Submission No 285

INQUIRY INTO PLANNING PROCESS IN NEWCASTLE AND THE BROADER HUNTER REGION

Organisation: The Haberfield Association Inc

Date received: 24/10/2014

The Haberfield Association Inc

www.haberfield.asn.au
ABN 95 746 895 512

24 October 2014

Rev. the Hon Fred Nile MLC - CHAIR
Select Committee on the Planning Process
in Newcastle & the Broader Hunter Region
NSW Legislative Council

re: **KING EDWARD PARK, NEWCASTLE**

Dear Reverend Nile & Committee ---

Please find attached a submission by The Haberfield Association Inc. in regard to the proposed use of the above Crown Land for a private function centre - and this site being of exceptional importance - not just "any" public space, but a major coastal/headland site that has both heritage/historic significance, and far wider community "ownership" and interest than just the local Newcastle region.

We urge you to take this State-wide relevance into account in your deliberations. However, and with even more urgency, we also suggest you consider the fundamental LEGALITY of what is being proposed.

For instance -- is the Committee aware of the "RUTLEDGE PRINCIPLES" as ruled in 1959 by Justice Windeyer in a famous case *Council of the Municipality of Randwick v Rutledge* (1959) 102 CLR 54, 88. (see attached) in the High Court. For over half a century these principles have been upheld as definitive case law regarding all questions of legitimate use for Crown Land Reserves.

To give some idea of how stringent this ruling is, consider the case in *Storey v Council of the Municipality of North Sydney* (1970) 123 CLR 574 where the High Court held that land which could only be used as a public reserve could not be leased to the Boy Scouts Association for a Scout hall and scouting purposes generally. That was not permitted because the land would, by reason of the lease, not be open to the public at large.

In another notable case, a south-coast Council was prevented from installing ocean outfall sewer gratings because this would be a 'non-recreational' an intrusion in conflict with the public area/access/enjoyment of a coastal Reserve.

In this context it is important to note that s 6 of the Crowns Land Act provides that Crown land is not, among other things, to be *"used, sold, leased, licensed, dedicated or reserved or otherwise dealt with unless the [activity] is authorised by this Act".*

What Rutledge means in essence is - whenever and wherever Crown Land is "reserved" for public recreation/purposes, that use is absolute, and anything that can occur on the land must be such that it remains open to the public as of right. In fact Rutledge goes further, to specify and that no use can be condoned, much less encouraged, when it is for private profit.

.

In fact, applying Rutledge means that the ONLY kind of commercial activity that can legitimately be allowed on a Crown Land Reserve is where income is incidental to, and arises from, relevant public use of the land, and where all profit is for the sole purpose of maintenance or improvement of the Crown land concerned.

To make this explicitly clear, the Crown Lands HANDBOOK spells it out on p.118 --

> The term 'public reserve' .... has been considered in legal proceedings to be: ***an unoccupied area of land preserved as an open space or park for public enjoyment, to which the public ordinarily have access as of right.***
>
> The two criteria which land must satisfy to be a public reserve are that the land must be ***open to the public generally as of right; and it must not be a source of private profit.*** 8

Applying these principles to King Edward headland Reserve, there is nothing inconsistent with the land being reserved for ".public recreation" and the construction of a clubhouse, shop and offices which are for the better enjoyment of the reserve by members of the public

None of this describe a PRIVATE function centre, which is thus ipso-facto disqualified from occurring on Crown Land Reserve such as King Edward Park. There is in fact is a direct legal precedent for this statement - in 1992 , Willoughby Council challenged a small wedding function centre that had somehow established itself in Garigal National Park, a large Crown Land Reserve located near Northbridge and often called Davidson Park.

Not only did the Court rule (*Willoughby City Council v NSW Minister for Parks*) that the private operation was illegal and must close forthwith. The actual function-room premises were demolished as an intrusion on the public nature of the Reserve.

This long-standing legal parallel means that no matter how or where (purported re-zoning of such a significant public site by way of Schedule is abhorrent as abuse of process) the revised Newcastle LEP indicates that "function centre" is to be a permitted use at this headland, this can have NO practical effect. While ever this Reserve remains gazetted for public recreation, neither the Council (nor indeed the Minister) have any power to approve what is demonstrable ILLEGAL USE. In law, they literally cannot give consent, because the Crown Lands Act overrides any local LEP.

We urge the Committee to consider the legal ramifications contained in this submission before making any decision - if needed, referring the matter to the Attorney General. We also respectfully draw the draw the Committee's attention to the fact that breaches of Rutledge in regard to several other Crown Land sites (immediate instances being Talus Reserve and Trumper Park) are currently under scrutiny by various authorities - the Auditor General and ICAC included.

As a recognised community group, The Haberfield Association actively supports all submissions made by Friends of King Edward Park and other groups. This headland is far too important to be alienated from public use simply to solve short-term problems, and never if the opportunistic so-called solution solely enriches profit-takers.

Trusting these comments are useful - we remain

Emma Brooks Maher
President 2013-14