

9th October 2013

# Invader's Bay Payday?

Invader's Bay has re-emerged from the shadows via PNM Senator Faris Al-Rawi's [budget contribution](#) on Monday 23 September 2013 (pp. 168-175). The twists and turns in this controversial proposed scheme are detailed at [JCC's webpage](#).

Invader's Bay is a 70-acre parcel of reclaimed State land off the Audrey Jeffers Highway - just south of PriceSmart & MovieTowne - in the western part of Port-of-Spain. Its value was estimated by the State in 2011 to be in excess of \$1.2Bn, so these are prime development lands, possessing these attributes -

- Water, Electricity and all urban services are readily available;
- Flat/gently-sloping terrain;
- Direct access to Audrey Jeffers Highway;
- Waterfront location.



Before proceeding to the latest revelations, it is important to restate the main objections raised by the JCC and others with respect to this proposed development -

- The Request for Proposals (RFP) was published by the Ministry of Planning in August 2011 seeking Design-Build proposals for the development of these lands and specifying an entirely inadequate 6 weeks for submissions;
- There has been no public consultation at all, so the public has not been involved in this, the largest proposed development in our capital in living memory;
- The RFP was silent as to the other three, extant strategic plans for the POS area, all paid for with Public Money. Given that the RFP was published by the Ministry of Planning, that is a tragic irony, to say the least;
- EIA - The RFP is silent as to the requirement for an Environmental Impact Assessment in a development of this scale;
- The proposals were to be evaluated against the "Invader's Bay Development Matrix and Criteria

Description”, which was only published after the closing-date for submissions. That is a clear breach of proper tender procedure, which renders the entire process voidable and therefore illegal.

The key points Al-Rawi was advancing seemed to be based on certain leaked Cabinet papers, but not having seen them, there is little detailed comment I can give.

Al-Rawi stated that the Government has agreed to lease parts of the property to two developers – DACHIN Ltd (Derek Chin, the MovieTowne man) and Invaders Bay Marina Development Company (Jerry Joseph). He also claimed that those leases are to be granted at the land value quoted by the developer/s’ valuer - \$74psf – which is a small fraction of the valuations obtained from the Commissioner of Valuations – \$511psf – and PricewaterhouseCoopers, the independent consultant retained by the State – \$436psf.

According to Al-Rawi -

*...The developers are saying, “Hold on, you need to look at this from a residual valuation approach”, and on a residual valuation approach they are saying, “Remember we have to do infrastructural work, we are only going to get a residue of this land coming into our hands, therefore, we want a residual value approach...*

Quite apart from the inevitable dispute as to valuation method, I have a serious concern as to the claims being made here, given that according to the [Public Sector Investment Program](#) (PSIP) 2014, (in a map at pg 89) there is an allocation for ‘*Infrastructure Development*’ at Invader’s Bay. That also corresponds to the PSIP listing on the Ministry of Planning & Sustainable Development’s [website](#) (it is identified there as #32 of 55 projects for that Ministry). Despite careful checking, I have been unable to locate any further details of that proposed ‘*Infrastructure Development*’ for Invader’s Bay. So what is the true picture? How is the infrastructure at that development site to be funded?

As to the valuation method, one would have to know the proposed lease terms in order to properly analyse the relevant land sales. The instructions given to the three valuers would have to be disclosed, so that we could see the basis on which particular property interests were being valued. Only then would it be possible to give a reliable critique of the various valuations being discussed.

In any case, the JCC is maintaining its position that the Central Tenders Board Act is being breached by this development process emanating from the Ministry of Planning. According to amendment [179/1997 to the CTB Act](#)(p. 46), the Board is responsible for all disposals of real property

by the State, which is what this RFP is proposing. Our objection is based on the fact that the CTB has been circumvented by this process.

The Minister of Planning has adopted the contrarian position of claiming to have legal advice that the RFP process conforms to the CTB Act and, at the same time, refusing to publish that advice. The JCC has invoked the Freedom of Information Act in a Court challenge of the refusal to publish that crucial advice. On Tuesday 1 October, the JCC was successful in having the [High Court grant leave to proceed with that challenge](#). According to Justice Frank Seepersad's ruling - *"...the court finds that the Applicant/Intended Claimant has an arguable ground(s) for judicial review with a realistic prospect of success..."*

I have seen [one newspaper report](#) on the legal advice given to the State in this matter and it is difficult to get into details without reading the opinion. That said, it seems that the proposal is to grant a head-lease to UDECOTT, who will then grant sub-leases to the various investors. It is difficult to reconcile that position with the repeated claims that Cabinet approved that this project should be removed from UDECOTT's portfolio.

Another aspect is the question of just how many developers has the State chosen to negotiate with. On 2 August 2012, the clear statement was that two developers had been selected from the original 10 which had made proposals. Those two were the same ones identified in Al-Rawi's speech. Yet, the Permanent Secretary in the Ministry of Planning, in replying on 16 August 2012 to the JCC's Freedom of Information Act request, specified that - *"...Further the decision to move forward with the process and the selection of the three (3) chosen investors was agreed by Cabinet..."* So, which is it? How many investors have really been chosen? Who is the silent investor? Can we continue to develop our country in secrecy?

Finally, I am not convinced by Al-Rawi's notion that this situation is one which could give rise to large claims from the selected developers in respect of 'legitimate expectations' arising out of the acts of public officials. Those claims would arise if it became impossible to transfer title to those lands and the 'legitimate expectations' of the developers were frustrated. My doubts are due to the publication of the rules for evaluation after the closing-date, as noted earlier that renders the process voidable.

The local Appeal Court case on this question of reasonable/legitimate expectations is *Sumair Bansraj & ors v The Attorney General & ors (#11 of 1985)*.

How does the Bansraj decision bear on this?

That episode concerned the 'dualling' of the then Princess Margaret Highway and the resistance of

certain inhabitants of Guayamare, represented by their MP, Winston Dookeran, together with attorneys, Basdeo Panday MP and Ramesh Lawrence Maharaj.

In the '*Guayamare case*', the claimants were able to delay the construction of that essential highway, at considerable expense to the State, by relying on the 'reasonable expectation' they had developed from politician's promises of full compensation for their land and new parcels of land.

The claims were dismissed after several years of delay to the highway project. The closing statement of Kelsick CJ is fitting -

*...Ministers of the Government and others employed in the various Ministries must begin to appreciate that laws are there to be followed both by the Government and by members of the public alike. There cannot be any discrimination. And persons (whoever they may be) are not permitted to conduct their business (particularly the business of the State) outside the pale of the law for reasons best known to themselves and not readily appreciated by this court. The courts will insist that the law be observed...*

Expediency must never be allowed to take priority over principle.