

Jape's Citiland & the Kulaluk Lease Area (Lot 5182) Darwin.

Planit Consulting on behalf of Jape's Citiland company advertised in the NT News on Friday April 27 and Friday May 8, 2015, proposing to increase the number of uses permissible in Area A and Area B of Lot 5182, otherwise known as the Kulaluk Lease Area between Fitzer Drive, Dick Ward Drive, Totem Road and Bagot Road in the flightpath of the Darwin International Airport..

The area has been divided into Parts A and B and was rezoned from Conservation to Light Industry in 2011. It is proposed by Jape that the uses permissible for Area A be extended to car park; leisure and recreation; licensed club; medical clinic; office; restaurant and veterinary clinic. Permissible uses for Area B would be car park; leisure and recreation; place of worship and veterinary clinic.

This sounds similar to plans proposed by Vysrose (now Citilands) and the Gwalwa Daraniki Association Inc leaseholders in 1993. These plans were strongly opposed by the RAAF and Darwin Airport authorities (“Air chiefs fear park could be dangerous”, NT News, 5 December, 1993). Eventually a 99 year lease was granted to McDonalds Restautants on a corner section of the land. The 2015 application by Planit notes that “the McDonalds restaurant sets a precedent for the area”.

It seems as though the tactic of Planit Consulting on behalf of Jape;s Citiland and another developer, Dragon Lady Pty Ltd (controlled by Ernie Chin, a past director of Citiland) are to wear down the opposition by continually submitting and resubmitting applications and amendments until concerned residents, traditional owners, environmentalists and others opposed to the alienation of the land are exhausted.

Unfortunately the planning processes provide for next to nil consultation with Aboriginal people, and the DCA hearings are not conducive to hearing Aboriginal views on developments that will have long-lasting effects on the life and culture of present and future generations of the Larrakia people and other associated Aborigines. In addition, no evidence of any standing has been produced to confirm that dealings between the leaseholders and others are legally binding. This needs to be challenged.

How did it come to this?

How did it come to this, that an incorporated association with a constitution more suited to a darts club is able to control the future of 301 hectares of urban land in Darwin by making presumably secret, questionable deals with developers? For a greater understanding it is necessary to firstly outline a brief summary of the history of changes affecting the land in question.

As a result of eight years of a struggle for land rights for Darwin's Larrakia people, the 301ha Kulaluk Lease Area was granted as Special Purpose Lease 465 to the Gwalwa Daraniki Association Incorporated in 1979 with an open membership. The annual rental of the community lease was "ten cents if and when demanded by the Minister". It is worth quoting some of the conditions of the SPL, including:

6. That any boundary fencing erected by the lessee will be to the satisfaction of the Minister and will thereafter be maintained to the satisfaction of the Minister.

8. That the lessee will not remove or destroy any live mature trees from the land except as required within the context of a development plan approved by the Planning Branch, Department of Lands and Housing.¹

The SPL was signed by Bobby Secretary, Topsy Secretary, Kathleen Secretary, Frederick Stewart Fogarty and Albert Rewi Lawrence Treves. In her "History of the Kulaluk Lease", Krimhilde Henderson (1984:37) describes how decisions were made prior to the signing of the SPL:

Justice Woodward's recommendations, that title should be held by trustees appointed by the Northern Land Council, was long forgotten by this time. The NLC itself could not be involved because Kulaluk was an urban land claim, while the Aboriginal Development Foundation (which was to hold title to the other Aboriginal leases in Darwin) had been involved in continuous quarrels with the community and its advisors. An internal memorandum from the DAA field officer liaising with the Kulaluk people summarised the situation: 'The people desire that the title in the first instance be given to the Gwalwa Daraniki Association, an incorporated body, and later handed over to the Larrakeah Lands Association once it is officially incorporated. The group were still adamant that the ADF should not be involved with the handling of the land title issue. The ADF advised that that did not worry them and they would be happy to withdraw from the nastiness of the Kulaluk scene.'²

In 1974 the Aboriginal Land Rights Commissioner expressed strong doubts about the ability of the Gwalwa Daraniki to manage the land because "its numbers are too small and its dependence on its white advisor too great". Recommending in his final report that for the time being at least the title should be held by trustees nominated by the Northern Land Council, Judge Woodward commented: "No doubt the special interests of the Larrakia people would be remembered when such trustees were appointed" (Woodward 1974:53).

A Land Use Field Study in 1984 showed that the lease was widely used by Aboriginal people for traditional, recreational and educational activities, as was intended. The whole area contains significant environmental, historical, religious and cultural sites that were presumed safe once the land was returned to Aboriginal people. However, there are few safeguards as exist in the Land Rights Act 1976, because the Act does not apply in a town.

¹ Condition 8, weak as it is, was the only condition inserted at the request of the Association and is significant in that it reflects the conservation intention of the applicants.

² G K Castine to J L Wauchope, 23 March 1979.

“The Kulaluk Development Proposal - Development Brief for the Development of Part Lot 5182, Bagot Road Town of Darwin” prepared by the Gwalwa Daraniki Association Inc and Vysrose P/L in August 1997 states:

In 1985, the consulting firm Hollingsworth Dames and Moore (HDM)³ undertook a conceptual pre-feasibility study, funded by the Aboriginal Development Corporation, to assess areas that the community could develop in order to strive for economic self-determination.

At the time of the above consultancy, the community land holding was changed from a Special Purpose Lease to a Crown Lease in Perpetuity and rezoned to R6, allowing for the community to develop their land in a commercial manner.

Since the HDM consultancy was completed in 1985, there have been several initiatives by the GDA to undertake the commercial development of their land.

Following the Hollingsworth report, which appears to have had very little Aboriginal involvement, Crown Lease in Perpetuity 00671 was granted over the lease area on April 27, 1987. The new lease was “conditional upon compliance by the lessee, with the covenants and conditions to be complied by the lessee” and stated that the lease was “liable to be determined to be forfeited for non compliance.” Amongst the conditions and covenants of the lease are:

1. Subject to the Crown Lands Act the Lessees shall not use the land for a purpose other than the lease purpose.
5. The Lessee shall, in respect of land included in the lease, ensure that at all times and to the satisfaction of the Minister, the land is kept clean, tidy and free from weeds, debris, dry herbage, rubbish, carcasses of animals and other unsightly or offensive matter and harbour for insects, pests and the breeding of mosquitoes.
6. If the Lessee fails to observe and carry out or to cause to be observed or carried out the conditions of clause 5 above on his part, the Territory shall have a right to enter onto the demised premises and do all things necessary to that end and the expense and costs thereof (as determined by the Minister) shall be borne and payable by the Lessee on demand.

Citiland Corporation Pty Ltd, previously known as Vysrose Pty Ltd has been involved with the Gwalwa Daraniki Association in attempts to develop Lot 5182 in the area bounded by Fitzner Drive, Bagot Road, Totem Road and Dick Ward Drive since at least 1993. Cherie Beach in the *Northern Territory News* reported on December 12, 1993:

The company developing Aboriginal land under the Darwin flight path is paying aviation consultants in an attempt to defeat official opposition to the project. Vysrose Pty Ltd director David Smith hired Airplan, which has worked for the RAAF and the Federal Airports Corporation in the past, to ensure the development did not interfere with the flight path. Mr Smith wants to build a multimillion tourism and leisure park on vacant Aboriginal land he has secured a 99-year lease for, bounded by Bagot Road, Fitzner Drive, Totem Road and Dick Ward Drive. The planned development is 1 km from the touchdown point on the runway where 30,000 aircraft, including fighter planes, jets and light planes, have taken off or landed in the past 18 months. A MacDonalds

³ Hollingsworth Consultants (1985) *Kulaluk Lease Area Land Development Study*, Brisbane: Hollingsworth Consultants in association with Planit Location International.

[sic] restaurant at the corner of Fitzer Drive and Bagot Road – where Mr Smith also plans to build shops – was approved last week.

The RAAF and FAC, which manages Darwin Airport, issued public warnings last week the development might cause or worsen an air disaster. Industries and Development Minister Steve Hatton said last week the NT Government's policy since self-government to "maintain the integrity of that land for flight paths – had been clearly explained to the developers". Mr Smith said: "We are prepared to compromise. The RAAF flies planes all over Darwin and they could drop a bomb anywhere."

A 2008 search of the titles office lists a 98-year sublease to Vysrose and a month later, in February 1996, a Caveat (part only) to Citiland. The directors of Citiland were listed in February 2006 as Tony Fu Chin Jape, Alan Fu Kung Jape, Kong Su Jape and Ernest Sue Wah Chin. In addition a 98-year "Under-lease" by the Gwalwa Daraniki Association was granted to McDonald Properties (Australia) in January 1996, expiring on July 6, 2094. According to the Aboriginal academic, Marcia Langton, who advised the GDA in their plans to develop the area at this time, McDonalds "forms the anchor tenancy for future planned developments" (Gwalwa Daraniki Association 1995). Significantly, according to a newspaper report, Helen Secretary said "the approval of McDonalds should set a precedent for the development of Kulaluk" (*NT News* 12 December 1993).

Who are the Gwalwa Daraniki?

During the years when the negotiations with Citiland and McDonalds were being finalised between August 1991 and August 1995 Helen Secretary was President of the Kulaluk Community. On November 22nd, 1994, at the Kulaluk community she entered the bedroom of her non-Aboriginal de facto partner, Darren Nelson, the father of her six children, and fatally shot him in the back with his rifle (*NT News* May 12, 1998, p.3, "Abuse made her shoot husband").

The transcript of the trial, on public record, gives some insight into the operations of the nominally Aboriginal Gwalwa Daraniki Association. Helen said the deceased would "come to the [Kulaluk] office and advise me about things", and if she disagreed with him "when I went home I used to get a flogging ... We were his property". If anyone interfered when he beat her, he said he "would kill them".

An amended constitution of the GDA was lodged in September 2006 by Michael Chin, Barrister and Solicitor, to limit membership of the lease-holding Association to people who have lived in the Kulaluk Community on "Lot 5182 Town of Darwin or Lot 8630 Town of Nightcliff ... for a continuous period of at least twelve months". In addition, the constitution states that the members should be descendants of "the Danggalaba Clan of the Larrakia People" or their spouses, provided at least half of the members (out of a minimum membership of 5) are "Aboriginal persons". Two examples of non-Aboriginal spouses who have held disproportional influence on the association are

the New Zealander Albert Treves and the deceased Darren Nelson. When Treves was asked in 2014 why only agreement by a majority of five members was required, he replied, “We would never get anything done otherwise.”⁴

“Crabgate”

In January 1998 a 10-year sublease was granted for the purpose of a 5ha “Prawn farm” on the lease, which subsequently failed. Excavation for the prawn ponds began in 1996. According to the Planning Authority Development Permit DP97/0077, item ten of a Schedule of Conditions, “Upon cessation of the use, the area used for ponds shall be rehabilitated to the requirements and satisfaction of the Secretary, Department of Lands, Planning and Environment.” This condition has never been enforced and in 2015 the ponds remain as a man-made mosquito breeding habitat, further defying the conditions of the lease.

In 2006 the Labor NT Minister for Planning and Lands, Dr Chris Burns wrote “regarding the application by the Gwalwa Daraniki Association for an exceptional development permit (EDP) to develop part Lot 5182, Town of Darwin, for aquaculture (mud crab farm) within existing ponds”:

On 9 March 2006, I approved the application by signing Exceptional Development Permit EDP05/0011, which was published in the NT Government Gazette on 22 March 2006.

While I respect your views, I can assure you that due process was followed in the approval of the application and that environmental issues were carefully considered. Notwithstanding your concerns, the project is an appropriate use of existing ponds which will contribute to the economic development of the local community. I wish the Gwalwa Daraniki Association every success in this venture.⁵

By 2008 the “crab farm” on the site of the failed “prawn farm” had also failed, at an alleged cost of two million dollars to the taxpayer and untold continuing environmental damage, as evident on aerial photographs. There was no public inquiry into the “Crabgate” scandal.

The Gwelo Non-Lapsing Caveat

A solution to the embarrassing sight of abandoned aquaculture ponds on the lease was soon found. A “Non Lapsing Caveat” over the land and mangroves not already committed to Citiland was signed by Helen Secretary and her daughter, Michelle Nelson and the Gwelo Investments Pty Ltd Director, Even Lynne, on March 9, 2009. The document notes that the caveat is “the grantee of exclusive rights pursuant to an agreement between the Caveator [Gwelo] and the Registered Proprietor [Gwalwa Daraniki Association Inc, PO Box 746, Nightcliff, NT 0814] dated 15 December 2008.” The “non lapsing caveat” document states:

⁴ Pers Comm.

⁵ Letter from Minister for Planning and Lands, Chris Burns to Bill Day, 4 May, 2006.

The caveator claims the estate or interest specified in the land described on the grounds set out and forbids the registration of any dealing affecting that estate or interest to the extent of the prohibition as specified during the period in which the caveat remains in force.

A map accompanying the caveat document shows that Gwelo's "equitable interest in the land" applies to almost all the vacant land and mangroves on the Kulaluk lease. When it was revealed that the leaseholders were receiving payments for the caveat, the GDA lawyer, Mr Michael Chin, said: "A developer doesn't go and prepare detailed plans unless they can get some commitment from the landowners" (*NT News* April 6, 2009). What those commitments are is a well-kept secret. Their legality has never been tested.

The Halikos Stockpile

In 2006 Halikos Construction began dumping construction-site waste onto the Kulaluk lease at the end of Fitzler Drive on Dick Ward Drive. The GDA lawyer, Michael Chin, claimed the Gwalwa Daraniki Association asked for approval in 2006 and were told "there was no need to ask for permission" (Trouble with the rubble", *NT News*, April 17, 2013, p28). However, David Ritchie the then head of the Department of Lands and Planning had written three years earlier:

The stockpile of fill located at Lot 5182 Dick Ward Drive, Town of Darwin (Minmarama Estate) commenced in approximately November 2006. The placement of fill is understood to have originated through a private arrangement between the lessees (Gwalwa Daraniki) and a private construction company...

Clause 6.16 (Excavation and Fill) of the NT Planning Scheme requires the consent of the Development Consent Authority (DCA) for the stockpiling of fill and the Department has sought legal advice in relation to whether existing use rights apply to the stockpiling that occurred prior to February 2007. This advice has now confirmed that the stockpiling is not protected by existing use rights and the Department and DCA are actively seeking to have this use ceased and the site rehabilitated...

The DCA has recently issued a 'Notice to Cease' under the Planning Act for the stockpiling of fill and has requested that the owners provide a written response outlining a timetable for remediation...

The Department wrote to the lessee in November 2009 in relation to the placement of construction debris on the site. At the time the lessee provided an undertaking to remove the recent deposits of building rubble within 3 months. The Department will be following up the progress of the owner in complying with this request.

According to a report ("No one claiming big heap of rubble", *NT News*, April 21, p.7), "The rubble has come from development sites around Darwin through a deal brokered by estate agent Ernie Chin with the land's leaseholder, the Gwalwa Daraniki Association." The terms of this arrangement have never been made public. Photographic evidence showed dumping of surplus concrete pours and use of rock crushing and sorting equipment on the site of what had become a virtual working quarry. A test

sample also found asbestos amongst the rubble (see “Asbestos at Darwin Dump”, *NT News*, March 6, 2014, p7).

In an attempt to divert responsibility, a Department spokesperson claimed in that the majority of the fill was placed on site before the start of the NT Planning Scheme in 2007, which meant the Development Consent Authority approval was not required (“Stench of evasion”, *NT News* April 15, 2010).

As a result of belated complaints, the Labor Minister for Natural Resources, Environment and Heritage, Karl Hampton, replied:

The stockpile is the result of a commercial arrangement between the developer and the Minmarama Park community for the stockpiling of inert waste material from residential and commercial (hotel) development sites in the Darwin CBD.⁶

Similarly, the CLP Opposition Leader in 2009 wrote: “While I would like to know precisely what will happen to the dump in the long term, I have no problem with the leaseholders exercising their right to earn revenue from their land within the terms of the lease....”⁷

However Minmarama Park tenants of the leaseholders have complained bitterly about safety and health issues associated with the earth stockpile next to their community. They cite the passage of heavy vehicles, the damage to the access roads and the dust from the dumping of building waste.

An Exception Development Permit Application was advertised by Planit for Halikos and the leaseholders in the *NT News* (April 19, 2013, p.40, Second Advertisement) with closing date for submissions as Friday, May 3, 2013. After the DCA heard submissions, Peter Chandler, Minister for Lands, Planning and Environment refused to grant the Exception Development Permit (PA2013/0170) for the dump on May 15, 2014. In his four-page decision the Minister stated in part:

I am not satisfied of this in relation to this proposal in this location as I believe that the integrity of the surrounding areas within Zone CN would be eroded during the period of any ongoing use for this purpose and as such the overall context and value of the zoning for the area in the longer term is likely to be detrimentally impacted.

I am further not satisfied of this as any decision to allow the introduction of an industrial community, in an area so proximal to sensitive vegetation communities with significant constraints, should in my view only be taken in the broader policy contest and having regard to the longer term intentions of the locality... The Reporting Body report includes 58 submissions all in opposition to the proposal indicating considerable community passion and identifying numerous and varied concerns...

⁶ Letter from Minister for Natural Resources, Environment and Heritage, Karl Hampton to Bill Day, 18 November, 2009.

⁷ Letter from Terry Mills MLA, Leader of the Opposition, to Bill Day, 4 November, 2009.

By February 2015 there had been no change to the stockpile. In reply to a query by Margaret Clinch, the Minister for Lands and Planning, David Tollner, wrote:⁸

As outlined in the previous correspondence from my Department, the applicant has been requested to develop a Fill Removal and Revegetation Management Plan (FRRMP) and is then required to carry out the required works.

On 13 November 2014, the applicant was granted an extension to the time period to provide the FRRMP as they have advised they wish to locate a receiving site prior to planning for and carrying out the required works. The extension was requested in order to avoid the adverse environmental impacts that would result for the need to move the fill twice.

It is preferable to ensure the works on site are appropriately planned and a suitable site found to accommodate the existing fill. An update from the applicant is expected during the course of 2015.

A Department statement confirms that the stockpile is “an ongoing compliance issue” which the Department is monitoring with a fill removal and revegetation management plan required to be developed.

Rezoning the Totem Road “Burials Block”

Previously, Planit made an application for a proposed Planning Scheme Amendment, PA 2008/0267 Part Lot 5182, Darwin, and Part Lot 8630, Nightcliff, to rezone another section of the Kulaluk Lease from CN (Conservation) to LI (Light Industry) on the seaward side of Dick Ward Drive opposite Totem Road. On November 3, 2010, Labor MLA and Minister for Lands, Planning and Environment Gerry McCarthy refused the application on several grounds. They were listed by the Minister as follows:

1. the Northern Territory Planning Scheme states that industrial development should not occur within a primary storm surge zone;
2. there is no demonstrated need for additional light industrial land in this locality;
3. the requirement for a 200 metre native vegetation buffer to the mangroves;
4. when developing the land there will be a negative impact on the native vegetation;
5. and there is no demonstrated benefit to the community or improved land use planning outcomes by the proposal

The application does not demonstrate any particular merit that would warrant the rezoning to Zone LI (Light industry), and on this basis I refuse to amend the NT Planning Scheme.

Following another rezoning application, on March 7th, 2014, the CLP Government Minister for Lands, Planning and Environment, Peter Chandler, approved the rezoning of part of Lot 5182, Town of Darwin and part Lot 8630, town of Nightcliff on Dick Ward Drive directly opposite the T junction with Totem Road. The rezoning was advertised in the Government Gazette on March 26, 2014.

⁸ Letter from Minister for Lands and Planning David Tollner to Margaret Clinch, Convenor, Planning Action Network, 19 March, 2015.

Explaining his decision to rezone, Chandler contradicted the earlier McCarthy decision (above) in stating:

Specifically, this rezoning is deemed suitable because:

- the proposal SD44 will facilitate a zone that incorporates important measures to ensure that development on the land occurs in a manner that is consistent with Zone LI (Light Industry), however aims to address important development issues such as aircraft noise, public safety and Storm Surge; and
- the proposal is seen to contribute to a built environment supporting the economic development of the Territory promoting commercial, primary production and industrial diversity servicing community needs and export potential.

The above decision was signed by the Minister on the same day that opponents of the Jape light industry subdivision of land between Fitzer Drive and Totem Road were making oral submissions to the Development Consent Authority at the Novotel Antrium Hotel on The Esplanade.

Submissions against the Totem Road rezoning had been made to the Senior Planner, Strategic Lands Planning, Department of Planning and Infrastructure on 21 June, 2013, repeating the many submissions that had convinced Gerry McCarthy to reject the application by Planit. It was the second time that the Totem Road application to rezone had been advertised in 2013. On this occasion, the new Minister discounted the objections, including a submission by the traditional owners represented by the Larrakia Nation Aboriginal Corporation.

In a surprising and shocking move by developer, Dragon Lady Pty Ltd, with local estate agent Ernie Chin and his wife as directors, clearing of the land began on May 1st, less than two months after the rezoning to light industry was approved. Despite protests by Larrakia and supporters, the entire block was stripped of vegetation, leaving only piles of woodchips and mulch. One woman was arrested and traditional owners were warned by police not to trespass on the land. News reports stated that the clearing was permissible under the Planning Act (See Youtube videos “Larrakia Land Desecrated, NITV News, May 2014”; “Protest at the Destruction of an Aboriginal Site in Darwin” [Parts One to Four]).

Peter Chandler explained: “As zoning of the land was changed from CN (Conservation) to Specific Uses Darwin (SD44), clause 10.2 (Clearing of native vegetation) of the Planning Act no longer applies.”⁹

In December, 2014, a “Notice of Determination (Section 53A of the Planning Act) notified Planit Consulting that the DCA had granted consent to “use and develop [Lot 5182 (213) Dick Ward Drive,

⁹ Letter from NT Minister for Lands, Planning and Environment, Peter Chandler, to William Day, 17 June, 2014.

Town of Darwin & Lot 8630 (95) Town of Nightcliff] for filling of land (SD44) for future development subject to the conditions specified below.” The notice ends, “If within fourteen days of this notice, no appeal is lodged with the registrar, Appeals Tribunal, a Development Permit will be issued in accordance with the conditions shown on the attached schedule.”¹⁰

On Friday 13 February 2015, PA2015/0112, consideration of the application for a subdivision to create three lots over Lot 5182 Town of Darwin and Lot 8630 Town of Nightcliff was once again formally deferred to allow the applicant to provide further information to allow proper consideration of the application. The hearing on 20 March 2015 was loudly disrupted by Larrakia Nation members offended by the application to dump fill on an Aboriginal site. Chairman Denis Burke was asked to step down due to a perceived conflict of interest, being a former CLP Chief Minister and lobbyist for Halikos Construction. Submitters questioned why the site remains as parts of two larger Lots, 5182 and 8630, rather than amalgamation into one lot for the proposed development. There were questions about drainage and the confusing boundaries shown on various maps, with a sacred tree being shown both inside and outside the block. Maps were labelled “Gwalwa Daraniki Association Pty Ltd”, who were also named as “the adjoining land owners”. A signed statement by Helen Secretary as “Director” gave permission for storm water from the subdivision to be released into the Kulaluk Lease Area.¹¹

The “Statement by Adjoining Land Owners” is here quoted in full:

This letter is in relation to the subdivision of Specific Use Zone SD44 (Part Lot 5182 (213), Dick Ward Drive, Town of Darwin, and part Lot 8630 (95) Dick Ward Drive, Town of Nightcliff. We, the Gwalwa Daraniki Association understand that an Application for the subdivision of the land was lodged to subdivide the land into 3 allotments in accordance with plan Ref 4073-12 dated 14/02/2015 from AUSURV Pty Ltd.

We also understand that, as a result of this application, stormwater from the Specific Use Zone (SD44) subdivided land will be discharged onto the adjoining Lots which are in our ownership. This letter is to confirm that we, the Gwalwa Daraniki Association, as legal owners of the adjoining land have no objection to stormwater being discharged onto land at Part 5182 (213) Dick ward [sic] Drive, Town of Darwin and Part Lot 8630 (95) Dick Ward Drive, Town of Nightcliff.¹²

As a result of defects in the application revealed at the DCA public hearing, a decision was deferred by the DCA. Amongst the additional information required was:

¹⁰ Letter from Hanna Stevenson, Delegate for the Development Consent Authority to Planit Consulting Pty Ltd, 15 December 2014

¹¹ Planit Consulting, Appendix E – Statement from Adjoining Land Owners: Letter from Helen Secretary (Director [sic]), Gwalwa Daraniki Association to Ms Sally Cunningham, Department of Lands and Planning, 16 February 2015.

¹² As above.

[Amended Plans] that better address the purpose of Zone CN (Conservation) and demonstrate that the subdivision (including storm water drainage) will not result in additional adverse impacts on adjacent land;

Confirmation of the location of the sacred site recorded within the proposed lot. All plans provided with the application are to be amended to accurately show this location including but not limited to filling plans, stormwater plans and hydrological assessment plans.¹³

Further information was provided by the applicant to address the matters for deferral and the application was scheduled for reconsideration at yet another public hearing before the DCA on Friday, 22 May, 2015, at 11am in the Novotel Atrium, The Esplanade, Darwin.

Kulaluk and the Heritage Council

Donna Jackson of Larrakia Nation Aboriginal Corporation, working with David Morris of Environment Defenders Office NT (EDONT) lodged an application to register the whole Kulaluk lease as a heritage site following a June 6, 2014, application by Chin and Polet to dump tones of fill on the cleared land. The Development Assessment Services (DAS) described the resultant actions:

On 24 June, 2014, DAS received correspondence from Heritage Branch of Department of Lands, Planning and Environment (DLPE) that recommended the application be deferred until further investigations were carried out in relation to possible human burials within the subject land. DAS determined to defer consideration of the application... On October 2, 2014, DAS received advice from the Heritage Branch that the archaeological investigation had been completed and there was no evidence of human remains or burials.

The application to dump fill on the Totem Road site was then advertised to be heard on 21 November 2014.

After supervising the digging of a series of eleven trenches up to 20 metres long and 1.2 metres wide, the archaeologist had reported in September 2014:¹⁴

Whilst the potential for Aboriginal burials cannot be ruled out entirely, there is sufficient evidence to demonstrate that the chance of burials being located within the Study Area is extremely low. The potential use of Ground Penetrating Radar (GPR) was considered as a future investigative strategy. However, the excavations demonstrate that compositing of subsurface soils means GPR is unlikely to be successful. In particular, the undulating, shallow bedrock, with large numbers of ironstone cobbles dispersed through the upper stratigraphy, means accurate identification of burials would be highly unlikely.

¹³ Letter from Denis Burke, Chairman of DCA to Planit Consulting, 7 April 2015.

¹⁴ *Archaeological Excavation Report: Part Lot 5182 and Lot 8630 Dick Ward Drive, Nightcliff*, by Robins, T., R. Robins and J. Towers (2014), an unpublished report prepared for Planit Consulting by Everick Heritage Consultants Pty Ltd. 47 Arthur Terrace, Red Hill, Queensland 4059.

Dr Brian Reid, chairperson of the Heritage Council advised Donna Jackson on 21 October 2014 that her nomination of the Kulaluk lease had been unsuccessful. Larrakia Nation through EDONT then appealed the decision of the Heritage Council, which had apparently been based on the archaeological report, despite the report being prepared after extensive consultation by a Heritage Council researcher.

The successful appeal by EDONT and Larrakia Nation was the first ever appeal under the Heritage Act and the last to the Lands, Planning and Mining Tribunal before the Northern Territory Civil and Administrative Tribunal (NTCAT) took over jurisdiction from 1 January 2015. In his decision, Chairman Greg Cavanagh SM cited the report's view that the history of the Kulaluk land was a significant event; that the lease contains sites of significance; that the land holds strong significance to "the Larrakia people and other local Aboriginal inhabitants of the area" and that the strength of attachment is proven by the number of different traditional owners or custodians who claim to speak for the land in question.¹⁵

Mr Cavanagh decided:

Unfortunately, the material submitted, both in the original application and to this Tribunal, does not appear to have been subjected to rigorous and objective historical analysis. In my view, such an analysis needs to be done before a decision is made on the heritage significance. Accordingly, pursuant to section 21F(1)(c) of the Act:

I set aside the reviewable decision and refer the matter back to the Heritage Council for reconsideration.

I direct that the Council commission and obtain an objective and thorough historical analysis of all the relevant material pertaining to sections 11(a), (g) and (h) criteria of the Act before reconsideration.

Following the Cavanagh decision, a Heritage Officer from the Department of Lands, Planning and Environment was appointed to assess the Kulaluk lease nomination. Legal advice is that the fact that the site has been nominated to be heritage listed does not, in itself, protect the site. Provisional protection comes into play once the Heritage Council has considered an assessment report and decided that the place is significant, and that comment ought to be sought about heritage listing the site.

On 8 September, 2015, appellants were advised that on 21 August the Heritage Council had reaffirmed their decision not to register the lease under the Heritage Act after considering a report from consulting anthropologist, Dr David Ritchie. However, the Council stated that "the Kulaluk

¹⁵Greg Cavanagh SM, Chairperson, "Decision of the Lands, Planning and Mining Tribunal at Darwin in the Northern Territory of Australia between Larrakia Nation (appellant) and Heritage Council NT (respondent). 30-12-2014.

Lease Area symbolises the first land grant made to the Larrakia people in acknowledgment of their longstanding traditional ownership and occupation of land and seas in the Darwin area.” And “this grant was the first land title granted to an Aboriginal group in an urban environment in Australia.”

Rezoning Lot 5182 - Fitzer Drive to Totem Road

Back in 2011, Labor Minister for Lands, Planning and Environment, Gerry McCarthy, took a different view to an application to rezone two areas of the Kulaluk Lease of approximately 20 hectares between Fitzer Drive and Totem Road, in the airport flightpath, previously vetoed for development because of its vicinity to the western end of the airport runway (“Air Chiefs Feel Park Could be Dangerous”, NT News, December 5, 1993). On June 3, 2011, McCarthy approved the rezoning of this area from RD (Restricted Development) to SD37 (Specific Use Zone Darwin No. 37), in particular proposed Commercial and Light Industry uses. Aborigines protested at this decision, claiming the areas contained a men’s site and burials (ABC TV News NT, September 6, 2011; Also see Youtube videos “Kulaluk not for sale!” and Fitzer Drive Community Meeting 2012).

At a fiery hearing before the DCA on March 7, 2014, Mr Chris Cheung of Planit Consulting read a letter from Mark Motlop of the Larrakia Development Corporation supporting the Citiland/Jape application to create 6 Lots; however, the application was refused.¹⁶ A major reason for this was defects in the Masterplan, which was a central part of the subdivision application.

Contrary to the approval of the Totem Road application, after the March 7th hearing, the DCA rejected the application by Jape to subdivide land behind McDonalds and on the corner of Totem Road and Dick Ward Drive previously rezoned for light industry by Minister Gerry McCarthy in 2011, as described above. In both of the above cases the land in question is part of the Kulaluk lease.

The “Notice of Refusal” dated 21 March, 2014, stated, “The Development Consent Authority has determined under section 53(c) to refuse to consent to the proposed development of the land for the purpose of subdivision to create 6 lots” and listed two reasons, including: “The proposed application is inconsistent with clause 10 of Zone SD37 (specific Use No.37), which is given in Schedule 1 of the NT Planning Scheme...”¹⁷

However, by Friday, 26 September, 2014, a pink sign on Fitzer Drive and Dick Ward Drive again advertised a call for public submissions on an application to subdivide two areas on Lot 5182 for light industrial use, despite the similar subdivision application, zoned SD37 Zone being refused by the Development Consent Authority on 7 March. According to Margaret Clinch of PLAN, after the

¹⁶ Notice of refusal of subdivision to create 6 Lots, PA 2013/0919

¹⁷ Notice of Refusal, Linda Henning, Delegate, Development Consent Authority, 21 March, 2014.

refusal the Department of Lands, Planning and the Environment had done its own processing of the Masterplan, followed by a closed session meeting of the DCA on 5 September, 2014, to endorse the Masterplan separately, without any public submissions, and without the public being present at the hearing to comment on the aspects of the Masterplan.¹⁸

Both applications were supported by a single page signed by Helen Secretary, president of the GDA, giving approval to Planit Consulting “to act on our behalf” despite the well documented presence of Aboriginal burials throughout the lease. However the Aboriginal Areas Protection Authority role had been severely restrained by the NT Government's amendments to NT Heritage Act in October 2012, making the Department of Lands, Planning and Environment the agency responsible for the protection of historical burial areas in the Northern Territory. Also on the advice of Helen Secretary, areas considered to be of cultural significance by Larrakia custodians had been removed from AAPA authority certificate C2012/127.¹⁹ However, an appendix notes “List of known burial places within the subject land: 1. 5073-8 is a burial area behind the Old Retta Dixon Home to an area beyond Totem Road & Dick Ward Drive e 701278 N 8628161 (UTM GDA94).”²⁰

On December 4, 2014, Denis Burke signed Development Permit DP14/0831 for Lot 5182 to allow Jape “To use and develop the land for the purpose of subdivision to create 6 lots, in accordance with the attached schedule of conditions and the endorsed plans” with the proviso that “Subject to the provisions of sections 58, 59 and 59A of the Planning Act, this permit will lapse two years from the date of issue.” Of concern to Aboriginal people and others is Condition 8: “Prior to the endorsement of plans and prior to the commencement of subdivision works (including site preparation), plans showing that all of the land within Areas A and B of SD37 will be filled to be above the Primary Surge Area (PSSA) shall be provided to the authority for endorsement...”²¹ Ironically, dumping of tonnes of fill is assessed by the Heritage Branch to be not disturbing burials, unless skeletal remains are exposed.

Despite the Development Permit as above, the Minister for Lands and Planning wrote on 7 May, 2015: “While no long term decision has been made regarding future development of Lot 5182, any development would need to be designed to address storm surge effects and ensure that flooding is not an issue.”²² Tollner added: “My predecessor also took steps to ensure the appropriate use of Lot 5182

¹⁸ Pers Comm. See Minutes of meeting of Darwin Division of the Development Consent Authority held on Friday 5 September 2014.

Notice of refusal of subdivision to create 6 Lots, PA 2013/0919

¹⁹ Letter from Ben Scambary, CEO, AAPA to Citiland Pty Ltd and Planit Consulting, Issue of Authority Certificate For variation to C2012/127 – Part Lot 5182 Town of Darwin, 26 September 2014.

²⁰ As above.

²¹ Denis Burke, Delegate, Development Consent Authority, Notice of Consent (Section 53B of the Planning Act) Lot 5182 (213) Dick Ward Drive, Town of Darwin, 4 December 2014.

²² Letter from Minister for Lands and Planning, David Tollner to Ann-Maree Grant, 7 May, 2015.

by refusing to consent to a recent application for the **unlawful stockpile** of fill located at the end of Fitzner Drive and required that the stockpile be removed” (my emphasis).²³

Tollner’s letter continued:²⁴

In relation to the broader issues that you raise, Clause 6.14 (Land Subject to Flooding and Storm Surge) of the Northern Territory Planning Scheme limits the types of land uses that may be developed in surge affected areas. As part of any development of surge affected land the purpose of the clause must be taken into account, which is to reduce risk to people, damage to property and costs to the general public.²⁵

Nothing more happened until PA2014/0904 – An application to the Minister for Lands and Planning to amend Zone SD37, to increase the number of uses permissible within the zone. This application is currently on exhibition for a period of four weeks, concluding 22 May 2015, and is the subject of this submission to the Development Consent Authority.

According to the Department of Lands and Planning, other applications which have received planning approval for the Kulaluk Lease, but for which construction has not commenced, include:

- PA2014/0745 – Subdivision to create 6 lots (superlot subdivision of Zone SD37). Development Permit DP14/0831 was issued 4 December 2014 with 8 conditions precedent prior to construction commencing.
- PA2014/0410 – Filling of land for future development (SD44). Development Permit DP15/0078 issued 12 December 2015 with 2 conditions precedent prior to construction commencing.

On 18 September 2015, Chief Minister of the Northern Territory, Adam Giles, and David Tollner Minister for Lands and Planning, announced that a Memorandum of Understanding between the Territory Government to work and the GDA :to develop an economic master plan for 3sq km of Crown land between Ludmilla Creek and Nightcliff.”

The media release stated that “Parcels within the lease which can be developed for commercial purposes and support local job creation will then converted to freehold and held by the GDA for the benefit of its members ... plans have already been approved to develop a retail precinct and medical centre on land between Dick Ward Drive and Bagot Road.” Lands and Planning Minister David Tollner said he hoped other communities would follow the lead set by the GDA.

²³ Letter from Minister for Lands and Planning, David Tollner to Ann-Maree Grant, 7 May, 2015.

²⁴ As above.

²⁵ Minister for Business Peter Styles announced the first meeting of the Darwin Flood Mitigation Advisory Committee in a media release dated 24 February 2015. \$25million has been allocated towards flood mitigation in Rapid Creek and the Darwin Rural Area.

On 24 September another media release announced a token gesture towards conservation by digging up endangered cycad palms on the development area and transplanting them as landscaping around Jape's proposed development. The media release stated: "Developer Citiland has awarded GDA a contract to identify, relocate and maintain all the cycads on the site. Citiland Managing Director Alan Jape says this contract is the first of many to be awarded to the organisation, 'GDA will maintain the cycads until we begin our landscaping and the cycads will be reinstated and form a feature of our landscaping plan ... We have developed a very good working relationship with the Board of the GDA over many years, and it is very pleasing to be able to begin the development process,'" Mr Jape said.

Larrakia people are now considering their options to halt the sell-off of land won by their ancestors in the land rights struggle.

Dr William B Day

Consulting Anthropologist

Darwin

20 May 2014