Submission

No 13

INQUIRY INTO THE UTILISATION OF RAIL CORRIDORS

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Date Received: 23/02/2012

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Submission to the Legislative Assembly Committee on Transport and Infrastructure

Inquiry into the Utilisation of Rail Corridors

February 2012

1.0 INTRODUCTION

The effective use of land in rail corridors should be an essential component of any response to the pressing housing and transport needs currently facing Metropolitan Sydney.

However, the effective use of rail corridors, for both pubic and non-public purposes, cannot be at the expense of existing communities living in and around such corridors.

The Terms of Reference for this Inquiry appear to be prefaced on the assumption that the use of rail corridors for non-rail purposes is always, and inevitably, a good thing.

This fails to recognise that proposals to better utilise rail corridors can, *and inevitably will*, result in negative consequences for existing communities (including adverse impacts on people's property rights).

There are additional steps that need to be taken, including legislative reform, if such proposals are to meet the community's expectations of what is fair and reasonable.

As a starting point, governments need to adopt a wholly new approach to involving the community in planning decisions which affect them. Meaningful and transparent consultation processes must underpin the planning process for such proposals.

The recent experience of the SLA campaign in saving homes in the Pines Estate from demolition serves as a timely reminder that without community acceptance, these proposals will inevitably fail.

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[1] This submission was prepared by and on behalf of Save Leamington Avenue/Friends of the Pines Estate Heritage Conservation Area (known as Save Leamington Avenue) Incorporated, a not for profit association incorporated under the *Associations Incorporation Act 2009* – Incorporation No. INC9893644.

2.0 THE SLA EXPERIENCE

The Pines Estate, comprising Leamington Avenue, Holdsworth, Pine and Wilson Streets, Newtown, adjoins the largely disused, Government owned, North Eveleigh site (see attached site plan showing the Pines Estate's location adjacent to the North Eveleigh site).

In December 2008 a concept plan was approved for North Eveleigh which provides for a $550 million redevelopment of the10.7 hectare site, comprising residential, commercial, retail and open space areas[2]. The concept plan also identifies that the site will also accommodate rail infrastructure.

The proposed redevelopment is an example of the type of mixed use, transit oriented, development adjoining a rail corridor that is anticipated by the terms of reference for this inquiry.

In early June 2010, residents of the Pines Estate received an anonymous flyer advising their homes had been identified for possible compulsory acquisition by Railcorp.

This was to make way for the City Relief Line (CRL). The CRL is a key component of the Western Express Project (WEP), one of the main transport proposals contained in the Metropolitan Transport Plan, '*Connecting the City of Cities*', released by the former Government in February 2010.

The flyer identified 34 homes as being affected[3]. This was the first time the residents had been informed their homes may be compulsorily acquired to make way for the CRL.

A few days later an article in the Sydney Morning Herald reported:

> '*Just 2 months after the NSW Government spared the heritage suburbs of Pyrmont and Rozelle by dumping the CBD Metro, another historic precinct is under threat from another controversial transport plan*'[4].

Reflections by one of the residents show the devastating impact of hearing the news in this way:

> *'My heart sank when I saw a picture of my house under the newspaper heading* "Rail tunnel plan threatens historic homes". *It is hard to describe*

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[2] *Concept Plan for the redevelopment of the former Eveleigh Carriageworks Site, North Eveleigh*', approved by the Minister for Planning on 16.12.08.

[3] The flyer included a map showing the affected properties, as identified in the 'Hyder Consulting' report entitled, '*MetroWest – Construction Site Investigation*' dated 17.1.02, and subsequent work by 'Aurecon' (formerly 'Connell Wagner') in 2007 through 2009.

[4] '*Rail tunnel plan threatens historic homes*', Andrew West, Sydney Morning Herald, 4.6.10, page 2. The details outlined in the article were sourced from leaked Railcorp documents.

how surreal the feeling was reading this article traveling on the train to work. The enormity of the moment was overwhelming'.

Residents' alarm was further heightened when it was discovered:

- the homes identified for possible acquisition formed part of the Pines Estate Heritage Conservation Area[5] and the Hollis Park Urban Conservation Area[6];

- the Planning Minister approved the concept plan for redevelopment of the North Eveleigh site without consulting affected residents about the potential acquisition implications – this was despite engineering plans forming part of the concept plan clearly indicating properties in the Pines Estate may require demolition;

- the WEP and CRL were the declared to be 'critical infrastructure projects' under the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) on 9th March 2010[7]: this was despite the project never having been identified in any environmental planning instrument (**EPI**) as a potential rail corridor or any other steps having been taken by Transport NSW (**TNSW**) to alert property owners and prospective purchasers of the proposal;

- 15 properties had been sold in Leamington Avenue and the adjoining streets between 2007/08 - 2010, with innocent purchasers completely unaware of their fate, whilst Government had knowledge of the possibility of compulsory acquisition since as early as 2007;

- despite this knowledge, Railcorp was also routinely approving residents' development applications[8] and allowing residents to commence costly renovations in complete ignorance of the financial risks they faced in the event the properties were acquired;

- as a result of information then in the public domain, property owners came under a legal obligation to make full disclosures to prospective purchasers about the threat of acquisition. This was despite owners not being entitled to any protection under the *Land Acquisition (Just Terms Compensation) Act 1991* (**Land Acquisition Act**) at that point in the process.

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[5] The Heritage Council listed the Pines Estate as a Heritage Conservation Area on 28.7.06.
[6] Being listed on the National Trust Conservation Area Register in 1981. One of the affected properties is also the site of the famous '*Three Proud People*' mural: being the only existing artistic representation of this historic moment in Australian Olympic history. The mural depicts the two black American Olympic medalists, Tommie Smith and John Carlos, giving a raised-fist salute at the 1968 Olympics, with the Australian Olympian, Peter Norman, standing in support.
[7] The CIP declaration made by the Minister for Planning was published in Government Gazette, Number 40, on 12.3.10, page 1283.
[8] Required as a condition of development consents issued by the City of Sydney.

A concentrated and highly effective community campaign eventually ensured the Pines Estate was saved (see Appendix 1 for details).

The Government announced in August 2010 that feasibility/investigative studies, **which were only agreed to be undertaken as a result of the community campaign**, had revealed there was "*no engineering or design basis to acquire the properties*".

The campaign was supported by:

- the legendary heritage campaigner Jack Mundey[9]
- the National Trust[10] and various heritage architects
- political representatives from across the political spectrum (Labor, Liberal and the Greens)
- the Lord Mayor and councillors of the City of Sydney
- the Environmental Defenders Office[11]
- the CFMEU[12] and Trade Union Choir
- REDwatch[13]
- documentary film maker, Matt Norman and local artist, Donald Urquhart
- American Olympic Gold Medallist, Tommie Smith[14]
- other resident action groups, including the Pyrmont residents and other victims of the failed CBD metro proposal
- local businesses.

The SLA campaign was recognised by the Planning Institute of Australia (PIA) in 2011, receiving a commendation in the 'Hard Won Victory' category at the annual PIA "Planning Excellence Awards".

Whilst the campaign resulted a significant victory for the local community on this occasion, it raises serious questions about why a community campaign of the size and scale undertaken by SLA was necessary to achieve outcomes that should have been the result of a proper planning process? What would the result have been if the local community did not have the resources and perseverance to orchestrate such a campaign?

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[9] Who was the special guest speaker at the SLA Rally on 14.8.10.
[10] The National Trust resolved on 13.8.10 to oppose the demolition of houses in the Pines Estate and wrote to the Minister for Transport on 18.8.10 noting, '*The Trust accepts infrastructure in Sydney will require expansion, however, this should not be at the expense of such important heritage precinct when viable alternatives are available*',
[11] The EDO agreed to take on the SLA case providing advice and assistance with community education on the compulsory acquisition process.
[12] By agreeing to impose a Green Ban on Leamington Avenue.
[13] REDWatch is a community group covering the Sydney suburbs of Redfern, Eveleigh, Darlington and Waterloo. REDwatch provided invaluable advice and assistance, including assisting with publicising SLA events.
[14] Tommie Smith sent a message of support for the SLA rally.

And, even though the campaign was a success, residents **still** do not have any confidence their homes are safe with,

- an article appearing in the SMH on 7.11.11 confirming the newly elected Government is considering proceeding with the CRL[15];

- despite this, TNSW continues to refuse access under the State's freedom of information laws to documents demonstrating how the CRL can be wholly accommodated on the North Eveleigh site.

3.0 THE NEED FOR PROPER PLANNING PROCESSES

The SLA experience demonstrates a number of significant failings in the current planning process. These include:

3.1 people's 'right to know' about planning decisions that affect them is a right which should be enshrined in planning legislation;

3.2 the current community consultation mechanisms adopted by Government are inadequate: new, more effective consultation models are needed if community consultation is to have any real meaning;

3.3 there is a lack of integration between transport and land use planning: planning at the local level needs to be informed by statewide, integrated transport and land use strategies which have been fully costed, funded and prioritised by Government;

3.4 there should be a statutory requirement for all transport corridors to be identified in EPIs: this should occur at the earliest opportunity in the planning process following meaningful consultation with those likely to be affected; and

3.5 where a transport corridor has been identified in an EPI but the land is no longer intended to be used for that purpose, the rail corridor should be removed from the EPI and the land appropriately rezoned.

In respect of the SLA experience, it should be noted that **at no time was the CRL or the WEP identified as a rail corridor in the applicable EPIs**.

EPIs are the key means by which people can be informed about future development proposals which may affect their land. Indeed, the conveyancing process recognizes this by requiring a s.149 certificate to accompany any contract for the sale of land.

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[15] '*All aboard for the future: single-deck rail network rapidly gathers a head of steam*', Jacob Saulwick, 7.11.11.

Section 149 certificates are intended to indicate the 'true status' of the land, having regard to the planning matters specified in Schedule 4 of the *Environmental Planning and Assessment Regulation 2000* . This includes, amongst other things, whether an EPI makes provision for the compulsory acquisition of the land.

Prospective purchasers rely on the s.149 certificate to inform themselves about any possible 'affectations' on title.

The s.149 certificate is also important for the vendor, given the vendor disclosure obligations that apply under the conveyancing process. Failure by the vendor to make relevant disclosures can give rise to a breach of contract, entitling the purchaser to rescind the contract.

As noted above, in the case of the Pines Estate residents, people selling their properties came under a legal obligation to make full disclosures to prospective purchasers about the possibility of compulsory acquisition. This was despite the CRL proposal never having been identified in an EPI and there being no protections under the Land Acquisition Act at that point. This effectively rendered the properties valueless and property owners in legal and financial limbo.

There is currently no statutory requirement for infrastructure/transport corridors to be identified in EPIs. This is essential to ensure people can make **informed decisions** about property related matters e.g. deciding whether to buy or sell property or invest resources in renovations. People should not be in a position where they are blindly entering into major financial commitments, without knowledge of the financial risks involved.

Where transport corridors are identified in EPIs, the purposes for which the land may be used should be clearly identified. Land should not be identified for a 'public purpose' (e.g. rail corridor) if it is in fact intended to be used for other, *non*-public purposes (e.g. private residential, retail or commercial development). This is because where land is identified for a 'public purpose', special planning privileges usually apply e.g:

- more generous permissibility provisions;
- relaxation of planning controls and development standards that might otherwise apply;
- public authority entitlements to compulsorily acquire land.

Where Government owned land (or land that may potentially be owned by Government as a result of compulsory acquisition) is intended to be used for non-public purpose, the EPI should appropriately reflect this. The same planning controls should apply to that land as applies to other land intended to be used for those same purposes. In other words, the special privileges applying to public purpose land should not apply.

INADEQUACIES OF THE CURRENT COMPULSORY ACQUISITION LAWS

The SLA experience also illustrates the inadequacies of the current compulsory acquisition laws in NSW.

As a consequence of the need for ongoing urban expansion and the ineffectiveness of transport planning over many decades, there will be an increasing reliance on compulsory acquisition as governments attempt to 'retrofit' transport and housing solutions in built up urban areas.

Any Government program aimed at making the most effective use of rail corridors (be it for public or non-public purposes) is likely to require compulsory acquisition on a very scale if it is to succeed. This is because land will need to be compulsorily acquired to consolidate lots and form viable land packages for private developers.

Compulsory acquisition is a necessary part of the planning system. However, unless there are reforms to the compulsory acquisition laws to deliver fairer, more equitable outcomes, it is very unlikely the community will accept increased levels of compulsory acquisition by the State. This will significantly impact on any proposed program to make better use of rail corridors.

The key areas of concern are:

3.6 property owners/occupiers need to be adequately, *and fairly*, compensated and protected where compulsory acquisition is required;

3.7 compulsory acquisition powers under any act should only be enlivened where transport/infrastructure corridors have been identified in EPIs (this is not currently the case);

3.8 zoning of publicly owned land for *non*-public purposes (e.g. private residential, retail or commercial development) should not give rise to a right to compulsorily acquire land; and

3.9 compulsory acquisition should only ever be pursued as a last resort.

Sydney is not alone in dealing with the inevitable problems arising from the lack of adequate transport planning. At the same time as the SLA campaign was underway, hundreds of property owners in Victoria also found out their properties were to be acquired through media reports, rather than through formal notification by transport authorities (see attached ABC Radio National, Law Report, transcript dated 19.10.10)

The Land Acquisition Act is outdated legislation that does not reflect the ever increasing need for Government to consider compulsory acquisition. Reforms to the Act are urgently required as it is one of the least generous compensation acts in the country. For example:

(a) losses incurred *before* people are served with a Proposed Acquisition Notice are not recognized or compensable (this is particularly important in circumstances where the acquisition does not in fact proceed, as happened in the case of the Pines Estate residents);

(b) the Act does not recognise the impact on people who are not acquired but who are adversely affected by the acquisition of neighbouring properties;

(c) there is no requirement to acquire land that is not directly needed for the proposal – this is despite the fact that the remaining/adjoining land may be adversely affected by the acquisition (be it loss in value and/or loss of amenity);

(d) the 'market value' *at the time of acquisition*, being the basis upon which compensation is currently calculated, may not reflect the owners' actual losses arising from the acquisition e.g. the market value of a property which is partly demolished as a result of renovations, may not be a reasonable basis on which to determine compensation entitlements;

(e) the Act does not provide for 'reinstatement' costs e.g. in circumstances where there is no equivalent stock in the surrounding area, people may be forced to move out of the area altogether because the compensation payable is insufficient to purchase property in the same location;

(f) the 'solatium' component of compensation (i.e. compensation for non-financial disadvantage resulting from the need to relocate) is grossly inadequate[16] - solatium should be calculated based on a % of market value, as occurs in other states[17];

(g) compensation under the NSW Land Acquisition Act is calculated in strict compliance with the identified heads of compensation set out in Part 3 of that Act – by contrast, the Commonwealth *Lands Acquisition Act 1989*[18], requires '*all* relevant matters' to be taken into account in determining compensation, thereby allowing the special circumstances of each individual case to be taken into account;

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[16] The current rate of solatium under s.60(2)(b) of the Land Acquisition Act is $24,244.
[17] See section 44, *Land Acquisition and Compensation Act 1986* (Vic) and section 241(8)&(9) *Land Administration Act 1997* (WA);
[18] Section 55(2).

(h) the Act needs to provide greater flexibility in the timing of acquisition to better reflect the varying circumstances of affected residents – currently a 90 day notice period applies[19], after which, the acquiring authority is entitled to charge the person market rent if they stay in the property beyond the 90 day period.

In addition to the above, the compulsory acquisition laws were further undermined in 2006[20] when the owner initiated acquisition provisions of the EP&A Act and Land Acquisition were amended so that owners subject to compulsory acquisition can now only compel an authority to acquire their property if they are able to demonstrate they are suffering hardship[21].

Previously, where an EPI reserved private land exclusively for a public purpose, the affected owner could compel the acquiring authority to acquire the land at any time, without having to demonstrate hardship.

Where land is acquired by a public authority and then on-sold to a private developer (e.g. as may occur where rail corridors are rezoned to facilitate residential, retail or commercial development), the person whose land is compulsorily acquired should be entitled to a proportion of the uplift in value of the land. This is only fair because the uplift in value could not have been realized without the person's land being acquired. The public authority that acquired the property and the subsequent owner of land should not be the sole beneficiaries of the uplift in value where this occurs.

The *Local Government Act 1993* (**LG Act**) and the *Roads Act 1993* (**Roads Act**) recognise this by placing an express limitation on councils and the RTA being able to compulsorily acquire land **for re-sale** without first obtaining the approval of the owner[22]. This provides the owner with the opportunity to negotiate a level of compensation outside the constraints imposed by Part 3 of the Land Acquisition Act (which requires compensation based on market value of the property, *without regard to the proposed future use of the property*).

Whilst this protection is enshrined in the Roads Act and the LG Act (and was upheld by the High Court in *R&R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603), the same can not be said in relation to other public authorities, such as Railcorp, the State Transit Authority, Sydney Ferries and the Transport Construction Authority. Unlike the Roads Act and the LG Act, the *Transport Administration Act 1988* gives these

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[19] Section 13, Land Acquisition Act

[20] See the *Environmental Planning and Assessment Amendment (Reserved Land Acquisition) Act 2006.*

[21] Section 27 EP&A Act and Division 3, Part 2, Land Acquisition Act (see s.24 of the Land Acquisition Act for what defines hardship).

[22] Section 188, *Local Government Act 1993* and s.179, *Roads Act 1993.*

agencies an express power to acquire land for the purpose of re-sale without the approval of the owner[23].

4.0 CONCLUSION

The effective use of rail corridors needs to form an essential part of any program to alleviate housing and transport needs in Metropolitan Sydney.

However, if rail corridors are to be used for non-public purposes (e.g. for private residential, retail or commercial development) this should not be at the expense existing communities.

There needs to a fair, proper and transparent planning and compulsory acquisition process to ensure existing communities are not disadvantaged. Without this, such proposals will fail to meet the community's expectations of what is fair and reasonable, and will therefore inevitably fail.

Consideration of proposals to better utilise rail corridors will need to balance:

- the public interest in using those corridors for purposes other than rail purposes; and

- the inevitable negative consequences for local communities affected by those proposals.

That balancing exercise should never result in support for proposals for the alternate use of rail corridors until the following is addressed:

- Governments need to adopt meaningful, genuine and transparent community consultation processes, based on the fundamental principle of a person's 'right to know' about planning proposals that affect them;

- heritage considerations should remain front and centre of the planning process;

- there should be a statutory requirement for all 'rail corridors' to be identified in EPIs (and, conversely, if there is no intention to proceed with rail corridor identified in an EPI, it should be removed from the EPI);

- 'Rail corridors' should not be able to be used for non-public purposes (because of the special privileges that apply where land is classified as a 'rail corridor');

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[23] Section 11(2) (Railcorp), s.18E (Transport Construction Authority), s.35F (Sydney Ferries) and s.101 (State Transit Authority), *Transport Administration Act 1988.*

- If land in and around a 'rail corridor' is to be used for non-public purposes (i.e. private residential, retail or commercial development purposes), then the land should be appropriately zoned as such and the planning controls applying to that land should be the same the planning controls applying to adjoining land intended to be used for the same purposes;

- public authorities should not be entitled to compulsorily acquire land and on-sell it for non-public purposes without adequately and fairly compensating people, including recognizing any uplift in value arising from the alternate use of the land; and

- people should not find out their homes are to be compulsorily acquired by reading about it in the newspaper – people's property rights need to be respected and protected given significant value society places on the notion of inalienable property rights.

Appendix 1

THE SLA CAMPAIGN

The SLA campaign harnessed the resources of the local and broader community to save the historic Pines Estate from demolition. The campaign was quick to get going.....

Within 1 week ....

- we had initiated our grassroots community campaign
- we doorknocked all affected residents and established an email group of over 40 users to allow for quick and effective campaign updates

Within 2 weeks .....

- we held our first residents' meeting where the findings of our research were shared and a register of volunteers established
- we made links with other community groups experiencing similar problems, including the Pyrmont resident action group which had recently succeeded in its campaign against the CBD Metro project

Within 3 weeks ....

- we arranged a community meeting with senior officials of TNSW and with the Deputy Premier[24] to express concern about the immediate impacts being experienced by residents as a result of the uncertainty surrounding the proposal
- we commenced a comprehensive letter writing/email campaign to Government influencers including: Mayor of the City of Sydney, the Transport Minister, John Robertson, and the Deputy Premier and local member, Carmel Tebutt

Within 4 weeks .....

- we arranged a public meeting attended by over 200 people, with presentations by TNSW officials, the Deputy Premier, Councillor John McInerney[25] and the Environmental Defenders Office
- we gained Government commitment to bring forward the feasibility/investigative studies for the part of the WEP/CRL that had the potential to impact of the Pines Estate[26]
- we formed 'Save Leamington Avenue Inc' (SLA)[27] and commenced fund raising for the campaign

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[24] Carmel Tebutt (MP), member for Marrickville.
[25] City of Sydney.
[26] The Government agreed to reschedule the feasibility process for the WEP by bringing forward the investigative works for the part of the CRL to be located on the Carriageworks Site and to complete those works within a 3 month period. These investigations would otherwise not have been completed for a further 12/18 month period.
[27] *'Save Leamington Avenue/Friends of the Pines Estate Heritage Conservation Area (known as Save Leamington Avenue) Inc'* was registered as a not for profit Association under the *Associations Incorporation Act 2009* on 15.7.10.

Within 6 weeks .....

- the City of Sydney endorsed a motion by Councillor Meredith Burgman to place the Three Proud People mural on the local heritage register
- we established the SLA website as our primary communication vehicle and linked it to social media platforms such as Facebook and Twitter
- we planned and rolled out a comprehensive media strategy targeting print, online, radio and television media across community, government, transport and planning sectors
- we received extensive (and exclusively supportive) media coverage across print, radio, online and television platforms (see attached examples of media coverage).

Within 8 weeks....

- we sent a deputation to meet with the Minister for Transport[28] and the Deputy Premier and presented a paper on the broader implications of our situation with respect to the compulsory acquisition laws and the need for reform of transport and land use planning processes[29]

Within 10 weeks .....

- we held a public rally attended by over 600 people, with speakers including Jack Mundey, the Deputy Premier, the Opposition spokesperson on Transport[30], Marrickville councillor and Greens' candidate for the NSW seat of Marrickville, Fiona Byrne, Councillor John McInerney, the artist who painted the 'Three Proud People' mural, Donald Urquhart, and the documentary film maker Matt Norman[31]
- we obtained over 3,000 signatures on a petition for submission to Parliament
- we succeeded in obtaining a green ban from the Construction, Forestry, Mining & Energy Union (CFMEU) on Leamington Avenue[32] (this would become the shortest green ban in CFMEU history)

Within 3 months .....

- the Government announced the feasibility/investigative studies undertaken had revealed there was no engineering or design basis to acquire properties and consequently '*no properties in or around Leamington Avenue will need to be acquired for construction of the CRL*'[33].

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[28] The Hon John Roberston (MLC).
[29] Available on request.
[30] Gladys Berejiklian (MP).
[31] Nephew of the Australian Olympian Peter Norman and director of the No.1 box office documentary '*Salute*', which tells the story of the defiant protest by the medalists of the 200m at the 1968 Mexico Olympics.
[32] As confirmed in a letter to SLA by the State President of the CFMEU, Peter McClelland, on 8.10.11.
[33] As confirmed in letters received from the Deputy Premier dated 30.8.10 and the Minister for Transport on 8.9.11.