

**INQUIRY INTO PLANNING PROCESS IN NEWCASTLE
AND THE BROADER HUNTER REGION**

Organisation: Friends of King Edward Park Inc.
Date received: 20/10/2014

Partially Confidential

Friends of King Edward Park Inc.

Reverend the Hon Fred Nile MLC

Chair

Select Committee on the Planning Process in Newcastle and the Broader Hunter
Region, NSW Legislative Council

Dear Reverend Nile

Please find attached a submission to the Legislative Council's Inquiry into Planning
Decisions in Newcastle on behalf of the Friends of King Edward Park Inc. The Association,
which was formed in 2011, and which has 230 financial members, has the following objects:

- The Friends of King Edward Park seek to promote and protect the historic values and public recreational purposes of King Edward Park and the King Edward Headland Reserve.
- We seek to involve the community in our objectives for the Park and the Reserve as a place of special significance in the Hunter, both in Aboriginal and European history.
- We seek to ensure any changes in the Park comply with its dedicated purpose.
- The friends also seek to promote interest and respect for the surrounding coastal regions and to provide a model for coastal public recreational reserves.

The Associations' motto is 'It should be good for the life of the people'. Joern Utzon

At an executive meeting on the 29/9/2014 a motion was passed that a subcommittee should be formed to make a submission to the enquiry. The members elected to that committee were

Yours faithfully

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APPENDIX ATTACHED SEPARATELY

ATTACHMENT 1

28/12/10. Newcastle City Council public notification of a function centre, kiosk, associated parking and landscaping.

ATTACHMENT 2

ICAC TRANSCRIPT 15/8/14 p 5417T, LINES 10 -40.

28/12/10 Telephone call between Mr. Keith Stronach and Mr. Tim Owen on the same day as the public notification.

ATTACHMENT 3

ICAC TRANSCRIPT 15/8/14 p 5415T, LINES 10 and following relating to shame invoice and mezzanine media

ATTACHMENT 4

12/1/11 Copy of sham invoice given by Keith Stronach, using his company Newcastle yachting P/L to Tim Owen's election campaign using Mezzanine Media.

ATTACHMENT 5

June 2011 Newcastle City Council rejects request for spot re-zoning.

ATTACHMENT 6

23/6/11 –23/8/11

A sequence of emails (obtained under GIPA) between Stronach Property, the developer, the Newcastle City Council, the Lands Department and the Department of Planning relating to the spot rezoning.

ATTACHMENT 7

10/2/12 Memorandum from _____, legal researcher for detailing enquiries made in relation to spot re-zoning.

ATTACHMENT 8

16/5/12 Mr. Justice Biscoe's judgement re Security of costs.

ATTACHMENT 9

Newcastle LEP 2012 showing Schedule 1 allowing a function centre, kiosk, associated parking and landscaping, the exact wording of the original Development Application in ATTACHMENT 1.

SELECT COMMITTEE ON THE PLANNING PROCESSES IN NEWCASTLE AND THE BROADER HUNTER REGION

This submission, concerning the planning decision over the King Edward Headland Reserve (KEHR), Newcastle, is made on behalf of the Friends of King Edward Park Inc. (FoKEP) and is authorised by the Executive.

Summary

RE: BIASED PLANNING PROCESS REGARDING THE SPOT REZONING OF THE KING EDWARD HEADLAND RESERVE IN THE 2012 NEWCASTLE LEP.

We wish to raise concerns with the NSW Legislative Council (or Upper House) Inquiry into *Planning Process in Newcastle and the Broader Hunter Region*. Our concerns relate to probity, a lack of transparency, inadequate community consultation, perceived conflict of interests and excessive developer influence on planning decisions surrounding the spot rezoning of the 2012 Newcastle Local Environment Plan (LEP).

This spot rezoning to allow a function centre with associated parking is contrary to the dedication of the land under the Crown Lands Act and contrary to its zoning under the local planning instrument. How and when the draft LEP from NCC was amended to incorporate a private function centre as an exception on the Headland Reserve is central to your inquiry.

The processes involving the re-zoning were not transparent or impartial as demanded both by regulatory obligations and general principles of public governance. From emails obtained under GIPA (attachment 6) there does not appear to have been any

consideration or discussion about why such a significant site should be rezoned. Despite over 300 objections to the proposed development of a private function centre on the site, no mention of the public interest articulated in these extensive submissions appears in the deliberations of the public officials over the decisions involving the KEHR. Plainly, public consultation has not been factored into the equation. Also, Justice Biscoe's decision in the LEC on Security of Costs in May 2012 (see details below) should have informed the decision-making, yet it was ignored.

These matters are especially concerning given their proximity to those recently investigated by the Independent Commission against Corruption (ICAC) in 'Operation Spicer' regarding illegal developer donations at the state government level, specifically relating to Newcastle.

As we know from the ICAC transcripts, on 5th August 2014, Mr. Keith Stronach, the developer, gave sworn evidence to ICAC that he spoke with Mr. Tim Owen on 29 December 2010 (ICAC transcript 15/8/14 5417T line10 – 30 Attachment 2). and that later; on 12th January 2012 Mr. Stronach donated \$5,000.00 to Mr. Owen's election campaign through a sham invoice using the name Newcastle Yachting P/L. (ICAC transcript 15/8/14 5415T line10 – 30. Attachment 3,4)

Later, under questioning, Mr. Stronach stated that he approached Mr. Owen to assist with an audience with the Department of Planning. The date this conversation took place is vague, but it was around June 2012, the possible time of the change in the LEP. Mr. Stronach denied on questioning that it had anything to do with King Edward Headland Reserve. (ICAC transcript 15/8/14 5420T Line 10 -40)Attachment 4

The time line, as vague as it is, however, suggests that this might be a line of investigation.

We understand that the Upper House has called for papers relating to Mr. Owen's and Mr. McCloy's dealings with the Department of Planning and we would like that investigation to be extended back to the 29th December 2010 to cover the period of the telephone call, the illegal donation and the re-zoning in June 2012. We would also ask the committee to look at any media briefings by government departments relating to the Headland Reserve.

Background

King Edward Headland Reserve (also known as 1 Ordnance Street) sits within King Edward Park and was part of the original grant to the people of Newcastle in 1863. The reserve is classified as RE1/6A in the LEP and is dedicated under section 87 of the *Crown Lands Act* to the public for public recreation. It is historically a very significant site in both Aboriginal and European culture. It is known to the Worimi and Awabakal people as *Yirranali*, the place of falling rocks and it is one of the places documented by Threlkeld in the early 1820s. As late as 1980, it was the sacred place where the Worimi people held up their newborn babies to their ancestors. It has a rich European history as well, being part of the Government Estate on which the original Government House was built. It is the site of the first coal shaft in Australia. The transport of coal in carts from the site to the Dock was the beginning of Watt Street, the first street in Newcastle and it was from here that the first exports of coal from the new colony were made. Finally, the site, as shown **below**, is arguably one of the most

spectacularly located on Australia's eastern seaboard.



In February 2012, a Development Application (DA) for KEHR became the subject of litigation in the Land and Environment Court. The case has been finalised and the judgement is expected in November. Briefly, the FoKEP challenged the consent given by Newcastle City Council (NCC) for a DA by Annie Street Commercial Pty Ltd (the sole director is Mr Keith Stronach) for the construction of a privately run function centre and car park which would virtually occupy the whole of the KEHR site. The DA was considered under the 2003 LEP that classifies the site as RE1/6A, which indicates open space and recreation zone. It forbids function centres except under plans of management (PoM) with consent.

Our contention, which is endorsed by the legal opinion of Senior Counsel, is that the PoM does not validly grant permission for a function centre, and furthermore a function centre is inconsistent with the dedication of the land and contravenes section 112a of the *Crown Lands Act*. This states “a purpose cannot be an additional purpose within the act if it is inconsistent with, contravenes, or negates the purpose for which

the land was reserved. The outcome of the case has state-wide implications for all similarly dedicated Crown Lands; changing an LEP classification simply cannot negate Crown Land legislation.

In response to the FoKEP's application, the NCC **unsuccessfully** applied to the Land and Environment Court seeking a judgment for security of costs. The case was heard in April 2012 and in his judgement Justice Biscoe dismissed the NCC's application finding that the FoKEP's proceedings were brought in the public interest. At paragraph 63 he found, *inter alia*, that 'the applicant is seeking to enforce public law obligations on the part of the council and the Minister, the proceedings relate to the protection of heritage items including aboriginal heritage items ... the proceedings have been brought to preserve the Reserve for its dedicated purpose of public recreation and to preserve the Park which is a public park'.¹ The judgement was handed down on 16th May 2012.

Clearly this significant judgement has been ignored in whatever process has been used to rezone the Reserve to allow a function centre on RE1 land.

The LEP 2012 planning decision

While the matter was before the court, in June 2011, a new Newcastle LEP was drafted. Generally, in formulating an LEP, function centres are prohibited from land designated RE1. An application by Annie Street Commercial for an exception to this prohibition to allow a function centre at KEHR was expressly refused by the Council in June 2011 (attachment 5).

¹ Friends of Kind Edward Park Inc. v. Newcastle City Council [2012] NSWLEC 113 (16 May 2012)

Newcastle City Council clearly expressed its view that function centres are not permissible in RE1 zones stating: **‘Adding Functions Centres as a permissible use is not supported.’**

The draft LEP was finalised by the NCC in July 2011 and sent to the Department of Planning (DoP) and the Parliamentary Counsel’s Office without any zoning amendments².

In February 2012 enquiries were made as to whether there had been any changes to the LEP in relation to the RE1 zoning. We were told by both Newcastle City Council and the NSW Department of Planning that no amendments had been made and were referred to the link². However, in June 2012, we found that the draft LEP 2012 had been amended to exempt the Headland from the RE1 constraint that function centres are not permitted. This is despite the earlier ruling by the NCC. We have never been able to establish how the amendment was made –it never went back to Council and it was never put to the public for comment. However, an exception to allow a function centre, kiosk and associated car parking and landscaping had been made. This exception exactly replicates the wording of the earlier Development Application made by the developer, Mr. Keith Stronach.

Specific concerns

It is not clear why or by what process the draft LEP from NCC was amended to incorporate a private function centre as an exception on the Headland Reserve. A

² The draft LEP was available at the following link
http://www.newcastle.nsw.gov.au/data/assets/pdf_file/0010/153793/Attachment_A_draft_LEP_June_2011.pdf

sequence of emails (obtained under GIPA) between Annie Street Commercial, the developer, the Newcastle City Council, the Lands Department and the Department of Planning relating to the spot rezoning support the amendment to allow a function centre. However, there are no reasons given to justify their decision.

See attachment 6.

Intriguingly, the Chief Planning Officer who assessed the objections to the original development, _____ was also involved in the rezoning. He would have been aware that there was significant public opposition to a function centre on the Reserve (300 objections as explained above) and yet this forms no part of these emails. Public interest should have been a factor in the rezoning decision. The emails highlight a lack of arm's length decision-making between the authorities determining the outcome and the applicant requesting the spot rezoning.

On 5 August 2014, Mr. Keith Stronach gave sworn evidence to ICAC that he spoke with Mr. Tim Owen on 29 December 2010 (attachment 3) and that later; on 12 January 2012 Mr. Stronach donated \$5,000.00 to Mr. Owen's election campaign through a sham invoice using the name Newcastle Yachting P/L. (ICAC transcript 15/8/14 5415T line10 – 30 Attachment 3, 4). **On the same day**, 29 December 2010 that Mr. Stronach spoke with Mr. Owen, Newcastle City Council sent out a public notification (attachment 1) for DA 10/1735 for the proposed function centre.

Annie Street Commercial (Sole director Mr. Keith Stronach) made a Provisional Developer's Agreement in 2009 with the state government which specified the yearly rental for the proposed development on the Headland Reserve at \$23,500 p.a. Whilst this was based on the advice of a registered valuer, such a small annual rental would

outwardly appear to be inconsistent with a commercial rent for 0.65 hectares of land situated in a most spectacular location. Similarly, the valuer determined the full value of the land at (just) \$787,415.

The Dedication and its implications

King Edward Headland Reserve has a dedication under the *Crown Lands Act* for Public Recreation. Land dedicated for public recreation needs to satisfy two conditions under the *Crown Lands Act*: viz. the land must be open to the public generally as of right and it must not be a source of private profit (see *Randwick Corporation v Rutledge* (1959) 102 CLR54 at 88).

A function centre by its definition is not open to the public as of right, and it is certainly in this case, a source of private profit.

No consideration of the dedication and its implications appears to have been considered by the trustees or the Crown Lands Department. The trustees of the Reserve and the Crown Lands Department had a special duty of care as trustees to consider the dedication of the land. No reasons are given in any of the limited email correspondence that we have been able to access as to why a spot re-zoning could or should occur or would be an appropriate use of this land. It appears to be, colloquially, a done deal. The site is the prime site in Newcastle. This was a very significant decision especially given the financial benefits which would flow should the development on the Headland be approved.

Summary of concerns

We are concerned about the lack of transparency, and the role of local and state

government agencies and officers in changing planning controls relating to the spot rezoning.

We are concerned that some critical decisions have not been based on any factual evidence and that vital evidence that was available that could have informed the debate was ignored:

- The significant heritage of the area
- The Biscoe judgement that pointed out the significance of the area
- The previous public objections to a function centre on the site
- The zoning and dedication of the land

We are concerned that there may have been inappropriate influence by developers on decision makers, and / or conflicts of interest that need to be investigated, specifically:

- As mentioned before the sworn evidence in ICAC
- The lack of 'arm's length' discussions revealed in the GIPA emails

We respectfully urge the Upper House Committee to please consider making the following recommendations:

1. Revoke the schedule 1 amendment in the 2012 LEP allowing a function centre on the site and ensure that this priceless piece of Newcastle history becomes part of the public domain for future generations to enjoy. Allow its dedication in 1863 to be preserved for the people of Newcastle, as was the intention of that far-sighted person, Mr. John Bingle so long ago.

2. Place a moratorium on all development associated with KEHR, No 1 Ordnance Street until a proper Conservation Management Plan (CMP) has been done. Firstly, the park is clearly 'historic' as it was once on the Register of National Estate when the register signified a special place. Secondly, it is in a conservation area. KEP warranted a proper CMP in place well before any development of the headland was

even considered.

King Edward Park Group in Newcastle was nominated for the State Heritage Register in 2008 and the Heritage Council of NSW acknowledged the heritage significance of the park. (This was confirmed in their minutes.)

We submit that the information provided will assist the Inquiry to find that these questionable and concealed planning decisions will burden Newcastle's future development.

Thank you.

Yours sincerely

For Friends of King Edward Park Inc.

CHRONOLOGY OF EVENTS LEADING TO THE SPOT REZONING OF KING EDWARD HEADLAND RESERVE (KEHR)

1 Ordnance Street Newcastle.

29/12/2010

Newcastle City Council publicly notifies the DA 10/1735 for King Edward Headland Reserve. The proponent is Annie Street Commercial Pty Ltd (Mr. Keith Stronach sole director). The application is for a

‘Function Centre, Kiosk and Associated Carparking and Landscaping’ The DA is to be considered under the 2003 LEP. Attachment 1.

29/12/2010

On the same day as the public notification there is a telephone call between the developer, Mr. Keith Stronach and Mr. Tim Owen. See ICAC transcript 15/8/14 5417T line10 – 30. Attachment 2.

Two weeks later on the 12/1/11 Mr. Keith Stronach donates \$5000.00 to Mr. Tim Owen’s campaign via a sham invoice using the name Newcastle Yachting P/L. ICAC transcript 15/8/14 5415T line10 – 30. Attachment 3,4. Later in 2012 Mr. Stronach approaches Mr. Owen for help with a matter in the NSW Planning Department.

March 2011

Mr. Tim Owen elected as MP for Newcastle.

21/6/ 2011

The Draft **2012** LEP is considered in regard to an application for spot rezoning of the Headland Reserve. Newcastle City Council clearly expresses its view that function centres are not permissible in RE1 zones stating

‘Adding Functions Centres as a permissible use is not supported. ‘

See link

http://www.newcastle.nsw.gov.au/_data/assets/pdf_file/0009/154197/Attachment_B.pdf

Newcastle Draft LEP sent to Department of Planning **without** a rezoning amendment. Attachment 5.

23/6/11 – 23/8/11

A sequence of emails (obtained under GIPA) between Stronach Property, the developer, the Newcastle City Council, the Lands Department and the Department of Planning relating to the spot rezoning. There are no reasons given in this exchange as to why the exception to the zoning should be made. See attachment 6.

On the 23/6/11 (Senior Planner, Hunter and Central Coast) advises (NCC) that the regional team would support the Council's decision to add a function centre as a schedule1 at King Edward Park. No supporting reasons for decision.

On the 21/7/11 (Project Manager, Crown Lands Division) advises from Stronach Properties that the Council has agreed to include a schedule 1 in the draft LEP to allow a function centre at KEHR. Again no supporting reasons for decision.

On the 23/8/11 (Development Manager, Stronach Property) emails (Senior Planner NCC) confirming conversation with NCC's re spot re-zoning.

8/11/ 2011

Newcastle City Council approves the development application, DA 10/1735 for a function centre on the Headland Reserve. The approval was given under the 2003 LEP.

10/2/2012

On the 10/2/12 (researcher for checks and finds that no spot rezoning has occurred despite the earlier email correspondence on the 23/6/11. See memorandum and email correspondence. Attachment 7.

Also progress of LEP was checked through the gateway process.

10/2/2012

Commencement in the Land and Environment Court of s101 Appeal against the Development Consent No 10/1735

Applicant	Friends of King Edward Park Inc.
First Respondent	Newcastle City Council,
Second Respondent	King Edward Headland Reserve Trust
Third Respondent	Minister for Primary Industry
Fourth Respondent	Annie Street Commercial Pty Ltd.

27/4/12, 7/5/12

Newcastle City Council v Friends of King Edward Park

Security of Costs before Mr. Justice Biscoe

<http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=158570>

16/5/12 The Court finds in favour of the Friends of KEP.(see link pp.33,34,35) stating that

a) The applicant is seeking to enforce public law obligations on the part of the council and the Minister, the proceedings relate to the protection of heritage items including aboriginal heritage items ... the proceedings have been brought to preserve the Reserve for its dedicated purpose of public recreation and to preserve the Park which is a public park'.³ P.33, Para 63

³ Friends of Kind Edward Park Inc. v. Newcastle City Council [2012] NSWLEC 113 (16 May 2012)

Mr. Justice Biscoe also finds p34, Para 64b) that the proceedings raise novel issues of general importance, particularly in terms of the operation of relevant provisions of the Crown Lands Act. Attachment 7

None of the significant issues raised in this judgement were considered in the decision making process for the LEP.

June 2012

Newcastle 2012 LEP is gazetted with a spot re-zoning of 1 Ordnance Street Newcastle, the King Edwards Headland Reserve, to allow a Function Centre, Kiosk and Associated Carparking and Landscaping.

This sudden and unexplained rezoning replicates the wording of the original Development Application (Attachment 8) made by the developer, Keith Stronach who has admitted in the ICAC to giving an undeclared and illegal donation to the local parliamentary candidate and subsequent member, Mr. Tim Owen, (since resigned).

There is no discussion or any reason given in any of the emails we have obtained under GIPA as to why the exception should be made.

This is a request for papers from the NSW Department of Planning, the Crown Lands Department and the Parliamentary Counsel's Office.

We request a chronology in relation to the Newcastle draft Local Environmental Plan 2012 and the dates the draft was in each of the above departments and the date the LEP was gazetted.

We request from the following departments any papers, information, correspondence, emails or discussions relating to the addition of the following schedule 1 to the Newcastle Local Environmental Plan 2012.

Newcastle Local Environmental Plan 2012

Current version for 15 August 2014 to date (accessed 21 September 2014 at 20:18)

[Schedule 1](#)

Schedule 1 Additional permitted uses

(Clause 2.5)

1 Use of certain land at 1 Ordnance Street, Newcastle

- (1) This clause applies to land at 1 Ordnance Street, Newcastle, being Lot 3109, DP 755247.
- (2) Development for the purpose of a function centre and kiosk with associated car parking and landscaping is permitted with consent.

Yours faithfully

On behalf of

Friends of King Edward Park Inc.

Heritage Division of the Office of Environment and the Heritage Council of NSW.

This is a request for papers from the above department for any papers, information, correspondence, emails or discussions relating to King Edward Park, Newcastle and its listing on the NSW State Heritage Register.

Yours faithfully

Friends of King Edward Park Inc.