1st Novemberr 2013

Invader’s Bay part 2: All the Ingredients for Bobol…

Since my previous article on this controversial proposal, we have seen that certain legal advice reportedly considered by the government has been featured in another newspaper. If that is the advice the State is relying upon in advancing their Invader’s Bay proposals, **we are seeing a large-scale act of intentional illegality and a worrying return to the ‘*bad-old-days*‘**.

My main concerns are -

CONSULTATION?

Compare the lack of consultation at Invader’s Bay with what happens elsewhere. In particular, the large waterfront lands near the city centre of San Fernando at King’s Wharf, which has been the subject of ongoing public consultations over the years. The press reports that various design and redevelopment concepts were presented to and discussed with a widely-based audience.

Whatever the criticisms one might make of the King’s Wharf proposals, it is undeniable that views have been sought from the public/stakeholders and various proposals have been made for consideration.

The JCC and its Kindred Associations in Civil Society met with Ministers Tewarie and Cadiz on 26 September 2011 to express our serious concerns. Yet, when Minister Tewarie was challenged by the JCC and others as to the complete failure to consult with the public, the only example of consultation he could cite was the very meeting we had insisted on, which took place after publication of the Ministry’s Request for Proposals (RFP) and just about one week before the closing-date for proposals.

This Minister obviously does not consider public consultation to be a serious element in real development, notwithstanding the lyrics about innovation, planning and, of course, Sustainability and the Cultural Sector. Just consider the way in which East Port-of-Spain is being discussed within that same Ministry. *The prospects for sustainable economic development of East POS must be linked with*

the Invader's Bay lands, there is no doubt about that. What is more, to carry-on as though the two parts of the capital can enjoy prosperity in isolation from each other is to trade in dangerous nonsense. When criticising the large-scale physical development plans of the last administration, 'dangerous nonsense' is exactly what I had accused them of dealing in.

Public Administration must be consistent, reasonable and transparent if the public is to be properly-served. To do otherwise is to encourage disorder and a growing sense that merit is of little value. The decisive thing has become 'Who know you'.

We need to be informed now what planning permissions or environmental approvals have been granted on Invader's Bay and on what terms.

The Legal advice

I have seen the two legal documents reported on in another newspaper and have to say that those are remarkable documents.

A critical undisputed point, is that the evaluation rules – the "Invader's Bay Development Matrix and Criteria Description" – were only published after the closing-date. The JCC made that allegation in its letter of 14 December 2011 and that was confirmed by Minister Tewarie in his Senate contribution on 28 February 2012. That is a fatal concession which makes the entire process voidable and therefore illegal, since the proposers would have been unfairly treated.

Note carefully that in writing to seek legal advice in response to that challenge of December 2011, the fact that the tender rules were published ex post facto does not seem to have been the subject of a query as to its legal effect.

In one of the legal documents I saw, the penultimate para is chilling in its directness -

> "…*A simple answer to Dr Armstrong's question on whether the RFP conforms to the (Central) Tenders Board Act is that it does. In reality, the entire tender process was not brought under the CTB Act and the matrix and criteria were forwarded to the tenderers AFTER they submitted their initial proposals to the MoPE…"*

The '*simple answer*', which is what Senator Armstrong got from Minister Tewarie, is that the Central Tenders' Board Act had been conformed with. The next sentence is where we enter *the other place*… let us deconstruct it -

Phrase	***Meaning of the phrase***
'*In reality*'	The prior sentence is the official version we are going to tell Senator Armstrong, but here is what really happened.
"…*the entire tender process…*"	Minister Tewarie has consistently held that there was no tender process, this is the State's senior legal adviser calling that process by its correct title, two weeks before his statement in the Senate.
…"*the entire tender process was not brought under the CTB Act…*"	The tender process was required to be brought under the CTB Act, since it was being done via a Ministry…but that did not happen.
"…*the matrix and criteria were forwarded to the tenderers AFTER they submitted their initial proposals to the MoPE…*"	The State's senior legal adviser is confirming here that the elementary good practice rules of tendering have been violated, rendering the entire process voidable.

There are two clear findings of illegality in that single paragraph by the State's senior legal adviser. Yet a '*simple answer*', which was ultimately deceptive, was suggested for Senator Armstrong.

The advice which featured in the press was from Sir Fenton Ramsahoye SC, seemingly obtained after the initial opinion just discussed.

The Ramsahoye opinion was reported to have '*given Bhoe a green light*' and so on, but I have serious doubts on that.

1.Firstly, if there had been clear-cut, solid advice which would have exonerated its actions, the government would have published that so as to silence its critics.

2.Secondly, having read it myself, their game is a lot clearer.

Ramsahoye's mind seems to have been directed to the prospect of UDECOTT being granted a head-lease of the entire Invader's Bay property and then granting sub-leases to the developers selected by the Ministry of Planning. Those developers would then carry out the proposed development/s.

If that is the way this is proceeding, then there are two serious issues arising on UDeCoTT's involvement -

1.***The Switch*** – While it is true that UDeCOTT can lawfully grant the subleases and operate outside the CTB Act, the burning question has to be when was this decision taken to give UDeCoTT that role? Minister Tewarie has been adamant, since November 2011, that Cabinet took a decision that the Invader's Bay project be removed from UDeCoTT's portfolio to be placed within his Ministry. When did that purported switch back to UDeCoTT take place? Has Cabinet actually approved such a move? The first advice looked at the development as it had proceeded and made the conclusions which I criticised above. The second advice, contemplated a procedure which had been vigorously resisted by the responsible Minister.

2. ***The role of the Board*** – One of the most vexatious issues to be probed in the Uff Enquiry is the question of to what extent can Cabinet instruct a State Board. That issue of undue Cabinet influence was also a large contention during the Bernard Enquiry into the Piarco Airport scandal. Uff concluded, at para 8, that the scope of Ministers' power to give instructions ought to be clarified. There are several significant challenges if

one accepts the formulation put onto the Invader's Bay process in Ramsahoye's opinion. Cabinet would have to instruct that UDeCoTT implement decisions taken by the Ministry of Planning etc. As we have seen and as the legal advice has clarified, those decisions emerged from unlawful processes. *Is UDeCoTT obliged to follow unlawful instructions? In the event of litigation, which is increasingly likely, will the members of UDeCoTT's Board be indemnified by the State for their unlawful acts?* ***If that were the case, it would be repugnant, with deep echoes of the two earlier large-scale episodes of wrongdoing at Piarco Airport and UDeCoTT projects as cited above.***

I stated earlier that this Invader's Bay matter had all the ingredients for corruption. I stand by those views.