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**ITEM 1**  
**OWNERSHIP OF REVETMENT WALLS**  
**WF62/38 (P2)**

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**CITY GOVERNANCE**

**This matter was considered at Coordination Committee on 22 October 2007:**

*PROCEDURAL MOTION CD07.1022.004  
moved Cr Molhoek seconded Cr Sarroff*

*That the matter lay on the table, and that interested Councillors meet with the City Solicitor to discuss the matter further prior to next Council meeting.*

*CARRIED*

**1 BASIS FOR CONFIDENTIALITY**

Not applicable.

**2 EXECUTIVE SUMMARY**

The Gold Coast has many hundreds of kilometres of waterfront properties comprising frontage to lakes, canals, rivers and creeks and to the Broadwater and southern Moreton Bay.

Much of this water frontage has erected on or near the land water-interface structures known as “revetments” which are structures designed to maintain the slope and/or prevent the embankment from erosion and/or to hold back tidal water. They also often serve the dual purpose of retaining or holding back land benefiting the waterfront landowner.

Any artificial structure including a revetment has an “engineered designed” lifespan and needs to be maintained on a regular basis to prevent structural deterioration and failure.

Many of the revetment walls throughout the Gold Coast area have now reached the limit of their engineered designed lifespan and, as more and more revetments do so with increasing damage or failure, there is a need for certainty in relation to whose responsibility it is to repair and maintain these walls and for a clear and precise policy to be adopted regarding such repair and maintenance.

There is still public confusion about the responsibility to maintain and repair such walls and whether or not the Council is liable to individual property owners in the event of the failure of such a wall. There have been a number of claims brought against the Council claiming compensation. Such claims often follow extreme storm conditions when damage or failure is accelerated due to increased water flows.

An added area of concern is that property owners are building structures such as swimming pools and decks closely adjacent to, on top of, or even outside revetments.

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### **3 PURPOSE OF REPORT**

The purpose of this report is to provide an assessment of the present legal situation regarding who is responsible for the maintenance and repair of revetment walls in tidal waters, whether this be the State, Council or Private landowners, and what action Council needs to consider. In essence this report is intended to determine the legal position concerning ownership and responsibility for revetment walls.

The issues arising in relation to revetment walls adjacent to artificial waterways or “non tidal lakes” are to be the subject of another report

### **4 PREVIOUS RESOLUTIONS**

Not applicable.

### **5 DISCUSSION**

#### History of Canal Development on the Gold Coast

The first canals were developed off the Nerang River in the 1950's. As a result of their popularity and success, development spread throughout the river and estuarine areas within the City. In 1958, the Canals Act 1958 was passed to regulate development and to determine responsibility for maintenance of canals.

Varying soil conditions and a range of design responses have meant that there are several types of revetment walls and these are set out in a Summary contained in Attachment “A”. The Summary also outlines various design issues and the reasons for revetment wall failures.

#### The Present

Within the City there are now:

- in excess of 675 kilometres of waterfront properties
- in excess of 220 kilometres comprised of lake or canal front
- in excess of 190 kilometres comprised of Broadwater and Southern Moreton Bay frontage
- in excess of 206 kilometres of river and creek frontage
- in excess of 400 kilometres of revetment walls

#### Type and Nature of Waterways

There are various types of waterways, and most are defined under acts of parliament as follows:

“**Canal**” is defined under the Coastal Protection Management Act 1995 (the “CPMA act”) as an artificial waterway connected or intended to be connected to tidal water.

“**Artificial Waterway**” is in turn defined to mean an artificial channel, lake or other body of water and includes an access channel, and an artificial channel formed because of land reclamation from tidal water which is intended to allow boating access to allotments on subdivided land.

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“**Access Channel**” means an artificial channel constructed in tidal water connected or intended to be connected to a canal.

“**Tidal Water**” means the sea and any part of a watercourse ordinarily within the ebb and flow of the tide at spring tides. (Spring tides are the highest tides predicted for any given area)

“**Rivers, Lakes and Streams**” are referred to in the Water Act 2000 and are all included in the definition of “watercourse”. These watercourses may be tidal, or non tidal.

Who owns waterways?

All land below the High Water mark vests in the State, including the beds and banks of tidal navigable rivers. (Section 9 of the Land Act 1994).

All land defined in a Subdivision as a Canal must be surrendered to the State as a condition of Registration of the plan pursuant to Section 116 of the CPMA act. The canal area thus becomes owned by the State.

“Inundated Land”, which is land that has become inundated by tidal water subject to tidal influence as a result of excavation, remains freehold title by virtue of Section 12 of the Land Act 1994.

In essence, land below and up to the High Water mark of any canal, river, lake or stream with the exception of “inundated land” belongs to the State.

Land above the high water mark where the bed or banks of a watercourse or lake form part of the boundary of land are also property of the State. (Section 21 of the Water Act 2000)

In summary, all land under tidal water is the property of the State (except “Inundated Land” as defined) and the bed and banks of any watercourse forming the boundary of land above the high water mark is the property of the State.

Who has responsibility for Maintenance of Canals

The responsibility for maintenance of canals has been passed by the State to Local Government by virtue of Section 121 of the CPMA Act. This has been the legal position for a number of years and was previously imposed under the Canals Act 1958.

The council “must maintain and keep clean” each canal (and each access channel for each canal) under the CPMA Act (Section 121). The statutory obligation to maintain extends to structures that form part of the canal.

Council, in response to this obligation under the CPMA Act, carries out a dredging and maintenance program in respect of canals on a three yearly cycle and carries out other necessary works on an “as required basis” such as realignment and flow control dredging.

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Canals constructed under the *Integrated Resort Development* Act 1987 and under the *Sanctuary Cove Resort* Act 1985 are excluded under Section 121 (2) and thus are not liable to be maintained by the Council or the State. There have been a number of reports, codes and procedures delivered or canvassed over the years, but these have not been subject to legal review or adoption. In some cases these reports or discussions have not represented an accurate summary of the legal position (in particular reference is made to the report of David Ogilvie dated 22.12.05). It does however validate the fact that concerns have been around for a number of years regarding revetment walls.

Some of these are identified as follows:

Part 7, Codes, Division 3 Constraint Code Chapter 3 - Canals and Waterways	This sets Performance Criteria for: <ul style="list-style-type: none"> <li>• covers minimum setbacks,</li> <li>• eave overhang,</li> <li>• cantilevered balconies,</li> <li>• pool decks,</li> <li>• ancillary structures (boat ramps jetties etc),</li> <li>• siting of stormwater outlets</li> </ul>
Part 7, Codes, Division 3 Constraint Code Chapter 9 – Natural Wetland areas and Natural Waterways	This sets requirements for: <ul style="list-style-type: none"> <li>• Ecological assessments</li> <li>• No development in Ecologically significant areas</li> <li>• Setbacks</li> <li>• Rehabilitation</li> <li>• Water quality and stormwater discharges</li> <li>• Effluent disposal</li> <li>• Buffers</li> <li>• Ecological corridors</li> <li>• Management</li> <li>• Use by vehicles/pedestrians</li> </ul>
22.12.2005 Statement on Stability of Revetment Walls – David Ogilvie.	This sets out the findings in relation to failure of revetment walls between 25 and 35 years old. NB This document states in its conclusion “the council’s obligation to maintain the “As Constructed Profile” within the canal system and the interests of the property owner to maintain the integrity of their revetment wall <b>creates a mutual interest and a shared responsibility</b> ” There are also recommendations set out as follows: <ul style="list-style-type: none"> <li>• Establish a program of revetment wall inspections similar to or in conjunction with canal audit</li> <li>• Apply assessment criteria to each property</li> <li>• Database recording</li> <li>• Introduce a maintenance program</li> <li>• Create Q &amp; A sheet</li> </ul>
Foreshore structures policy 1-4-4	Sets out policy on foreshore structures including revetment walls, in particular: <ul style="list-style-type: none"> <li>• Revetment walls must be located along within [sic] the property boundary (part D, item 1)</li> <li>• Maintenance of walls is the responsibility of the owner (part D, item 3)</li> <li>• Provision of a setback area of at least 1m to allow for maintenance (part D, item 3)</li> <li>• Any structures to not increase loading on wall (part D, item 4)</li> <li>• Prohibited construction beyond the wall (part D, item 5)</li> <li>• Pontoons/jetties must be structurally independent of revetment walls (part C, item 1 and part B, item 1)</li> </ul>



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There are other procedural requirements set out under “Beaches and Waterways Procedures” including:

- Waterways dredging (4.3.2.1)
- Waterways cleaning (4.3.2.2.)
- Canal Rocking (4.3.2.3)
- Foreshore protection Public Land (4.3.2.4)
- Waterfront Assistance scheme (4.1.2.3.1)
- Waterfront Search (4.4.1.1)

There are also Local Laws affecting structures in coastal waters and indirectly revetment walls as follows:

- Local Law No 34 - “Jetties, Wharfs and Public Boat Ramps”
- Subordinate Local Law No. 7.1 “Jetties and Boat Ramps (2006)”

Both of these local laws cover use, permits, development approvals and general matters relating to their subject matter.

Finally in the Land Development Guidelines, Section 3.6 – “Waterfront Development” contains general design principles regarding revetment walls.

It is suggested that the above identified policies and documents need to be reviewed by Legal Services in light of this report.

It is noted that, in the more recent past, there have been issues in relation to private boat ramps and other structures in or adjacent to canals falling into disrepair and/or allegedly being damaged by dredging works and the question has been raised as to Council’s liability to repair or maintain or make good. Private structures in or adjacent to canals is a related issue also to be addressed in this review.

Who is responsible for maintenance of revetments?

Under ordinary principles of law it is the owner of the land upon which any structure rests who is responsible for its maintenance.

Thus if a revetment is within the title boundary of freehold land, it is the Registered Proprietor who is responsible for its maintenance.

Where a revetment is within the boundary of a canal, such revetment forms (and is) part of the canal within the meaning of that term used in Section 121 of the CPMA Act. Council has a responsibility to maintain canals pursuant to Section 121 CPMA Act as already noted, that responsibility extends to revetment walls within the canal boundary.

Section 124 of the CPMA Act modifies the ordinary principles of law so that a person, who is the owner of land above the high water mark where the land is connected to, or receives a benefit from a structure that is “tidal works”, also has a duty to maintain such structure in a safe condition.

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“tidal works” is defined in the CPMA Act as works in, on or above land under tidal water, and includes the construction of breakwaters, embankments, and training walls (amongst others) and any works associated with the construction.

Land adjoining a canal has been held to enjoy the benefit from that proximity both by accretion to its value and also to its amenity (*Australand Land and Housing No. 5 (Hope Island) Pty Ltd v. Gold Coast City Council* [2006] QSC 332 at paragraphs 69 and 70 per Chesterman J.

In essence then, **the owner of land adjoining any canal which receives the benefit of any revetment not on the land also has a responsibility to maintain it** in a safe condition under Section 124 of the CPMA Act.

The responsibility of adjoining land owners to maintain revetments not on their land but which benefit their land co-exists with Council’s responsibility under Section 121 of the CPMA Act.

Where a revetment is partly within the canal boundary and partly within the adjoining freehold land, as to that part within the canal, the council and the adjoining land owner each have responsibility to maintain it and, as to that part within the freehold land boundary, the freehold owner has the responsibility to maintain it.

The responsibility of landowners to maintain imposed by s.124 of the CPMA extends to the revetment wall both above and below the high watermark and whether the revetment, including its foundations, is partly or wholly inside or outside the canal boundary.

Section 124(1)(a) applies to “structures for which a development permit is or was required for operational work that is tidal works” under the *Integrated Planning Act* 1997 (“IPA Act”).

Prior to the *IPA Act* 1997, the *Canals Act 1954* applied, and by virtue of Section 176 of the CPMA Act, all approvals under the *Canals Act* were deemed to be approvals under the *IPA Act* 1997. The better view is that the obligations imposed under Section 124 of the CPMA Act are intended to extend to any structures previously approved under the *Canals Act* 1954.

Section 124(2)(b) of the CPMA Act defines the responsibility to maintain revetments not covered under sub-section 124(2)(a)

Section 124(2)(b) covers the situation where a revetment is not connected to freehold land or where freehold land does not benefit from the revetment.

Examples of such revetments are those in a reserve or park adjoining a canal, or where the revetment is in an area defined under Section 9(3) of the CPMA Act, broadly speaking being facilities used commercially or by members of a club or association for boating and associated activities or associated boating recreation purposes.

Section 124(2)(b) imposes the responsibility on anyone else (that is anyone else not covered by subsection 124(2)(a)) who is responsible under any law, or contract or agreement, or is responsible for any wrong arising out of failure to ensure that they are safe.

Generally this is Council in relation to land controlled by Council, but it is not the Council in all cases, such as in the case of a private marina, commercial facility, body corporate or club

operated facility where it is the private owners or the club or the body corporate who have the duty to maintain and keep safe.

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In the case of a seabed lease between the State and the lessee, the maintenance of structures in or on the leased property is a matter between the Lessee and Lessor governed by the lease, and not any concern or responsibility of the Council.

Note that the CPMA Act applies to:

- Tidal works in
- Tidal water being
- Works requiring a development approval.

Not all revetment walls within the City are situated in tidal water and therefore not all revetment walls within the City are covered by the CPMA Act.

For revetment walls not covered by the CPMA Act, general principles apply such that the owner of the land on which the revetment wall exists is responsible for its maintenance in the absence of any other statutory or development approval conditions. The owner for that purpose is the title holder of the land where the revetment is situated.

As regards jetties, boat ramps and other like structures, these are clearly within the definition of “tidal works” and fall under the same requirements as revetment walls such that the owner of the land benefited by the structure (in the absence of any ongoing maintenance requirements as part of the relevant approval process) has the responsibility to maintain the structure in a safe condition.

As to alleged damage caused by any dredging operations, this is a separate issue properly addressed on a case by case basis. Council’s position is that it is the responsibility of the owner to design and maintain the structure so that it can withstand the expected stresses of local boating traffic, weather and water flows including any stress caused by periodic dredging.

It is clear that any structure in the marine environment has a designed life span and that no structure will last indefinitely. Therefore failures over time are to be expected as assets of this nature reach the end of their working or designed life.

Alleged liability on the part of the Council with respect to such other structures should be scrutinised with the utmost scepticism given the nature of the structures and having regard to their age and situation and the permits together with any ongoing conditions as to maintenance under which they were originally constructed.

How does the Council enforce the responsibility to maintain?

The responsibility to maintain revetments which fall under the definition of tidal works as seen above may be enforced by the issue of a **“tidal works notice”** under Section 60 CPMA Act. This notice effectively:

- Applies where revetments need repair, or are abandoned or should be removed
- Is served on the freehold owner or other responsible person (under Section 64) such as a commercial boating facility or club.
- Requires repair to the satisfaction of the chief executive
- Or requires removal
- Allows an avenue of appeal
- Provides for a penalty for non-compliance

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However, Council does not have power to issue tidal works notices.

Such power to issue notices vests in the Chief Executive of the responsible department and, pursuant to the CPMA Act, that is the Environment Protection Authority (the EPA).

Whilst Section 165 of the CPMA Act allows the EPA to delegate its powers in this regard to Council, to date no such delegation has been made.

The current position is thus that:

- Council has no power to issue “tidal works notices” under the CPMA Act, and
- Council has no power under the CPMA Act to enforce obligations or responsibilities under the CPMA Act including the responsibility of landowners to maintain revetments in a safe condition under Section 124 of the CPMA Act.

Other possible control options

The council has general Local Law making powers pursuant to Section 26 of the Local Government Act 1993.

Section 934 of the Local Government Act 1993 contains specific reference to local laws relating to canals, including under 934(b), laws relating to any structure in the canal including obligations about maintaining it in a safe condition.

A Local Law clearly defining and setting out the responsibility of landowners to maintain revetment walls is required. This Local Law should specify that the responsibility of landowners to maintain revetment walls applies where the revetment is within the private land boundary or wholly or partly outside the private land boundary but benefiting the land.

It should be noted however that, even if such a Local Law is passed, Council nevertheless has an ongoing statutory liability to maintain and keep clean canals pursuant to Section 121 CPMA Act. The passing of a Local Law cannot absolve Council of its statutory liabilities in this regard.

Under the development approval process, Council may also address concerns about revetment walls in developments by the imposition of conditions under Section 3.3.30 of the IPA Act 1997. This could apply to both new canal developments and to any application in an existing canal development whereby a permit be required to upgrade and maintain the revetments in consequence of the application being granted.

Council as the “assessing authority” in relation to structures that are “tidal works” under the CPMA Act has power under the planning scheme in relation to any development application to impose conditions in relation to the design, construction and maintenance of such structures and can enforce such conditions through the enforcement notice procedure under the IPA Act.

Council also has the ability to issue enforcement notices under Section 248 of the Building Act 1975 where repairs are required. Enforcement orders may be sought in the usual manner and, by virtue of Section 252 of the Building Act and Section 1066 of the LGA Act, Council may enter on the land and complete the works. The costs of such works is a debt

recoverable as a rate imposition and is a charge on the land pursuant to Sections 1066, 1067 and 1068 of the LGA Act.

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In summary, in relation to other controls:

1. Council has the ability to pass a Local Law requiring land owners to bear the responsibility to maintain revetment walls
2. Council has control powers pursuant to the development approval process and under the Building Act and IPA Act regarding the design, construction and maintenance of revetment walls and enforcement powers under both Acts,
3. regarding jetties ramps and other structures within canals, Council has powers under the IPA Act and the Building Act to enforce the owner's responsibility to maintain and remedy defects and to require the removal of non-compliant structures.

**How does the responsibility to “maintain and keep” canals clean and the responsibility to maintain revetments work together in practice?**

The responsibility of the Council under Section 121 to keep canals clean and the responsibilities under Section 124 on the adjoining freehold land owner to maintain revetments in a safe condition are separate responsibilities attaching to different legal entities.

Section 121 of the CPMA Act imposes a responsibility on Local Government to maintain and keep clean each canal in its area and any access channel attached to such canals.

This responsibility is, in part, discharged by the council's dredging program, including the three year maintenance dredging program.

Section 121 of the CPMA Act also, as previously noted, imposes a responsibility on Council to maintain revetments that are within the canal boundary.

Section 124 of the CPMA Act imposes an obligation on individual land owners adjoining and benefited by revetments to keep such revetments safe.

Where a revetment is within a land owner's title boundary, the land owner is solely responsible to maintain the wall.

There is a need for a clear policy statement setting out who is responsible for which part of the canal and a public education program may be desirable in conjunction with the introduction of the proposed Local Law.

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The position in relation to revetment walls and canals can be properly summarised as follows:

- (i) revetment walls located within the boundaries of privately owned lots are the responsibility of the registered proprietor to maintain;
- (ii) revetment walls which fall within the boundaries of canals under the CPMA Act are subject to two distinct ongoing obligations:
  - a. Council is obliged to maintain such walls by virtue of Section 121 of the CPMA Act; and;
  - b. Private land owners who own land that adjoins the revetment walls and which receive a benefit from them are under an obligation pursuant to Section 124 of the CPMA Act to maintain the walls in a safe condition.

It is obvious that, in order to determine who bears responsibility for the maintenance of revetment walls, it will become necessary to determine where the wall sits relative to the boundary of the canal and the title of the adjoining private land. This may require surveys being carried out .

It should also be noted that the obligation to maintain canals under Section 121 CPMA Act is to keep the canal generally in the form or profile as approved and constructed. Issues surrounding the “as approved and constructed profile” of canals and related issues regarding flood mitigation will be the subject of a further report.

Council should have in place:

- (a) a system to identify problems with revetment walls and structures within canals; and
- (b) a system to record such problems, and any complaints; and
- (c) a procedure to ensure that any problems and complaints are dealt with by the responsible party.

It should also be noted that all revetment walls should have been constructed within the boundaries of the private land abutting any canal. This is the intent of the planning controls applicable to canal development. Whether this is true in all cases appears doubtful. There are certainly instances where there has been an encroachment into canals by structures benefiting the adjoining land. Whilst such structures are liable to be removed as an encroachment on Crown Land and a new properly aligned revetment wall constructed, this raises far reaching consequences should Council embark upon such a strict enforcement policy.

In this regard, it must be appreciated that Council has limited financial resources to address what is in reality a massive financial problem which will only increase over time. The whole issue involves over 400 km of revetment walls abutting canals. These revetment walls have been built over the past 50 years according to the approvals and engineering standards applicable at the relevant time. All such revetment walls are in various varying stages of repair and maintenance depending upon their age and, in any event, all have a limited engineering lifespan.

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However, the importance of putting into place appropriate systems and procedures as suggested can not be understated. It is vital that Council responds appropriately to its statutory duties and address its responsibilities in a planned and programmed manner to the best of its limited financial abilities.

A further related matter is the position of private land owners wishing to carry out dredging in a canal to accommodate boats with deep drafts, and the position that puts Council in should such dredging cause or contribute to the failure of, or damage to, an adjacent revetment wall.

It is assumed that any works carried out within the boundaries of a canal by any private landowner are the subject of a Development Approval pursuant to the IPA Act with the attendant engineer's design computations and confirmation.

Any work, such as the construction of a jetty or boat ramp or other structure in or adjacent to any canal, should as a matter of course be the subject of a Development Approval which, amongst other things, should set out clearly who bears the liability for any loss or damage caused as a result of the proposed works, both during and after construction. Such liability should rest with the applicant. The approval can also set out the ongoing maintenance requirements and the enforcement procedures available under the IPA Act would then be available to ensure ongoing compliance.

In respect of waterfronts other than "Canals" as defined in the CPMA Act, the general proposition is that where there is a revetment or other structure erected on the land-water interface, the owner of the land on which the structure exists (and thus the "owner" of it) is responsible for its maintenance.

There are several types of waterfronts that are not Canals. These include:

- Riverfront – both tidal and non tidal;
- Lakes – both natural and artificial;
- Non-tidal canals upstream of a loch;
- Artificial waterways that do not fall under the definition of "Canal" (for example not connected or intended to be connected to tidal water);
- Freehold land that has become inundated land not under the definition of "Canal";
- The Broadwater;
- Ocean Beaches.

This report relates to tidal waters in canals containing revetment walls.

As a general proposition, any revetment that is within the title boundary of a lot is owned by the title owner and must be maintained by the owner.

A revetment that is not within the title boundary of an individual lot will be owned by the State in accordance with Section 9 of the Land Act 1994 where the land, including the bed and banks of tidal navigable rivers, is below the high water mark. This should not be confused with those revetment walls where such walls have been, or now are, in the wrong position and have encroached into the canal area.

The foreshores of the Albert Shire were placed under the control of that Local Government by proclamation published in the Queensland Government Gazette dated 8 December 1979.

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The foreshores of the Gold Coast City Council were placed under the control of that Local Government by proclamation published in the Queensland Government Gazette dated 16 June 1984.

Regarding artificial waterways, which are very widely defined as meaning an “artificial channel, lake or other body of water” that are not “canals” as defined under the CPMA, Section 119 of the CPMA has the effect that, prior to development approval, there must be an approved plan in place for the ongoing management and maintenance of the waterway which includes its bed and banks and any structure, including revetments in, on or adjacent to it.

As a general proposition, revetment walls in artificial waterways are to be maintained in accordance with the plan approved under the development approval.

Hope Island and Sanctuary Cove

Developments under the *Integrated Resort Development Act 1987* and any canal constructed under the *Sanctuary Cove Resort Act 1985* do not fall under Section 121 of the CPMA Act and thus do not have to be maintained by Council.

Maintenance and keeping clean canals in developments under these Acts falls under the responsibility of the various bodies corporate formed as part of the developments.

Maintenance and the obligation to keep safe revetments also falls under the responsibility of the same bodies corporate, and not under Section 124 of the CPMA Act.

This is the case unless the canals have been surrendered to the State under the *Integrated Resort Development Act* or the *Sanctuary Cove Act*. To date there have been no such surrenders.

Civil Liability of Council arising from acts or omissions (Negligence)

As a general proposition, a public authority may be held liable where it owes a duty of care and that duty is breached by any act or omission giving rise to foreseeable damage or loss.

What a “reasonable authority” as opposed to a reasonable person ought to have done or not done in the circumstances is the relevant test and each case turns on its own facts and circumstances.

In a recent High Court case (*Brodie v Singleton Shire Council; Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512), the principles of negligence in relation to Local Government and roads under their care and control were considered. Having examined the statutory powers given by the *Local Government Act 1919* (NSW) to local government to design and construct roads, or carry out works or repairs on them, the Court concluded that the council in those cases:

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“was obliged to take reasonable care that their exercise of or failure to exercise those powers does not create a foreseeable risk of harm to a class of persons (road users) which includes the plaintiff. Where the state of a roadway, whether from design, construction, works, or non-repair, poses a risk to that class of persons, then to discharge its duty of care, an authority with power to remedy the risk is obliged to take reasonable steps by the exercise of its powers within a reasonable time to address the risk. If the risk be unknown to the authority, or latent and only discoverable by inspection, then to discharge its duty of care an authority having power to inspect is obliged to take reasonable steps to ascertain the existence of latent dangers which might reasonably be expected to exist”

The principles which determine whether the Council will be liable in negligence are detailed in the *Civil Liability Act 2003*. This Act modifies the common law as it relates to public or other authorities including councils. There are a number of principles made applicable in deciding whether a duty of care exists and whether such a duty has been breached.

These principles are set out in Section 35 and include consideration of:-

- the functions required to be exercised by the authority are limited by the financial and other resources available to the authority;
- the general allocation of financial or other resources is not open to challenge;
- functions to be exercised are decided by reference to the broad range of activities it performs
- compliance with general procedures and any applicable standards can be used as evidence of the proper exercise of its functions.

Section 36 of the *Civil Liability Act 2003* defines further the principles to be used in an action based on an alleged wrongful exercise of or failure to exercise a function by a "public authority", which includes a local government. This section holds that an act or omission does not constitute a wrongful exercise or failure unless the act or omission was in the circumstances so unreasonable that no public or other authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.

In plain terms, unless a claimant can establish that the conduct of the Council (in maintaining the canal, or exercising its powers with regard to maintenance by those responsible to maintain) was so unreasonable that no council acting reasonably could engage in such conduct, then the claim will fail.

It should be noted that positive conduct by the Council which causes loss or damage is more likely to lead to a duty of care being held to exist. In this context the dredging program should be mentioned.

There have been suggestions that the dredging program is inadequate or insufficient, and accordingly, the Council has contributed to or caused the failure of revetments. This is essentially a question of fact in each case – that is, did the dredging cause or contribute to the failure? This could only be determined by appropriate expert evidence after due examination of the facts in each case.

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Even if it were established as a matter of fact that the dredging was a causative factor, the liability of the Council would have to be determined against the background and in accordance with the principles in Section 35 and Section 36 of the *Civil Liability Act* 2003.

How the *Civil Liability Act* 2003 will be interpreted and held to apply remains to be seen, as there are no cases yet decided in relation to these specific sections. The intended effect of the *Civil Liability Act* 2003 was to define and limit the liability of various persons to civil liability, particularly public authorities that have responsibility for maintaining large scale public infrastructure.

It should also be noted that, in the *Canals Act* 1958, there was a reasonably broad indemnity provided to Council under Section 14. When the *Canals Act* 1958 was repealed by the CPMA Act, a different indemnity provision was enacted, somewhat limiting the indemnity to “officials” acting or omitting to act honestly and without negligence. “Official” is defined to mean an authorised person or anyone acting under their authority. (Section 133)

It is the view of the City Solicitor that the better position would be for the indemnity to be reinstated in the form that it originally existed under the *Canals Act* 1958

**6 STATUTORY MATTERS**

Building Act 1975

Coastal Protection Management Act 1995

Integrated Planning Act 1997

Integrated Resort Development Act 1987

Land Act 1994

Local Government Act 1993

Sanctuary Cove Resort Act 1985

Water Act 2000

**7 CORPORATE/OPERATIONAL PLAN**

Strategic Priority 12 – Land Use and Development Control.

**8 COUNCIL POLICIES**

Not applicable.

**9 DELEGATIONS**

Not applicable.

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**10 BUDGET/FUNDING**

Not applicable.

**11 COORDINATION & CONSULTATION**

Not applicable.

**12 TIMING**

Not applicable.

**13 STAKEHOLDER IMPACTS**

Not applicable.

**14 CONCLUSION**

The responsibility to maintain revetments is determined by what land the revetment benefits, the ownership of the land and by the nature of the waterway where the revetment is located.

Revetment walls located within the boundaries of privately owned lots are the sole responsibility of the registered proprietor to maintain.

Revetment walls which fall within the boundaries of canals under the CPMA Act are subject to two distinct ongoing obligations:

- (i) Council is obliged to maintain such walls by virtue of Section 121 of the CPMA Act; and,
- (ii) Private land owners who own land that adjoins the revetment walls and which receive a benefit from them are under an obligation pursuant to Section 124 of the CPMA Act to maintain the walls in a safe condition.

The responsibility to maintain is:

- an **ongoing responsibility**,
- imposes a **duty to act positively by periodic inspection**,
- likely requires the involvement of a **suitably qualified expert**.

The Council has a duty under Section 121 CPMA Act to keep canals maintained and clean.

The duty extends to maintaining any revetment wall within the canal boundary although there is a co-existent obligation to keep the wall safe on the owner of land adjoining the wall and benefited by it.

The obligations of Council under Section 121 and owners under Section 124 to maintain revetment walls co-exist, however are separate and distinct obligations.

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The council has limited financial resources to deal with what is in reality a massive problem regarding:

- identifying the state of repair of over 400km of revetment walls, and other structures within canals
- recording consequent issues, dangers and complaints
- determining who is the responsible party
- identifying any required repair or remediation works
- ensuring compliance by owners with their statutory obligations
- and at the same time complying with its own statutory obligations

The indemnity provisions as they existed under the Canals Act 1958 are preferable to those under the CPMA Act and consideration ought to be given to their statutory re-instatement.

It is noted that the position of Council regarding Revetment Walls has been the subject of a brochure available to the public entitled "Revetment Walls" printed in August 2003. This a publication by The Building and Technical Services division and covers the need for revetment walls, the responsibilities of the owner, when Council Approval is required, the responsibilities of the Council, the enquiries to be undertaken by prospective purchasers of water front properties and some details of the waterfront assistance program.

Council may consider that an update of this brochure incorporating the salient features of this review be commissioned.

## **15 RECOMMENDATIONS**

- 1. That the report of the City Solicitor be noted.**
- 2. That the Chief Executive Officer write to the Local Government Association of Queensland regarding the indemnity under the CPMA seeking LGAQ support for the re-introduction of the indemnity previously provided under the Canals Act 1954.**
- 3. That the Chief Executive Officer authorise and direct the City Solicitor to commence appropriate action to draft a Local Law regarding the maintenance of canals.**
- 4. That the City Solicitor be directed to prepare further reports regarding:**
  - (a) issues relating to revetment walls and other structures in non-tidal waters.**
  - (b) Issues relating to "as approved and constructed" profiles of canals, including any associated flood mitigation issues.**
- 5. That consideration be given to requesting a delegation of powers under the EPA to Council to enable "Tidal Works Notices" to be issued by Council where appropriate pursuant to the CPMA Act in the event of revetment walls or other structures in tidal waters being in need of repair or replacement.**

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**ITEM 2 (Continued)**  
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6. That a procedure for inspection, identification, specification and supervision of necessary maintenance or other works be prepared for consideration and adoption.
7. That a policy statement be prepared for consideration and adoption, which is intended to, amongst other things, state clearly:

**Canals**

**Land Owner's Responsibilities**

- Private land owners who own land that adjoins revetment walls and which receive a benefit from them are under an obligation pursuant to Section 124 of the CPMA Act to maintain the walls in a safe condition.
- Revetment walls located within the boundaries of privately owned lots are the sole responsibility of the registered proprietor to maintain.
- The responsibility is specifically to keep the "structure maintained in a safe condition" – this means that regular inspections must take place to ensure that the structural integrity of the revetment continues to be safe and is suitable to prevent failure.
- Inspection at other times may be advisable or required after flooding or storm events may have altered the usual flows or water levels in canals.
- Only a properly qualified engineer is able to carry out an inspection and certify the safety of any revetment.
- Re-certification of any revetment wall serving freehold land is required when any development application is approved.
- The responsibility extends to any works on the land that may affect the safety of the revetment such that land owners must ensure that any works undertaken on the land do not affect the safety and structural integrity of the revetment.
- A permit is required before any works may be done to repair or maintain or shore up any part of any revetment.
- Nothing is allowed to be attached or anchored in any way to any part of a revetment.
- Revetments are not to be used for the support of or connection to any structure or works on the land.
- Purchasers of land served by revetments become responsible for the maintenance and safety of the revetment upon completion of the purchase and it is recommended that an independent engineer's report on the structural integrity of revetments benefiting the land be gained prior to purchase.

**Council Responsibilities**

- The responsibility of the Council is to maintain and keep canals clean.
- This extends to the Council being responsible to maintain any revetment wall that is within the canal boundary, noting that there is also an obligation on private land owners benefited by any revetment wall to maintain it.
- Primarily, the obligation to maintain and keep canals clean is achieved by the periodic dredging program undertaken.

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- The Council's program also includes necessary removal of vegetation (aquatic and land) from the canals, and maintenance of the canals to their "as constructed profile".
  - Maintenance of the banks of canals may take place through installation of rock protection or placement of dredged sand so that the original profile is maintained.
  - Council is the relevant authority in respect of approval for any works which may impact on any revetment wall or canal.
8. That appropriate funding be provided for the implementation of the procedure for inspection, identification, specification and supervision of necessary works (point 6 above) and implementation of the policy as suggested (point 7 above)

*Author:*  
David Montgomery  
City Solicitor  
1 October 2007

*Authorised by:*  
David Montgomery  
Acting Director City Governance