbeyfield right now – time AND money. Construction funding is now all at covid-price premiums, plus grave concern re $1 million in Grants, because now lacking land tenure, there's no way for Abbeyfield to re-negotiate funding, bank loans, etc. Also in limbo are would-be residents who signed up for a home in the new Abbeyfield facility.

Bad enough – but now see earlier re Roads Act **s.38E (2) (a)** and **(b)**. Any disposition of the roadway's Turallo Terrace 'frontage' in a lame land-swap or lease deal to Abbeyfield is immediately beyond Council powers. It means still more delay because Majara-2 becomes Crown land – beyond power of QPRC to give/sell/lease unless, or until, CL legalities are in place to permit any such transfer.

Crs – think how that adds to the anguish in this ongoing QPRC sabotage of Abbeyfield aged care plans – the crippling uncertainties, and appalling cost in TIME.

F: - Sighting the Sites

Instead of fudging results from DoE surveys or risking censure under Wednesbury by rejecting objectors when they join the dots between road closures and school buildings, go talk to people who live there. Get real – get to Bungendore and do some site visits. As a Cr, see for yourself.

Don't be put off by DoE cop-outs about no other site is suitable. There are at least two, and maybe four, the community know of. After the above CL fiasco, these sites would be simple, accessible, build-able, expand-able and above all – AVAILABLE.

As Crs, challenge DoE to tell you IN DETAIL about the land they looked at, about the lots and hectares they were offered FREE, about the ones they falsely called flood plain.

And above all, don't forget their fibs re Trucking Yard Lane – a potential site rubbished in the DoE assessment as lacking power, water or service facilities, yet it's got them all already, and right in a residential growth area. DoE lied about that land last year, and got away with it.

But not any more.

G: Ramifications

Councillors - it's one thing to shuffle a few things around on a Mick Sherd Oval, but quite another matter if it means that you ---

- damage a CL dedication and dilute its "public purpose"
- carve a slice off a public Park that's been much-loved for 100+ years
- destroy a whole heritage precinct hailed for its "intact-ness" since 1885
- use community assets (like the swim pool) as a blackmail threat
- bully the Community Centre out of its established location
- treat Kings Highway road-users of Majara-1 as irrelevant
- pull the land out from under an aged-care project that's been years in the planning
- try to shift that project onto land QPRC won't own after road closure
- doing it the very week their DA was set to be approved
- doing it in a way that deprives the Scout Hall of its new $90K carpark
- doing it via a road closure that shuts off future road access to a key growth area
- breach the Roads Act re landowner notification
- rely on fake 'traffic' studies and flawed assumptions re ownership laws
- misrepresent the real situation in notification to TfNSW
- pretend that you can hide the issues or hand them over to DoE
- think that an SSD process is a magic bullet against Crown Land law
- disregard major community objection on excuse so fake QPRC's own rationale and resolutions contradict it.

All the above, and more, relate to the QPRC scenario that currently applies.

H: Conclusion – what to do NEXT

This letter means that you now DO KNOW about the above issues. "I wasn't told" or "Let's leave-it-to-DoE" won't wash. So, what to do next ?

As Crs, and for whatever reason, you're clearly not getting near enough need-to-know in appropriate information. (From what the Schools Infrastructure team said to flaunt the force of SSD at their "Info Hub" at Bungendore Primary on 11 May, I suspect DoE is in the same boat.).

I know from personal experience that when it comes to dedicated Crown Land, things get so convoluted, so confused, so costly, and (as here with this BHS proposal) so counter-productive that the easy place to put it is in the too-hard basket. But as Crown Land Manager of B-Park, it's the duty of QPRC to be on top of issues involved. This means you as Mayor, Cr, or CEO.

Clearly, ordinary QPRC staff don't know it all – and can't be expected to. You, and QPRC, need specialist legal advice.

Until then, forget Crown Land. Go back to the community and remember what it really wants –

High School – YES

this location – NO.+

Tell DoE to start their site-search again. To pause any MOU, and to delete any Heads of Agreement that relies on Majara.

Reverse the resolution to close Majara-1 and Majara-2. Retain No.2 Majara and rethink its use as a new-look Community Centre. Re-instate the leasehold for 4-6 Majara St and let Abbeyfield lodge their DA. Tell the Scouts they can keep their carpark. Advise the Ngambri to keep their Turallo land claim as-is. Assure the notifiable owner his access is safe. Revitalise pride in all that Bungendore Park stands for – treasure it as the Crown Land asset is it. Above all - thank the community for its concern, with congrats for a good result.

Bungendore needs a new High School. Let's get it right – in the right place!

Above all --leave Bungendore Park to be the green heart of a heritage village.

Yours sincerely

[redacted]

EMMA BROOKS MAHER
28 August 2021