

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

Name: Ms Therese Doyle

Date received: 7/11/2014

Partially Confidential

**Case
for an
Investigation
into
Newcastle City
Council
2014**

Summary & Timeline

Since the 2012 NSW Local Government Election Newcastle City Council (**Council**) has practised an ongoing and systemic disregard for the *Local Government Act 1993* (**the Act**) to an extent which represents a significant departure from the expected openness and transparency provided for by the Act and has facilitated a misuse of public resources.

The end result has been;

- a) The portrayal of Council as supporting the *State Environmental Planning Policy Amendment (Newcastle City Centre) 2014* (**Newcastle SEPP**) when in fact no open and transparent debate on this issue ever took place at Council, and
- b) Hundreds of thousands of dollars have been spent on providing a political benefit to the former Lord Mayor in contravention of Council's policy and the requirements of the *Local Government Act 1993*.

While the pathway to these outcomes could be construed as ignorance and the making of procedural errors, it is my opinion that this disregard for the law has been used systemically for political purposes, to stymie legitimate and lawful public debate; to prejudice Council decisions and positions.

The disregard for, and breaches of, the Act have occurred in varying ways.

Often procedural advice given to the Lord Mayor by the General Manager, as well as action by the General Manager to prevent legitimate items from being placed on the Council Agenda has been contrary to the provisions of the Act, Regulations and associated policies

Of great concern is that the stifling of debate, the culture of executive control, has culminated in a situation where the Council has in effect acted privately and without any democratic oversight (as required by the Act) with regard to the amendment of the Newcastle LEP by the NSW Government via the *State Environmental Planning Policy Amendment (Newcastle City Centre) 2014*.

A further serious instance of disregard for the Act is the creation of at least one staff position (and possibly an entire office) which is openly tasked to provide political advice to the Lord Mayor. It is my opinion that, in the creation of this position, the Council has acted contrary to the Act and that public resources have been used for the political and personal benefit of the former Lord Mayor (and the current acting Lord Mayor). This situation remains urgent as from 15 November a new Lord Mayor will be elected and without proper instruction from the Office of Local Government another person may become potentially exposed to the misuse of Council resources.

While the particulars listed below can be considered as separate matters, it is my opinion that when considered as a whole, the full extent of Council's current abuse of the Act become apparent, and its failure to act as a responsible local authority.

The reasons an investigation is needed are detailed in the categories listed below:

- 1) Breaches of the Act, Regulations and Code of Meeting practice to such an extent that open and transparent debate is made impossible.
- 2) Entrenched conflicts of interest.
- 3) The misuse of public resources in a manner not provided for in the Act (Employment of Chief of Staff).
- 4) The *State Environmental Planning Policy Amendment (Newcastle City Centre) 2014* and Newcastle City Council's failure to make submissions which were debated by the elected Councillors or to which due diligence had been applied.

Timeline

September 2012 –	Jeff McCloy popularly elected as Lord Mayor of Newcastle
10 September 2012 –	McCloy states with regard to Labor Councillors <i>“can’t go against the things that the people of Newcastle have elected me to do”</i> and said he <i>“would demand a list of current development applications and reasons why they had not been approved.”</i> ¹
9 October 2012 –	Jeff McCloy introduces Mayoral Minute to employ his election campaign manager, on a contract of \$90,000 per year ² .
9 October 2012 –	McCloy withdraws Mayoral Minute to employ campaign Manager.
October 2012 –	Lord Mayor Chief of Staff position advertised, required to negotiate with the community, business and constituent groups, and act as representative of the Lord Mayor and provide political advice.
21 November 2012	Applications for Lord Mayoral Chief of Staff position close.
14 December 2012 to 19 April 2013 -	Exhibition of the Draft Newcastle Urban Renewal Strategy
15 January 2013	General Manager Phil Pearce hands in resignation. Lord Mayor McCloy commented to media that ... <i>the two had differed on various aspects of the council’s finances and direction.</i>
16 April 2013 -	NCC submission to Draft Newcastle Urban Renewal Strategy
28 May 2013	NCC unlawfully refuses to debate motions on marriage equality, Newcastle as a welcome city for refugees, and public voice on Ammonium nitrate storage.

¹ Newcastle Herald, 10 September 2012, *McCloy victory referendum for rail cut.*

² NCC meeting minutes 9 October 2012

25 th June 2013 -	NCC unlawfully refuses to debate motion of which notice had been given regarding NSW Midwives Association.
October 2013 -	Position of assistant to the Lord Mayor's Chief of Staff is advertised internally and states: <i>This Lord Mayor's office manages the political, strategic, and tactical day-to-day business of the incumbent Lord Mayor</i>
November 2013	Without consulting the elected Council, and in a submission sent to the NSW Department of Planning, but not shared with the elected Council, Jeff McCloy offers the 'support of the city' to the Port Waratah Fourth Coal Terminal proposal despite the position of Council being to cap exports of coal. Clr McCloy later claims it was a personal letter.
18 February 2014	Councillors given closed briefing on proposed changes to SEPP Amendment (Newcastle City Centre) 2014 by Planning and Infrastructure with a cursory overview of GPT/Urban Growth plans ³ .
24 th February 2014	Confidential briefing of Councillors by UrbanGrowth, Planning and Infrastructure NSW and Transport for NSW
25 th February 2014	Council supports Lord Mayoral Minute to support the State Government Urban Renewal Strategy and catalyst project for Hunter Street Mall revitalisation projects with GPT and Urban Growth. The Mayoral Minute is presented and voted on before the SEPP Amendment (Newcastle City Centre) 2013 and DCP are made public. No written materials or details are provided to Councillors.
25 February 2014 -	Lord Mayor rules an ALP sponsored motion 'Our Town Our Choice' out of order. The Council officer's report of the motion had recommended Council make a submission on the SEPP.
27 th February 2014 -	Former Councillor John Sutton writes to NCC with regard to the incorrect use of meeting procedure after a ruling that a Labor Clr was not permitted to move an amendment to the Lord Mayoral Minute regarding GPT, Urban Growth and the T4.
5 March 2014 – 21 March 2014 –	Exhibition of the revised SEPP Amendment (Newcastle City Centre) 2014
7 March	Clr Doyle makes a formal request for a copy of the presentation given to councillors by the State government agencies on the 24th Feb on the new Newcastle city plan and the light rail proposals. No response is given.

³ NCC, report to Extraordinary meeting 25.3.14

7 th March 2014	Clr Tim Crakanthorp requests to “get a copy of the Newcastle Council Urban Design Consultative Group report /response to the Urban Growth GPT proposal.”
13 th March 2014	Peter Chrystal, Acting Director Planning and Regulatory, responds that “there have been preliminary discussions between GPT and their consultant team, Council officers and the Urban Design Consultative Group. These discussions were, at the request of GPT, confidential. A development application and the accompanying detailed design has not been presented to the Urban Design Consultative Group.”
18 th March 2014	Clr Doyle makes a formal enquiry asking whether council had consulted with, or sought advice from, Council’s Urban Design Consultative Group
20 March 2014 -	General Manager makes a submission on the SEPP consisting of the Mayoral Minute of 25 th February without the Council resolving to make a submission.
21 st March	<p>Peter Chrystal, Acting Director Planning and Regulatory, responds to Clr Doyle’s query, stating that “Council officers had no opportunity to consult with the Urban Design Consultative Group. Council has been informed that Planning and Infrastructure will brief the committee in April 2014”.</p> <p>NB: A response to a query in October established that no consultations took place between Council’s Urban Design Consultative Group and Planning and Infrastructure.</p>
25 March	<p>Memo from Peter Chrystal, Acting Director Planning and Regulatory reveals that “in response to a request from Planning and Infrastructure for comment on the recently advertised Renewal SEPP, a letter based on the recent Lord Mayoral Minute was lodged on 21 March 2014.</p> <p>NB This is the ONLY submission that Newcastle Council has made on the SEPP</p>
25 March 2014 -	Council finally receives a report on the SEPP only as a result of Clrs Doyle and Osborne’s call for an extraordinary meeting to discuss the SEPP.
25 March 2014 -	A motion to rescind the Mayoral Minutes is lost.
15 May 2014 -	Councillor Therese Doyle gives notice of a motion regarding the GPT/Urban Growth development.
27 th May 2014 –	Councillors Crakanthorp and Nelmes lodge a motion to have the community group Newcastle Inner City Residents Association address Council. Council had already had a presentation from the developers

	on the same issue. The motion was rejected on 'procedural grounds' by NCC.
27 th May 2014 -	No report from General Manager to Council meeting pursuant to Reg. 240 giving reasons why Clr Doyle's motion had not been included on the agenda.
August 2014 -	Revised motion from Clr Therese Doyle
8 th August 2014	Notice of Motion(NOM) lodged by Clrs Doyle and Osborne calling on the Lord mayor, Jeff McCloy to stand aside from his position until the completion of ICAC hearings
12 th August	GM informs councillors that the abovementioned NOM is "unlawful" and will not appear on the council business paper. The NOM did not appear on the business paper for the meeting of 26 th August. However, the Lord Mayor had resigned by this time.
15 th August 2014 -	Lord Mayors Chief of Staff makes comment to the Newcastle Herald on the Lord Mayor's election arrangements with other candidates.
17 th August 2014 -	Former Lord Mayor Jeff McCloy resigns.
26 th August 2014 -	Refusal to allow debate on urgency on the basis of an 'unlawful' motion.
16 th October 2014	Clr Doyle submits a "Councillor Service Request" for "any advice that Council has received from Council's Urban Design Consultative Committee"
22 nd October 2014	A copy of a report addressed to Council from Council's Urban Design Consultative Group, dated 16 July is finally made available to all councillors accompanied by a memo from Jill Gaynor, Acting Director Planning and Regulatory

1) Breaches of the Act, Regulations and Code of Meeting practice to such an extent that open and transparent debate is being denied.

There is a systematic pattern of ignoring meeting procedure, the Regulations, Code of Meeting Practice and Office of Local Government Practice Notes by Newcastle Council. The result is that Newcastle City Council has in effect become a dictatorship in which the political majority silence debate and dissenting voices.

The use of unlawful means to stifle open and democratic debate means that the decisions of Newcastle Council between October 2012 and the present cannot be said to be a proper expression of the will of the people of Newcastle.

Breaches of Act, Regulations and Code 1

Refusal to allow business to be debated at Council meetings in contravention of the Local Government Act.

Newcastle Council has by majority vote limited the subject of what can be debated at Council meetings. By purporting to decide what can and can't be debated at a properly convened meeting, Council has acted beyond its power. In my view Council has contravened the following Sections of the Act:

S 7 (a) to provide the legal framework for an effective, efficient, environmentally responsible and open system of local government in New South Wales,

s.232 (2) The role of a councillor is, as an elected person:

- to represent the interests of the residents and ratepayers*
- to provide leadership and guidance to the community*
- to facilitate communication between the community and the council.*

And in contravention of the Regulations:

241 Giving notice of business

240 Agenda and Business papers for council meetings

And a breach of 46.1.9 of Newcastle Council Code of Meeting Practice.

At the meeting of 28 May 2013 the majority of Councillors determined that lawfully lodged motions regarding Marriage Equality, Public Voice on Ammonium Nitrate storage and Newcastle as a Refugee Welcome City would not be debated.

The minutes of the 28 May 2013 meeting are below:

Again on June 25th 2013 Council rejected debating a motion of which valid notice had been given. The motion concerned the NSW Nurses and Midwives Association 'Ratios put patient safety first' campaign. A majority of Councillors moved a procedural motion that the item 'lay on the table', presumably indefinitely. The minutes are copied below:

Permissibility of the Lord Mayor and majority Councillors preventing debate at a Council meeting

Newcastle City Council Code of Meeting Practice (**NCoMP**) allows for a procedural motion that an item '*lay on the table*'.

63.1 A Councillor may move a motion that the matter be left on the table if the Councillor has not exercised their right to speak to the substantive motion before the Meeting.

The purpose of the procedural motion as stated by the NCoMP is to be to have the motion stay on the agenda until a Councillor has exercised their right to speak on the motion.

Another definition of the purpose of a procedural motion that a substantive motion 'lay on the table' is:

...the subsidiary motion to lay on the table refers to temporarily setting aside a pending motion (or a series of pending motions) to take care of something else deemed urgent. The motion to lay on the table is less about the business being discussed than about the assembly needing to handle something else immediately. One such motion may be: "Madam President, because our speaker has arrived, I move to lay the pending motion on the table."⁴

However the purpose that a motion 'lay on the table' as used in the examples above by Councillors Luke and Tierney, is to ensure (via a political majority) that the motion is never debated. In other words the political majority are using unlawful methods to silence lawfully elected Councillors who are trying to represent their community.

The use of the procedural motion in this manner (i.e. to prevent debate rather than to preserve further opportunity for debate) is dishonest. In my view it is a breach of the NCC Code of Conduct both for being dishonest (CI 4.2), and because it breaches the Code of Meeting Practice (CI 25.1).

Clause 46.1.9 of Newcastle Council Code of Meeting Practice says a motion is unacceptable if it is *proposed solely as a way to impede the orderly transaction of business*. In my view the majority Councillors were (and are) systemically breaching the Code of Meeting Practice.

My submission is that, provided a lawful motion (Reg. 240) is properly given notice of (Reg. 241) and it is in the opinion of the Councillor a matter which satisfies Section 232 of the Act, then a refusal by a majority of Councillors (on procedural grounds) is a breach of the purpose of the *Local Government Act*, particularly s. 7, which provides for an open system of government to assist community participation; and s 232 in preventing a Councillor from playing a role in Councils policies, representing their community. **This is the basis of how elected representatives fulfil their function.**

We emphasise that voting for or against these motions is not the issue. The issue is whether or not an abuse of power has occurred which has resulted in the legitimate expression of the elected representatives of Newcastle being gagged. If one concludes that debate at Newcastle Council has been gagged then it is in contravention with the letter and spirit of the *Local Government Act 1993*.

At no time did the General Manager advise these Councillors of their obligation to adhere to the Act and the Code of Conduct/Code of Meeting Practice with regard to these motions.

It is my submission that the operation of Newcastle Council is systemically in breach of the purpose of the Act to provide open and transparent government; and is also preventing Councillors from

⁴ Roberts Rules for Dummies, webpage <http://www.dummies.com/how-to/content/roberts-rules-and-the-motion-to-lay-on-the-table.html> accessed on 14th October 2014.

fulfilling their statutory role of providing leadership and guidance to the community pursuant to Section 232 of the Act.

Breaches of Act, Regulations and Code 2

Having set the scene for controlling debate, the Council continued to thumb its nose at proper meeting procedure.

In February 2014 local resident and former Newcastle councillor John Sutton wrote to the current General Manager pointing out errors in advice he gave to Lord Mayor McCloy during a Council meeting on Tuesday 25th February 2014. The ruling benefited Clr McCloy. The Lord Mayoral Minute recommended Council support the Urban Growth/GPT 'catalyst projects', the T4 project and the Wickham interchange.

The issues raised were:

- a) the ability of a Council meeting to amend a Mayoral Minute, and
- b) the requirement of a Councillor to stand during a division.

The ability to make an amendment to a Mayoral Minute is clarified in Practice Note 16 (Meetings Practice Note) 2009 which is currently available on the Office of Local Government website. With regard to amendments to Mayoral Minutes the Practices Notes states:

2.7.3 Can a mayoral minute be amended?

While not addressed in the Regulation, mayoral minutes may be altered in practice. This could be covered in council's Meeting Code. Changes to mayoral minutes should avoid making changes that will introduce, without notice, matters which need research or a lot of consideration by the councillors before coming to a decision.

A check of the NCC Code of Meeting Practice 2012 (**NCoMP**) (at 44) show while no specific mention is made of amending a Mayoral Minute, no prohibition is imposed by the NCoMP. Further (at 53.1) the NCoMP says *Any Councillor may propose an amendment to any motion put to a Meeting.*

At 44.2 the NCoMP demonstrates that a Mayoral Minute is a motion by stating *The Lord Mayor may move the adoption of a Lord Mayoral Minute without the motion being seconded.*

Consequently the ability to amend a Mayoral Minute is established in the NCoMP and by reference to Practice Note 16, Meeting Practice, 2009.

With regard to the second issue, that of requiring a Councillor to declare their position when voting on a division, the complainant correctly pointed out that despite the General Manager's insistence at the meeting, Councillors are not required by the NCoMP to stand. Nor are they required to stand by Cl.251 of the *Local Government (General) Regulation 2005*.

The respectfully toned correspondence of John Sutton dated 27 February 2014 is attached as **Appendix 1** to this complaint.

On 25 March 2014 the General Manager gave a four sentence written response in which he 'stood by' his previous advice. The reply claimed the NCoMP was subject to overriding legislation but did not identify what these were. The General Manager's letter is **Appendix 2** to this correspondence.

On 9 April Mr Sutton wrote back to the General Manager raising concerns that he (the General Manager) had not provided any material which supported his contention that his advice was correct and was not prepared to disclose what advice (if any) had been sort to clarify the advice. Mr Sutton's correspondence of 9 April is **Appendix 3** to this correspondence.

On 23rd April the General Manager wrote to Mr Sutton saying that he was no longer prepared to engage in correspondence with Mr Sutton on the matter.

Mr Sutton in reply said on 27th May 2014:

This is not a matter of a "bush-lawyer legal debate", as you characterise it. If, as you have stated, you are of the view that specific provisions in the council's Code of Meeting Practice that applied to the instances to which I referred are overridden by some other legal provisions or considerations in these instances, I cannot understand why you appear to be unable or unwilling to indicate what these relevant overriding provisions are.

Given your inability or refusal to provide such simple information, it is difficult to escape the impression that you are unable to locate any such provision, and that your advice to the Lord Mayor (on which he based his rulings) was therefore incorrect.

Mr Sutton's reply is **Appendix 4** to this correspondence.

It is my opinion that the General Manager, Mr Gouldthorp, has shown no basis on which his advice to the then Lord Mayor Mr McCloy was correct with regard to this matter. Further the General Manager has treated a legitimate and articulate request for clarification and reasons dismissively and with disdain. This is unacceptable.

In doing so, the General Manager was not acting in accordance with the Act, particularly Section 7(a), which aims to provide an open system of local government in NSW, and Section 7(c), which aims to assist the participation of local communities in the affairs of local government.

It is also my opinion that, in refusing to supply reasons to the complainant, and by refusing to provide correct advice, the General Manager has breached Newcastle Council's Code of Conduct, particularly clauses:

4.1 You must not conduct yourself, in carrying out your functions, in a manner that is likely to bring the Council or holders of civic office into disrepute. Specifically, you must not act in a way that:

4.1.1 contravenes the Act, associated Regulations, Council's relevant administrative requirements and policies;

4.1.4 is an abuse of power or otherwise amounts to misconduct;

4.2 You must act lawfully, honestly and exercise a reasonable degree of care and diligence in carrying out your functions under the Act or any other relevant legislation.

4.3 You must treat others with respect at all times

Apart from the breaches of meeting procedure the practical effect of the General Manager's ruling was that it limited debate during a formal Council meeting of duly elected Councillors. It is via the process of debate at Council meetings that decisions are informed and made by the representatives of the community and so the purposes of the Act are achieved.

Breaches of Act, Regulations and Code 3

Refusal by GM to receive lawful motions from Cllrs Therese Doyle and Michael Osborne 1

Newcastle has recently been subject to a draft *State Environmental Planning Policy Amendment (Newcastle City Centre) 2014* the purpose of which was to amend certain parts of the Newcastle Local Environment Plan (**NLEP**). Once the NLEP was amended by notification on the NSW Legislation website on July 29th 2014, the *SEPP Amendment (Newcastle City Centre) 2014* expired.

The SEPP Amendment (Newcastle City Centre) 2014 was controversial in that it allowed for greater heights for development in the historic centre of Newcastle, but only for a select few sites.

The graphic below is was generated by the proponents and shows the site specific height benefits which have been bestowed only on particular property titles, including GPT and the NSW Government's Urban Growth. The diagram shows the towers situated on the harbour side of the Newcastle Cathedral which will subsequently disrupt the iconic views from the Harbour to the Cathedral. These views, and the general low rise ambience of the historic East End of Newcastle have previously been protected by the NLEP, which the SEPP amends.

Immediately following the exhibition of the SEPP a development application for approval of a concept plan for a high rise tower (utilising the planning controls foreshadowed in the SEPP) was lodged with Newcastle Council.

On Thursday 15th May I (Cr Therese Doyle) gave notice of a motion to be considered at the Council Meeting of Tuesday 27th May. The notice read as follows:

*Thursday 15 May
Notice of Motion for Council meeting Tuesday 27 May*

Moved: Cr Therese Doyle

Seconded: Cr Michael Osborne

That the council officers' report on the Newcastle East End Project Development Application (concept plan) be brought to open Council for consideration; if possible before it is sent to the Joint Regional Planning Panel.

Background

While Council will not be the consent authority on this matter, Council's resources are being spent to develop this report to the JRPP and there is considerable community interest in the report. It is within the remit of the elected council to discuss and offer an opinion on a matter of such importance to the city.

On Tuesday 20th May the General Manager (**GM**), Mr Ken Gouldthorp, informed me verbally that my Motion would not be placed on the agenda of the meeting of 27th May due to it being 'unlawful'. At that time I requested the GM provide me with written reasons for his decision.

On Monday 26th May I sent an email to the GM asking for the reasons he had previously promised and received the reply copied below:

*From: Ken Gouldthorp
<kgouldthorp@ncc.nsw.gov.au<mailto:kgouldthorp@ncc.nsw.gov.au>>
Date: 26 May 2014 2:47:38 pm AEST
To: Cr Therese Doyle <tdoyle@ncc.nsw.gov.au<mailto:tdoyle@ncc.nsw.gov.au>>
Subject: RE: notice of motion re council officers' report on GPT/UrbanGrowth to JRPP*

Therese I gave you a full explanation last Tuesday. I will of course fulfil my obligation under the Code of meeting practice in respect to notifying the meeting of my decision. I will endeavour to give you a succinct written response to support the more comprehensive explanation I have already provided to you and Michael; however given that I have had very little time at my desk due to a range of council commitments – in particular recruitment selection panels this may not occur prior to the meeting tomorrow night.

*Regards
ken*

*Ken Gouldthorp
General Manager
The City of Newcastle
Phone: [+61 2 4974 2211](tel:+61249742211) | Fax: [+61 2 4974 2201](tel:+61249742201)
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Our Corporate Values: Cooperation | Respect | Excellence | Wellbeing*

Copied below is Regulation 240 of *Local Government (General) Regulation 2005* (the Regulation) which states that the General Manager must include in the Agenda any business of which due notice has been given, or if in the GM's opinion a motion was unlawful, a report to the meeting of the exclusion.

240 Agenda and business papers for council meetings

- (1) The general manager must ensure that the agenda for a meeting of the council states:*
- (a) all matters to be dealt with arising out of the proceedings of former meetings of the council, and*
 - (b) if the mayor is the chairperson—any matter or topic that the chairperson proposes, at the time when the agenda is prepared, to put to the meeting, and*
 - (c) subject to subclause (2), any business of which due notice has been given.*
- (2) The general manager must not include in the agenda for a meeting of the council any business of which due notice has been given if, in the opinion of the general manager, the business is (or the implementation of the business would be) unlawful. The general manager must report (without giving details of the item of business) any such exclusion to the next meeting of the council.*

At the meeting of 27th May 2014, there being no report from the GM as to why my motion had been excluded, I moved on the basis of urgency that the motion be considered.

The minutes of the Council meeting, copied below, show that again the GM then advised that the motion was unlawful, without giving reasons. In the Council Agenda papers of 24th June I expected to find a report complying with Reg. 240(2) which noted the exclusion of the motion from the agenda and (preferably) the reason why the motion was thought to be unlawful.

There appears to be no valid explanation of why the motion would be unlawful. It is simply a request that the assessment report *if possible* be brought to a Council meeting prior to being submitted to the Joint Regional Planning Panel. There was no suggestion that the Councillors would, could, or should amend or otherwise influence the assessment report, and even if the GM construed it as such the motion allowed scope for the GM to advise that wasn't possible. If the motion were adopted by Council, the GM would be responsible for its implementation, including determining if it was possible for the report to be brought to councillors before being sent to the JRPP. In my opinion, and that of those who have been consulted, there is no credible reason to believe the motion was unlawful.

I believe the GM has acted in breach of Reg. 240 (1) by not ensuring business of which due notice had been given was placed on the business paper.

I believe the GM acted in breach of Reg. 240 (2) by not providing a report to either the meetings of 27th May or 24th June noting that he had excluded a motion for unlawfulness.

In my opinion the GM has also breached the Code of Meeting Practice requiring the same actions as those of Reg. 240.

The prevention by a GM of a councillor attempting to carry out a statutory function which consisted of raising an issue by way of notice of motion is in my opinion, a breach of the Act and an abuse of power.

Breaches of Act, Regulations and Code 4

Refusal by GM to receive lawful motions 2

I submitted a further motion the Council in August 2014 taking extra care to emphasise that the purpose of the motion was not to influence Council Staff in their assessment of any development arising from the amended NLEP.

The revised motion as follows was lodged on 7 August 2014:

Notice of Motion for Newcastle City Council meeting of Tuesday 26 August

Moved: Cr Therese Doyle and Cr Michael Osborne

That in relation to DA 2014/323 re the staged development of sites in the East End of Newcastle owned by the GPT Property Trust and Urban Growth NSW, Council:

- 1. Receive a briefing by mid-September 2014 in open briefing committee by Council Staff responsible for development assessment, an overview of the factors which will be taken into account when assessing DA 2014/323. The briefing will include the expected timeframe involved and what factors will act as triggers for the timing of the assessment of the DA.*
- 2. Receive a further briefing, once Council officers have completed their assessment (and forwarded the assessment to the Joint Regional Planning Panel), on the council officers' report to the Joint Regional Planning Panel (JRPP) on the Newcastle East End Project Development Application (concept plan). This should be fine*
- 3. Recognising that Council does not have the power to amend or influence Council Officers' report to the JRPP, and recognising that Council staff do not (and cannot) represent the views of the people of Newcastle as the currently elected councillors do, that Council set aside an amount of \$50,000 to engage consultants to canvass the residents of Newcastle, their views on the proposed development; the social and cultural impacts of the development and develop a submission from the elected Councillors of Newcastle City Council. This should be fine*

Background

Newcastle City Council received an early closed briefing from representatives of UrbanGrowth on Tuesday 18 February 2014. The information presented at that briefing was scant and councillors were given no written documents at all regarding UrbanGrowth's plans for the centre of the city. Councillors were shown slides depicting "artist's impressions" of the proposed development that would be allowed in the new changes to planning controls.

Since that time, the elected council of Newcastle has received no information apart from what has been publicly released for exhibition and comment. Nor has the Council taken the opportunity to discuss proposals that will drastically affect the built character of the city.

While Council will not be the consent authority on this matter, Council's resources are being spent to develop this report to the JRPP and there is considerable community interest in the report. It is within the remit of the elected council to discuss and offer an opinion on a matter of such importance to the city.

This motion in no sense seeks to influence council officers in the performance of their duty in any respect.

A response from the GM was received on 8 August 2014 and is copied below.

Hi Therese,

As per our previous discussion in respect to the JRPP process; the legislative framework for planning assessment results in a situation where Council Officers are required to complete a planning assessment report for applications subject to JRPP determination independently and without influence from the elected Council.

Section 352 of the Local Government Act states:

(1) A member of staff of a council is not subject to direction by the council or by a councillor as to the content of any advice or recommendation made by the member

Clause 23.3.2 of the Code of Conduct elaborates on this by stating:

Councillors or Administrators must not in any public or private forum, direct or influence or attempt to direct or influence, any other member of the staff of the Council in the exercise of the functions or the member or delegate.

The Operational Procedures for the JRPP, which provide:

4.11 Council representation to the regional panel

An elected council may make a submission on a DA within their LGA that is to be determined by a regional panel up to seven days before the regional panel meeting [...]

After (emphasis added) the assessment report has been forwarded to the secretariat, it may be provided to the elected council to assist in its decision as to whether it will be making a submission to the regional panel

Clause 1 of your NOM requires a briefing by mid September by Council Staff responsible for Development Assessment on matters to be taken into account when assessing DA2014/323. This is likely to be in advance of the assessment being completed and submitted to the JRPP and in my opinion is contrary to the legislative arrangements outlined above. Consequently I would be obligated under the Code of Meeting practice not to put the NOM (as it is written) in the agenda. You could however amend your NOM to exclude 1 and slightly amend 2 and 3; and it could then be included in the agenda.

For example (and please take this as an example only); if your NOM was to be worded:

That in relation to DA 2014/323 re the staged development of sites in the East End of Newcastle owned by the GPT Property Trust and Urban Growth NSW, Council:

1. A copy of the council officers' report to the Joint Regional Planning Panel (JRPP) on the Newcastle East End Project Development Application (concept plan) be provided to Council once Council officers have completed their assessment and forwarded the assessment to the Joint Regional Planning Panel

2. Recognising that Council does not have the power to amend or influence Council Officers' report to the JRPP, and recognising that Council Planning staff are required to undertake a pure planning assessment of the allocation rather than represent the community of Newcastle as the currently elected Councilors do, that Council set aside an amount of \$50,000 to engage consultants to canvass the residents of Newcastle, their views on the proposed development; the social and cultural impacts of the development and develop a submission

from the elected Councilors of Newcastle City Council.

Please note that I have taken the liberty to alter the wording within 2 above so that it reflects the responsibilities of Councillors and staff accurately and in a less adversarial way. As previously stated, this is an example only.

I would be happy to meet with you early next week to assist you to finalise wording for your NOM in manner that would not result in it being excluded from the agenda if that would help. Unfortunately I have limited time due to existing appointments and we would need to lock in a time as soon as possible – I'm currently available between 10 and 12 noon Monday. The NOM of Course remains yours and my advice is purely in respect to how it can be worded in compliance with the assessment framework. It should not be implied to reflect my views.

*Regards
Ken*

In conversation with the GM I told him I would consider his redrafted wording. I did consider his proposal but decided to stay with my own words. I informed the GM I would not accept his redrafted motion approximately a week later. The GM then claimed I had withdrawn the original motion. The GM's claim is not correct. At no time did I withdraw the motion either verbally or in writing.

*From: Ken Gouldthorp
<kgouldthorp@ncc.nsw.gov.au<mailto:kgouldthorp@ncc.nsw.gov.au>>
Date: 22 August 2014 11:00:28 am AEST
To: Cr Therese Doyle <tdoyle@ncc.nsw.gov.au<mailto:tdoyle@ncc.nsw.gov.au>>
Cc: Cr Michael Osborne
<mosborne@ncc.nsw.gov.au<mailto:mosborne@ncc.nsw.gov.au>>, All Councillors
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Frank Giordano <fgiordano@ncc.nsw.gov.au<mailto:fgiordano@ncc.nsw.gov.au>>
Subject: RE: notice of motion re high-rise development*

Cr Doyle;

During our meeting on Monday 11 August I explained why I considered your NOM seeking a briefing from Council Officers responsible for Development Assessment on the Urban Growth/GPT Development Application to be unlawful. In essence these were the same reasons given in respect to your similar NOM on the same Development Application that was not placed on the agenda for the July meeting. AS previously explained, the DA in question is subject to assessment by the JRPP and not Newcastle City Council. Council Planning staff are required to complete a planning assessment of the application and submit their report to the JRPP. Councillors are not to attempt to influence the officers in undertaking their independent assessment and the officers report is not available to the Councillors until after it is submitted to the JRPP.

At our meeting I took the time to explain those parts of your proposed motion that could be advanced and how you could amend it to exclude the components that give rise to it being excluded from the agenda. This would still enable you to seek majority support to direct that Council receive a copy of the Officers Report AFTER it is provided to JRPP and for Council to submit its own submission to the JRPP. At that time you withdrew the NOM and advised that you would adjust it and resubmit it. Your email below (received after the closing deadline for NOM's for the August ordinary meeting) subsequently sought to have the original motion included on the agenda. This has not occurred because:

1. *The original advice to you in respect to the original NOM being unlawful remains; and*
2. *It was resubmitted after the Deadline.*

As it is not listed on the Agenda it will not be considered for debate at the meeting next Tuesday.

Should you wish to progress the alternate motion outlined in your email below, it will need to be submitted as a signed NOM in time for inclusion on the agenda for the September meeting. I understand that the completion of assessment and JRPPs consideration of it are some time off and there is sufficient time for a revised NOM to be considered at the September meeting.

As an aside you may note the article on P10 of today's Herald "New Rules for NSW Ministers" this refers to recommendations from ICAAC and proposed new rules to strengthen the separation between public officials undertaking assessment and providing recommendations from influence of elected officials. The principles behind this are consistent with the rules behind JRPP determined DA's that exclude Councillors from attempting (or being perceived) to influence officers reports.

*Ken Gouldthorp
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Our Corporate Values: Cooperation | Respect | Excellence | Wellbeing*

Mr Gouldthorp has continued to frustrate repeated attempts to place a lawful Notice of Motion on this matter before the Council.

I make the following submissions with regard to Mr Gouldthorp's claims the motion was unlawful:

- 1) The proposed motion does not seek to direct Council Staff in any way that could be interpreted as breaching the provisions of Section 352 of the Act nor the related parts of the Newcastle City Council Code of Conduct. In fact the motion specifically states that as councillors cannot direct staff a separate budget allocation be made available to engage a consultant for the purpose of making a submission on behalf of the elected Councillors.

With regard to this first contention the GM is in my opinion wrong.

- 2) With regard to the GM's claims that the operation procedures of the Joint Regional Planning Panel (JRPP) preclude inclusion of the Motion on the Council agenda the following is noted:
 - i) JRPP's are created via Sections 23G & 23H of the *Environment Planning and Assessment Act 1979* which sets out the function and purpose of JRPPs and that the Regulations may make further provisions.
 - ii) Part 16B – Planning Bodies of the *Environment Planning And Assessment Regulation 2000* sets out the general procedures for Joint Regional Panels. It does not make a reference to any prohibition on Councillors from viewing an assessment report which is to be presented to a JRPP. Nor does it refer to any timeframes in which the Councillors sitting as the Council may or may not have access to an assessment report.

My submission is that the *Operational Procedures for the JRPP* are guidelines. They are neither legislation nor regulation, do not override the *Local Government Act 1993*. The Operational Procedures for Joint Regional Panels are recommendations but they are not legally enforceable.

The prologue to the *Procedures* states:

These procedures are provided for general guidance and information only and are made available on the understanding that the NSW Department of Planning and Infrastructure (department) is not providing legal advice. The department has compiled the procedures in good faith, exercising all due care and attention.

The procedures do not affect or replace relevant statutory requirements. Where an inconsistency arises between the provisions of the procedures and relevant statutory provisions, the statutory requirements prevail.

And

It is recommended that independent advice be sought in respect of the operation of the procedures and the statutory requirements applying to Joint Regional Planning Panels under the Environmental Planning and Assessment Act 1979.

The GM is incorrect in his contention that my motion is unlawful.

However even if the *Operational Procedures for the JRPP* were binding the motion does not seek access to the assessment report, it seeks *an overview of the factors which will be taken into account when assessing DA 2014/323..* not a copy of the assessment report prior to its completion.

I have still not been able to place a lawful motion on the published agenda of a Council meeting.

Breaches of Act, Regulations and Code 5

Prevention of a motion of urgency

At the meeting of 26th August I presented the motion above on the basis of urgency.

The GM repeated his opinion that the motion was unlawful.

The Acting Mayor (Deputy Mayor Brad Luke – by this time former Lord Mayor Jeff McCloy had resigned) accepted the GM's opinion that the motion was unlawful and ruled against its acceptance. Cllr Luke did not declare a conflict of interest (which will be discussed further below).

The Council's published minutes of 26th August show no record of the moving of the motion of urgency or the ruling purported to be given by the chair.

Regulation 254 of the *Local Government (General) Regulation 2005* requires that the GM ensure the minutes of a Council meeting include the *details of*

each motion moved at a council meeting and of any amendments moved to it,

In my opinion the Council has not complied with the Regulations and provided accurate minutes to the public.

The three examples above show the apparent reluctance by Council to have public discussion of the *SEPP Amendment (Newcastle City Centre) 2014* at a public Council meeting. Both the Objects of the Act set out in Section 7 and the Charter, set out in Section 8, require Councils to consult with the community when their decision may affect them, and to promote public participation in local government. Consequently in addition to breaching the meeting regulations the actions of Council are contrary to the purpose and Charter of local government established by statute.

Breaches of Act, Regulations and Code 6

Refusal to allow Notice of Motion calling on Lord Mayor Jeff McCloy to resign

On 7th August 2014 Cllr Therese Doyle gave notice of a Motion calling on the then Lord Mayor Cllr Jeff McCloy to step aside. The Motion is copied below:

Notice of Motion to the meeting of Newcastle City Council Tuesday 26 August

That the council call on the Lord Mayor Jeff McCloy to stand aside from his position as Lord Mayor of the City of Newcastle until allegations related to his participation in alleged illegal political donations currently being considered in association with the Independent Commission against Corruption's Operation Spicer hearings and associated investigations have been completed.

Background

To ensure that council retains the confidence of local residents, it is imperative Cr McCloy should do the right thing and step aside until ICAC completes its inquiry. Persons facing charges or allegations deserve the presumption of innocence, and Cr McCloy is no exception, however there is also a broader public interest at stake in this matter.

Cllr McCloy himself has said, in relation to other matters before council, that it is very important that those in public office and in business should be seen to do the right thing.

It is illegal in NSW for property developers, or close associates of property developers, to donate to political parties and the law as it currently stands should be respected.

Cr McCloy is currently challenging this aspect of NSW law in the High Court. His position as Lord Mayor of the City of Newcastle and as councillor are specifically mentioned in the High Court writ. This is an unfortunate association and brings council into an affair not of its choosing. Council should not be associated with any action that has, as its aim, the reversal of a law that attempts to prevent developer interests from impeding the proper functioning of government or of councils.

The Lord Mayor resigned on 15th August 2014.

On 19th August while at a Briefing session Cllr Doyle was informed by the General Manager Mr Gouldthorp that the motion was unlawful as the Council could not legally require the Lord Mayor to stand aside, *'only the people of Newcastle can do that'*.

Cllr Doyle pointed out to the General Manager that the motion did not claim to require the Mayor to step aside and would simply be, if passed, an expression of the communities elected representatives.

This incident creates the appearance that the General Manager is so lacking in understanding of the Act that he is unable to recognise role of a motion which simply states in principle support for a particular position of Council.

There can be no credible argument that the Motion lodged by Cllr Doyle was unlawful.

The incident constitutes a breach of 240(1) of the Regulations. It is also another example of how Newcastle City Council has been prevented from functioning properly.

2. Entrenched conflicts of interest and unfair treatment of community groups.

The Deputy Lord Mayor, Cllr Brad Luke, is currently acting in the Lord Mayors position since the resignation of the elected Lord Mayor, Cllr Jeff McCloy.

As mentioned in the introduction one of the difficulties facing good governance in Newcastle City Council at present is the intertwined nature of the administration and the political leadership. The normally appropriate pathway to raise issues of conflicts of interest would be via a Code of Conduct complaint.

The Code requires a complaint regarding a Council official, other than the General Manager, to be made to the General Manager⁵. All complaints regarding the General Manager to be handled by the Mayor⁶ (acting in this case).

As the nature of the issues complained about relate to both the General Manager and the current acting Lord Mayor it is impossible to have any confidence that a complaint made via the Code of Conduct provisions could have any hope of being fairly dealt with.

My submission is that a repeated and fundamental disregard for conflicts of interest is occurring at Council to the extent that the Council is unable to be regarded as complying with the Act.

Conflict of interest example 1

The Minutes of Newcastle City Council meeting of 27th May 2014 show that Cllrs Posniak, Crakanthorp, Nelmes and Dunn lodged the following motion on 15th May 2014:

⁵ *Procedures for the implementation of the Code of Conduct, Newcastle City Council, May 2013, cl 5.1*

⁶ *Procedures for the implementation of the Code of Conduct, Newcastle City Council, May 2013, cl 6.1*

MOTION

That Newcastle City Council invite NICRA (Newcastle Inner City Residents Alliance) to brief Council on their concerns regarding the size scope and height of GPT/ Urban Growths proposed inner city development.

BACKGROUND

While Council has had a presentation from Urban Growth NSW and GPT, it has not had a presentation from the community, who has a divergent view from Urban Growth NSW. In the interest of fairness this motion proposes to provide a community view. NICRA aims to maintain the heritage precinct of central Newcastle, and the vistas from and to the Cathedral. There is a groundswell of concern from residents and Council has an obligation to at least listen to those concerns to better inform its decision making capacity. The inner city residents group should be given an opportunity to address council directly about their concerns.

NSW Planning and Environment placed on public exhibition two major proposed changes to planning controls for Newcastle City Centre. They are as follows:

Proposed changes to planning controls for Newcastle city centre

Planning and Infrastructure is proposing a change to the Local Environmental Plan (LEP) in response to issues raised when the draft Newcastle Urban Renewal Strategy was publicly exhibited for feedback. The exhibition includes the draft State Environmental Planning Policy Amendment (Newcastle City Centre) 2014 to enable the proposed changes. Exhibition commenced on 05/03/2014 and concluded on 21/03/14.

Newcastle Development Control Plan 2012 Amendment Newcastle City Centre

Planning and Infrastructure is proposing an amendment to the Newcastle DCP 2012 city centre controls to enable some aspects of the Newcastle Urban Renewal Strategy to be implemented. Exhibition commenced 5/03/14 and concluded on 4/04/14.

These significant proposed changes, seek to vary the previous concept plan put forward by GPT/ Urban Growth, in a major way, with the bulk of the development now directed to residential, rather than commercial development.

The minutes then show that during declaration of interest Cllr Luke declared a potential conflict of interest in the motion and then moved a 'procedural motion' that,

Notice of Motion Item 6 Urban Growth / GPT Proposal lie on the table until such time as Council is made the approval authority for the development application.

Clearly under current planning regulation the Council would never qualify to be the consent authority and therefore Cllr Luke was effectively removing the motion from debate. What is more extraordinary is that Cllr Luke, recognising that he may have a conflict of interest as a Joint Regional Planning Panelist, did not think there was a conflict of interest in voting to effectively nobble the motion.

It is acknowledged that it is up to Cllr Luke make a judgement regarding any conflicts of interest he may or may not have. Cllr Luke did this by acknowledging a potential conflict. In my opinion Cllr Luke then made a judgement that by using the sham of being able to participate in a 'procedural motion' he could take part in a majority vote which would deny debate on the motion. Had the motion to

have the NICRA group address Council been debated Clr Luke would have felt obliged to declare an interest and leave the chamber, thereby allowing the motion to be passed by a bare majority.

The NCC Code of Conduct requires any Council Official (not Staff) who has disclosed a significant non-pecuniary conflict of interest to:

13.5.2 have no involvement in the matter, by absenting yourself from and not taking part in any debate or voting on the issue as if the provisions in section 451(2) of the Act apply.

In doing so NCC has elected to apply the same standard to significant non-pecuniary interests as the Act applies to pecuniary conflicts.

Section 451(2) of the Act says:

(2) The councillor or member must not be present at, or in sight of, the meeting of the council or committee:

(a) at any time during which the matter is being considered or discussed by the council or committee, or

(b) at any time during which the council or committee is voting on any question in relation to the matter.

In my opinion the language of s 451(2) is clear in preventing any presence, discussion or voting *on any question in relation to the matter*.

Consequently I believe Clr Luke has engaged in serious and repeated breaches of the conflict of interest provisions of the Newcastle Code of Conduct. I further believe this was readily apparent at the time, and that to all observers of common sense Clr Luke and other Councillors were simply engaging in a device of pedantry to try to avoid the appearance of a conflict of interest.

It is of grave concern that there was no attempt by the GM to advise Clr Luke and other Councillors, either at the time or in an explanatory memorandum following the incident that the same considerations apply to a procedural motion regarding an item of business in which a councillor has a conflict of interest as to a substantive motion.

The position is amplified for the following reasons:

- a) The purpose of the procedural motion was not really procedural, it was substantive in the sense that it prevented any debate on the business matter whatsoever.
- b) as the voting on the procedural motion was only successful on the Mayor's casting vote a decision to remove himself from the Chamber by Clr Luke would have altered the outcome of the procedural motion and therefore the Council would have had the opportunity to consider a lawfully lodged motion to allow a residents group to address Council.

The situation is made more repugnant when it is realised that the use of the fiction that no conflict of interest can be ascribed to a procedural motion was used to completely remove debate on giving a residents group equal access to address the elected Councillors as had already been afforded to the developers. The developer (GPT) had made a presentation at a Councillor briefing on 18

February 2014. Despite this Cllr Luke and a majority of Councillors had voted to deny access to a residents group on the same subject.

In my opinion this action is in conflict with the requirements of:

- the purposes and Charter of the Act which promote community consultation.
- The conflict of interest provision of the Newcastle Code of Conduct
- the Newcastle Code of Conduct Section 5 requiring observance of equity and Section 7.2 which says:

In determining development applications, you must ensure that no action, statement or communication between yourself and applicants or objectors conveys any suggestion of willingness to provide improper concessions or preferential treatment.

While it is true that the consent authority for the development in questions will be the JRPP it is the Council planning staff who will assess the proposal. To have those staff who are in the process of producing an assessment report for the purpose of determining the application privy to a presentation of GPT and Urban Growth but refuse a recognised community group the same access is, in my opinion, a breach of 7.2 of the Code.

The breach was engaged in by half of the Councillors with the then Mayor exercising his casting vote in favour. No guidance either at the time or since has been received from the GM as to the probity of the situation.

Conflict of Interest 2

The failure to declare a conflict of interest on August 26th Council meeting.

The same conflict of interest was not even declared when my motion of urgency regarding the GPT Urban Growth development was presented to the Council meeting of 26th August, yet it must have applied.

Cllr Luke in the role as Chairperson ruled the motion was unlawful without declaring any conflict of interest arising out of his position on the JRPP. Cllr Luke was under the same obligations via the NCC Code of Conduct (which adopts the standard set out in s. 451(2) of the Act) as he was on previous occasions, i.e. to not be present or in sight of any Council meeting which is voting on *any question in relation to the matter*.

Had Cllr Luke stepped aside, as I believe he should have done, the motion would have been able to be considered for urgency.

3. The misuse of public resources in a manner not provided for in the Act via employment of Chief of Staff for the Lord Mayor

In my opinion the Council is in breach of the Act by employing a Chief of Staff to the Lord Mayor who reports to the Lord Mayor, represents the Lord Mayor at meetings, negotiates with community and business groups on behalf of the Lord Mayor and gives political advice to the Lord Mayor.

The position is far more than an executive assistant. In my opinion the specific position description advertised for the position of Chief of Staff on constitutes a breach of the following sections of the Act;

- a) S.335 Role of General Manager
- b) S.226 role of Mayor
- c) S.231 Deputy Mayor
- d) S.232 Role of Councillor
- e) S.252 provision of facilities other than in accordance with an adopted policy
- d) s.352 Independence of staff

It is my further opinion that the employment of the Lord Mayor's Chief of Staff is also a breach of the Code of Conduct by the Mayor and a breach of the General Managers contract of employment.

Background

On being elected Mayor in September 2012 Mr McCloy sought to install a 'special advisor' to the Lord Mayor.

On 9th October a Lord mayoral Minute was presented to the Council meeting seeking to engage on a contract as 'special advisor' to the then Lord Mayor. had been the campaign co-ordinator for Mr McCloy's election campaign. The contract was to be \$90,000 p.a. inclusive of expenses.

The Lord Mayoral Minute is **Appendix 5** to this complaint.

The Minutes of 9th October 2012 meeting show that the Lord Mayor withdrew the Lord Mayoral Minute. Media reports at the time suggest that both the ICAC and the Office of Local Government (OLG) were contacted and apparently reminded the Council of it's obligations to advertise the position.

Subsequently a new position of Lord Mayor's Chief of Staff was created and advertised. It is not apparent that this decision was taken by the elected Council. Nor was the position considered in the context of Council's structure, which in my opinion it should have been given the qualitative change to the office staffing in the 'Lord Mayor's Office.

The advertisement for the Lord Mayor's Chief of Staff from October 2012 is attached as **Appendix 6**

The advertisement states of the positions' responsibilities:

- reports to the Lord Mayor
- may only direct other staff in the Lord Mayor Office and all other contact with staff is to be via the General Manager
- Liaise and negotiate with the community, business and constituent groups, and act as representative of the Lord Mayor as required
- Manage projects and issues on behalf of the Lord Mayor as directed. This includes the preparation of submissions to Government (in conjunction with Council staff), including researching and preparing briefs on issues as directed by the Lord Mayor.

- Liaise with Councillors and Council staff and monitor and manage key issues on behalf of the Lord Mayor.

These elements of the position description show that the position is not purely administrative. It is a political position, directed by and answerable to the Lord Mayor, tasked with representing the Mayor to business and constituent groups.

The words *manage projects and issues on behalf of the Lord Mayor as directed* is strongly indicative of a position which is not just facilitative and does more than just convey the Lord Mayor's wishes. *Manage projects and issues* suggests that the position is charged with a management function inclusive of independent judgement.

The Essential Position Criteria require:

Ability to identify and respond to emerging issues which have a political and / or policy impact and to provide proactive advice

and

Experience and skill in dealing with people at executive and representative level with the ability to represent the Lord Mayor and the Office of the Lord Mayor to a wide range of individuals and organisations.

These so called essential skills are both strongly political.

Also of note is the advertisement for the position of Executive Assistant to the Chief of Staff. The advertisement dates from September 2013, almost a full year after the creation of the Chief of Staff position.

The Executive Assistant to the Chief of Staff Advertisement is attached as **Appendix 7**. Under the heading *Organisation Context of Position* it states (underlining added):

The Executive Assistant role is working in the Lord Mayor's Office. This Lord Mayor's office manages the political, strategic, and tactical day-to-day business of the incumbent Lord Mayor – a role that is popularly elected by the residents of the Newcastle Local Government area. The office interfaces with a number of stakeholder groups on behalf of the Lord Mayor including the general public, Newcastle Councillors, Council staff, the media, State and Federal politicians and visiting dignitaries. This multi-faceted portfolio requires a high degree of professionalism.

It is hard to imagine a clearer statement of the position of Chief of Staff as a political one than that contained above:

This Lord Mayor's office manages the political, strategic, and tactical day-to-day business of the incumbent Lord Mayor.....

Finally there is evidence that the Chief of Staff position acts in a political way. Just two days before the then Lord Mayor Jeff McCloy resigned on 17 August 2014 the Chief of Staff was quoted in the Newcastle Herald as providing an explanation in answer to queries raised in the ICAC as to the Lord Mayor funding another candidates election material for the 2012 Local Government Election.

The Herald article is attached as **Appendix 8**, in it the Chief of Staff says:

The lord mayor's chief of staff, Gillian Summers, said the Electoral Funding Authority was aware of the arrangements for the printing.

Ms Summers said "two lots of printing" – one for Mr Robinson, the other for Mr McCloy – were "made on one order form", with Mr Robinson paying \$550 for his 20,000 flyers and "Jeff McCloy separately paying his printing costs".

In the normal course of Council employment it is inappropriate for a Council staff member to be commenting on election matter of Councillors. That it has occurred in this instance is indicative that the Chief of Staff perceives it as part of their job to manage political issues on behalf of the Mayor.

Permissibility

I am unable to find where in the Act a Mayor is able to engage a political assistant (as opposed to an administrative assistant) who is directed by the Mayor. All positions other than the General Manager, who reports to Council, are required to report to the General Manager in order to ensure the administrative and political separation of responsibilities is clear.

Bluett's Local Government Handbook NSW, 17th Edition, 2012, says on page 143:

Section 335 represents a major departure from the previous Act. It confirms a Council's General manager as its chief executive officer, a position formerly held by the Mayor, and should be read in conjunction with s. 226 (role of the Mayor) and s 232 (role of a councillor) to gain a picture of the relationship created by the Act between the elected body and the general manager of a council.

The role of the General Manager is to manage the day to day operations of the Council and to direct staff (s 335). By not doing that with regard to the LM's Chief of Staff I believe the General Manager is failing to fulfil his duties as required by the Act and by the Standard Contract.

The role of the Mayor is to preside at meeting and civic functions, exercise policy making in times of necessity between meetings (s 226). Nowhere in the Act does it state that the Mayor is to exercise direction of staff or the operations of Council such as drafting submissions to other levels of Government as described in the Chief of Staff position description.

The role of the Deputy Mayor is to *exercise any function of the mayor at the request of the mayor or if the mayor is prevented by illness, absence or otherwise from exercising the function (s 231(3)).*

In my opinion the clear intention of the Act is that the role of representing the Mayor (when the Mayor is unable to be present) is to be carried out by the Deputy Mayor. In practice it is often carried out by another elected member of a Council but never by a staff member.

A staff member representing an elected official crosses the boundary between staff being required to give independent advice (s. 352) and representing the political position of elected councillors. The requirement of the Chief of Staff to represent the Lord Mayor requires the person to act in a political

manner. Further the requirement in the position description to identify *and respond* to political issues is also a political role which is prohibited by the Act.

In my opinion the engagement of the Lord Mayor's Chief of Staff is a breach of s. 352 of the Act.

Further Section 252(3) of the Act provides that no expenses are to be paid nor facilities provided for the Mayor or Deputy Mayor unless in accordance with a policy published in accordance with s 252 (1).

The policy must comply with the Act, regulations and relevant guidelines issued under s 23A of the Act.

The *Guidelines for the payment of expenses and the provision of facilities for Mayors and Councillors in NSW, October 2009 (Expenses and Facilities Guideline)* is such a document issued under s 23A of the Act.

The Expenses and facilities Guidelines say that:

A person's re-election is considered to be a personal interest. Official council material such as letterhead, publications, websites as well as council services and forums must not be used for such personal interests. Situations in which the appearance may be given that these are being used for such purposes are also to be avoided (clause 10.16 refers).

The Expenses and Facilities Guideline goes on to say that Councillor should not obtain private benefit from the provision of facilities.

NCC's adopted policy of *Payment of expenses and provision of facilities to Councillors* states:

6.1 The Lord Mayor and/or Councillors must not obtain private or political benefit from any expense or facility provided under this policy.

And,

6.3 Political benefits include production of election material, the use of Council resources for campaigning, use of official Council letterhead, publications, websites or services for Councillor's own political benefit.

The *Payment of expenses and provision of facilities to Councillors* also says with regard to the Mayor:

25 Additional facilities for the Lord Mayor

25.1 Council will provide to the Lord Mayor:

25.1.1 furnished office at City Hall, with computer, printing and copying facilities, internet access, telephone and reasonable office refreshments such as tea, coffee and biscuits and daily newspapers;

25.1.2 maintained motor vehicle of an appropriate standard and type with a fuel card and a car parking space at Council's City Administration Centre;

25.1.3 Lord Mayoral Chains of Office and robes for official, civic and ceremonial use;

25.1.4 Lord Mayoral letterhead; and

25.1.5 corporate credit card for the payment of expenses incurred in accordance with this policy, which the Lord Mayor will use in accordance with Council's Corporate Card Policy.

25.2 The General Manager will make Council Officers available to assist the Lord Mayor to attend to Official Business in accordance with Council's organisational structure, budget allocation and the Lord Mayor's delegations.

25.3 When deputising for the Lord Mayor, the Deputy Lord Mayor will be provided with reasonable access to and use of the facilities provided to the Lord Mayor under this policy.

Given the wording of the position description of the Chief of Staff and the declaration in the Chief of Staff Assistants' position it is apparent that the position of Chief of Staff is a Council facility which is designed to provide political advice and support.

The receipt of political benefits is prohibited by Newcastle Council's own policy and the practice is therefore also in breach of s 252 of the Act. The immediate past General Manager and the current General Manager's role in allowing the appointment to be made and continue, must also be seen as a failure to act in accordance with the Act and the standard General Managers' contract.

4. The State Environmental Planning Policy Amendment (Newcastle City Centre) 2014 and Newcastle City Council's position on it.

Summary: The Council's submission and interaction with the Newcastle SEPP can be summarised as follows:

- As yet undisclosed negotiations appear to have been held between Council, DoPI, GPT and Urban Growth prior to February 2014.
- A Lord Mayoral Minute supporting the GPT and Urban Growth '*catalyst projects*' was passed by Council without Councillors having any written information about the Newcastle SEPP and without knowing what was contained in the Newcastle SEPP and associated DCP.
- Debate on the Lord Mayoral Minute by the elected Councillors was unlawfully prevented from occurring by the Lord Mayor on advice from the General Manager.
- The Lord Mayoral Minute was later used as a submission to the Newcastle SEPP without any authorisation from Council.
- Council did not receive any professional planning advice from its own staff on the Newcastle SEPP.
- Council did not request its own Urban Design Consultative Group for input (despite the Group requesting input).
- Consequently the Council submission to DoPI regarding the Newcastle SEPP was made without authorisation by the elected Councillors, without proper debate, without professional advice from Council staff, and without the exercise of due diligence by Council.

Background

The Draft Newcastle Urban Renewal Strategy 2012 (DNURS 2012) and the proposed changes to the Local Environmental Plan for zoning, height and floor space ratio controls were first exhibited from 14 December 2012 until 19 April 2013. The DNURS 2012 was within bounds of community expectations although the majority of submissions reflected the view that the community of Newcastle and the Hunter Valley do not want the rail line cut at Wickham.

Newcastle City Council made a submission on the DNURS 2012 dated 16 April 2013. The submission was endorsed by Council on 9th April 2013. As can be seen by reading the submission it is a detailed 20 page response to an important planning initiative. It is the type of response which is typical of a professional planning submission to a planning instrument. The NCC submission on the 2012 DNURS is **Appendix 9** to this letter.

However in February 2014 the NSW Government announced that a revised strategy would be placed on exhibition for just 16 days from 5th March 2014 til 21st March 2014.

This was done in the form of *State Environmental planning Policy Amendment (Newcastle City Centre) 2014* and associated Development Control Plan.

The revised plans had not been the result of a consultative process and were shocking to the community of Newcastle. The revised plan had clearly been informed by detailed discussions with the property development company GPT, their (now) partners the NSW Government owned Urban Growth, and the University of Newcastle. The plan featured a massive benefit to specific sites owned and controlled by those particular organisations. A diagram showing site specific benefits bestowed on particular GPT and Urban Growth in the East End of Newcastle was included earlier in this submission.

An obvious and immediate question to anyone involved in public life must be *“Is it appropriate to bestow windfall benefits on a small number of landowners to the exclusion of others?”* And *“Why was there no opportunity for broader input into the drafting of the plans?”* and *“Why was there such a short public exhibition period?”*

The public exhibition material included ‘submissions’ from GPT/Urban Growth dated a week before the exhibition period began. It is not possible for submissions dated a week before public exhibition to have been the source of input to the proposed SEPP. Therefore it is likely these ‘submissions’ were only drafted after substantial discussions had already taken place between GPT/Urban Growth and Newcastle University as to the likely course the DoPI was going to support.

The Newcastle City Council submission on *SEPP Amendment (Newcastle City Centre) 2014* comprised only the forwarding of a copy of the Mayoral Minute of 25th February 2014. The Lord Mayoral Minute is not a specific endorsement of the Newcastle SEPP and was passed prior to the Newcastle SEPP being placed on public exhibition – and consequently there was no chance for the Council to hear from Newcastle residents and potentially consider their sentiments in the Council submission - and indeed the Newcastle SEPP had not been seen by any of the Councillors (that I am aware of) at the time of the Lord Mayoral Minute.

The minute is copied below:

When the Lord Mayoral Minute was presented to Council on 25th February 2014 an attempt was made to amend the Minute by Cllr Nelmes. The unlawful manner in which debate was prevented on the amendment was discussed previously in this submission.

It is of greater concern that the above minute constitutes the body of NCC's submission to the *SEPP Amendment (Newcastle City Centre) 2014* and the *Newcastle Development Control Plan 2012 Amendment Newcastle City Centre* **and that Councillors did not have access to the proposed SEPP or planning analysis at the time of voting on the Mayoral Minute.**

On 20 March 2014 Council's General Manager made a submission on the SEPP which simply forwarded the Lord Mayoral Minute and included the sentence copied below:

The City of Newcastle Council at its meeting on February 2014, adopted a commitment to the continuing revitalisation and future prosperity of the City of Newcastle. Whilst the commitment preceded the release of further changes to planning controls for the city centre, the commitment specifically identifies that the City will partner with the NSW government to deliver the Urban Renewal Strategy.

Several things must be noted at this point:

- i. Councillors did not at any stage vote to support the SEPP Amendment (Newcastle City Centre) 2014.
- ii. At the time the General Manager forwarded the submission to the Department of Planning a rescission motion had been lodged regarding the Mayoral Minute.
- iii. In a memo dated 25 March 2014 Councillors were informed that the submission authored by the General Manager was sent in response to a **request** from the Department of Planning & Infrastructure for comment.

Charter of Local Government Act & governance.

Council has a responsibility to act in accordance with its Charter; which includes providing community leadership and to engage in long term strategic planning⁷.

Councils also have a responsibility to exercise 'due diligence' in exercising their functions⁸.

It is not credible that experienced and professional Council staff would not make a submission on such an important planning strategy, the purpose of which was to alter its own Local Environment Plan, without being directed not to. In fact the staff response (**Appendix 10**) to the Labor Councillors 'Our Town Our Choice' motion which was on the agenda of the Council meeting of the 25th February 2014 included a recommendation that a submission be made.

The fact that no substantive submission was made indicates that Council staff were directed not to.

In my view this is a serious failure of Council to act in a manner which was either responsible or consistent with its Charter.

The failure of the Council to make a submission, or even make inquiries is highlighted by the requests by the Council's Urban Design Consultative Group (**UDCG**) to be briefed by the DoPI. The UDCG is constituted under Clause 27 of SEPP 65. After the DoPI failed twice to attend appointments with the advisory group apparently nothing was done by either the Council or the DoPI to obtain their advice.

⁷ Section 8, *Local Government Act 1993*

⁸ P. 22 *The Guide to good governance and ecologically sustainable development for local Councillors 2008*, HCCREMS 2008 (The Hunter & Central Coast Regional Environmental Management Strategy — a program of the Environment Division of Hunter Councils)

The advice turned out to be explosive in its critique of the Newcastle SEPP however it was not passed on to the DoPI but not to Councillors until I requested it in October 2014.

The UDCG advice says, in part:

The distinct urban form at the centre of the city of Newcastle is a critical part of the historic character and visual identity of the region, and it is the Group's view that it must be respected by any new development. In Newcastle the adopted urban strategy is for tall towers to be located at Wickham, where they will not be intrusive and destroy the unique qualities of the historic city. (Appendix 11)

Given that the UDCG was pressing Council to make a contribution it does not seem credible that Council did not seek their views and incorporate those views into their own submission on the SEPP. There is an even stronger question surrounding the DOPI failure to honour two appointments with the UDCG for the purpose of discussing the SEPP.

I request that an investigation clarify if Council staff were:

- a) directed not to make a submission for reasons that their opinion would not be welcome to the political majority of Council, or
- b) directed not to make a submission because the conflicts between the 2013 submission and 2014 submission would be embarrassing for Council, or
- c) directed to remove opportunities for open debate on what was (and is) the most significant and controversial planning decision to affect Newcastle for 30 years.

Council's current position on the Newcastle SEPP

Council's failure to lodge a submission that had been discussed and endorsed by the elected Councillors, and to instead lodge the Lord Mayoral minute, results in a Council's only position being that described in paragraph d) of the Lord Mayoral Minute above:

(d) Working with UrbanGrowth NSW (the lead NSW State agency for the revitalisation of the City Centre) to deliver significant catalyst projects for the City's revitalisation such as the Hunter Street Mall revitalisation project with The GPT Group, which UrbanGrowth believe "has strong potential to be one of the most exciting and significant urban renewal projects in the country".

The adoption of this Minute is presumably informed by the [GPT/Urban Growth 'submission'](#) and tantamount to an outright endorsement of the property developer's position.

At this point I can only conjecture what the motivations might have been behind this "submission". However the evidence is that Newcastle Council has remained silent in circumstances where no responsible local authority could be expected to remain silent.

To adopt the briefest position of accepting a property developer's submission without asking professional Council Staff for an appraisal must surely be such an obvious failure of due diligence on behalf of the public interest as to be plainly unacceptable.

In fact a local authority which did not make a submission to the Department of Planning and Infrastructure when faced with such radical changes to its principal LEP could be considered to be negligent or incompetent.

Further at every single opportunity Council has sought to muzzle all debate regarding the *SEPP Amendment (Newcastle City Centre) 2014*.

I request that you as Minister institute an investigation into Newcastle City Council to determine the extent to which Council may have been privately directed by the former Mayor, and possible others, in contravention of the governance structure of the Council, to bestow windfall planning gains to a select few property owners.

Summary

The Local Government Act provides for an open and participatory system of Government which allows for a diversity of opinion to be debated in a public forum. This is an admirable strength of the Act.

As presented above I have concerns that Newcastle Council is consistently in breach of the Act, the Regulations and its own Code of Conduct.

The Council has shown a consistent unwillingness to allow open debate of the GPT/Urban Growth development proposals and in so doing has incorrectly claimed various motions were unlawful, and in my opinion has improperly abused meeting procedure to stifle debate.

The Council has consistently failed to recognise conflicts of interest particularly where those conflicts have prevented the debate of motions regarding the GPT property development.

Most importantly it appears Newcastle City Council, via its responsible staff, failed to make an appraisal of the GPT/Urban Growth-driven SEPP Amendment (Newcastle City Centre) 2014 and failed to provide Councillors with advice. In my opinion there is an urgent need for an inquiry into the reasons why a local planning authority, which is experienced and comparatively well resourced, would not (or was prevented) from providing professional advice to the elected Councillors.

Finally it appears that NCC has created a position which, in breach of adopted policies, bestowed political benefits on the former Lord Mayor. The position was created by the management of Council without being debated by the elected Council and without being included in the organisational structure of the Council.

The provision of benefits to the former Lord Mayor raises serious questions of probity, personal benefit and the administration of the Council.

An investigation is required into Newcastle City Council to examine the extent to which the current administration and Councillors have, and haven't, acted in accordance with the Act.

Therese Doyle
Newcastle City Councillor

List of Appendices

Appendix 1 correspondence of John Sutton dated 27 February 2014

Appendix 2 General Manager's letter of response to this correspondence.

Appendix 3 Mr Sutton's correspondence of 9 April.

Appendix 4 Mr Sutton's reply

Appendix 5 The Lord Mayoral Minute requesting appointment of former campaign manager.

Appendix 6 The advertisement for the Lord Mayor's Chief of Staff from October 2012

Appendix 7 The Executive Assistant to the Chief of Staff Advertisement

Appendix 8 Herald article 15 August 2014

Appendix 9 The NCC submission on the 2012 DNURS

Appendix 10 Staff response to the Labor Councillors 'Our Town Our Choice' motion

Appendix 11 Urban Design Consultative Group correspondence to Council regarding the Newcastle SEPP.