

**Submission
No 117**

INQUIRY INTO CROWN LAND IN NEW SOUTH WALES

Organisation: Friends of King Edward Park

Date received: 22 July 2016

Friends of King Edward Park Inc.

The Hon Paul Green MLC

Chair

Inquiry into Crown Land

NSW Legislative Council

Dear Mr. Green

Please find attached the submission of the Friends of King Edward Park Inc. to the Legislative Council's Inquiry into Crown land.

As your Committee will note from the submission, the Friends of King Edward Park Inc. has very considerable experience in undertaking action, including extensive litigation in the Land and Environment Court, to ensure that government and its agencies comply with the dedicated purpose of Crown land. It is a complex story and one which provides critical case study evidence of the management of Crown land.

This submission following earlier submissions in response to the White Paper.

We very much look forward to your committee's deliberations.

Yours faithfully

Dr. Kim Ostinga, Dr. John Lewer and Margaret Ostinga

On behalf of the Friends of King Edward Park Inc.

FRIENDS OF KING EDWARD PARK INC.

SUBMISSION TO THE NSW LEGISLATIVE COUNCIL COMMITTEE OF INQUIRY INTO CROWN LAND

1. Introduction

Using a case study approach, this submission describes and analyses a developer's proposal to build a 500 seat private function centre on an iconic Crown land site in Newcastle's King Edward Park. Inevitably, given the complexity of the case, range of sources and the various actions of the many stakeholders, not all the fine detail has been discussed, however the cardinal issues are outlined. We are not lawyers; the case reflects on the operation of and contests over Crown land as a lived experience. Finally, the submission draws on the case to provide conclusions and makes a number of recommendations.

2. Friends of King Edward Park Inc.

Formed in 2011, the association has 270 financial members. Its objects are:

- 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.

Drawing on Joern Utzon, the associations' motto is - 'It should be good for the life of the people'.

Specific activities undertaken by the association include being engaged in litigation to defend the dedication of the park and the Headland Reserve, facilitating the publication of a book on the history and significance of the park, submissions to parliamentary representatives, Newcastle City Council's elected members and officers and other authorities over the Bathers' Way and the Gunners' Cottage, sponsorship of a University of Newcastle student prize and the promotion of public awareness of the amenity and values of the park, most notably the Splendor in the Park public forum arranged in 2012 (see attached). The association is self-funded.

The status and bona fides of the Friends of King Edward Park was tested before Justice Biscoe in the Land and Environment Court in 2012 - the case is discussed in detail later. His Honour found the association's motives satisfied the broad public interest by seeking to enforce public law obligations and to protect heritage items including Aboriginal heritage, that the membership of

the Friends of King Edward Park was geographically widespread and that the membership had no pecuniary interest in the park.

3. King Edward Headland Reserve

King Edward Headland Reserve (KEHR), which is 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. In 2005, the Minister dedicated the reserve under section 87 of the *Crown Lands Act* for the purpose of public recreation. The King Edward Headland Reserve Trust (No 1011189A) was established under section 92(1) of the Act with the Lands Administration Ministerial Corporation appointed to administer the affairs of the trust pursuant to section 95.

Known to the Worimi and Awabakal people as 'Yirranali' - the place of falling rocks - 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. The Headland 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; coal was the very first export from the colony. In recognition of the great potential wealth from coal, the nearby streets Watt, Newcomen and Bolton were named after pioneers of the steam engine. Two hundred years later, the site overlooks the world's largest coal port.

Aesthetically, and as shown below, the park and headland occupy one of the most spectacular locations on Australia's eastern seaboard.



4. Plan of Management

In 2007 a draft Plan of Management was publicly advertised for comment. Meetings were held with the local community and the Newcastle City Council (NCC). The consensus was that there should be little or no development on the Reserve. The General Manager, at the time, wanted the Reserve to be returned to the Park. Despite this, economic considerations won the day and approval for a commercial development on the site was given and the POM was duly gazetted by the Minister, Mr. Tony Kelly.

5. Development Application

In December 2010 a Development Application (DA) for a 500 capacity seat function centre with associated parking and a small kiosk was lodged with the NCC and publicly advertised. Annie Street Commercial Pty Ltd - its sole director is Mr. Keith Stronach – was the developer. The DA was for a much larger development than was proposed by the Plan of Management; it allowed very little public access and completely restricted the public from the magnificent southern boundary. The only heritage it acknowledged was that of a bankrupt bowling club. Despite the fact the DA was notified on 28 December 2010 - over the Christmas and New Year period - the Council received more than 300 objections to the proposal. In response to these objections the DA was re-notified with minimal changes- and still no access to the southern boundary.

In November 2011 the DA was given consent. The Council had been presented with an opinion from Mr. Tim Robertson SC suggesting that the proposal was unlawful but this was ignored.

To compensate the public for its loss of the views from the southern boundary, a pathway through the adjoining park was added to the DA. It was well removed from the overhanging function centre in order to protect the privacy of its guests from the public.

The pathway on a slope, known to be unstable was not subject to mine subsidence, geotechnical assessment or park impact studies but was a condition for DA support from several councillors. It was later to be the subject of a section 96 application for its removal. This was supported by both state and local government officers and there was additional strong evidence to suggest that it was no more than a ruse to placate the public and win the necessary votes for the consent with no intention of its ever materialising.

It's interesting to note that one of the reasons previous access to the southern boundary within the Reserve had been refused was because of soil instability. The NCC now approved a pathway on the southern slope below the site on even more unstable ground.

There was community consultation on all steps along the way, sadly it was completely ignored.

6. Land and Environment court litigation

The NCC's consent of the DA was challenged by the Friends of King Edward Park in the Land and Environment Court. A Joint Regional Planning Panel review was not possible as, interestingly, the DA specified a capital investment value which was just below that which would have facilitated their involvement.

The DA was considered under the 2003 Local Environment Plan (LEP) that classified the site as RE1/6A, which indicates open space and recreation zone. It forbids function centres except under Plans of Management (PoM) with consent. Concerned as to the validity of the proposed use of the KEHR site the Friends of King Edward Park provided NCC with the written opinion from a senior counsel, Mr. Tim Robertson SC, which the Council then provided to the Crown. Robertson's advice was comprehensive and unequivocal:

'In summary, the application before Council proposes to use the Reserve for commercial purposes and is prohibited. It is not permissible.'

Prior to the case being heard, in a tactical response to the Friends of King Edward Park's application, the NCC applied to the Land and Environment Court seeking a judgment for security of costs (\$70,000); which, if successful, would have had the effect of excluding a judicial review of the DA consent and the appropriate use of Crown land. The case was heard in April 2012, and in his judgement handed down on 16th May 2012 Justice Biscoe dismissed the NCC's application finding that the Friends of King Edward Park's proceedings were brought in the public interest. At paragraph 63 his Honour 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.' (*Friends of King Edward Park Inc. v. Newcastle City Council [2012] NSWLEC 113*)

Justice Sheahan heard the substantive case in March 2014 and handed down his decision in May 2015 in *Friends of King Edward Park Inc. v. Newcastle City Council (No. 2) [2015] NSWLEC 76*. His Honour found in favour of the Friends of King Edward Park deciding, in brief, that the PoM and the DA were invalid and of no effect. He confirmed the Rutledge Principle which states that land can be said to be used for public recreation only if it is open to the public as of right and is not a source of private profit.

Of particular note during the court hearing was an email record in which the NCC's Manager of Building Services responded to several queries from a senior planner. The planner was concerned that heritage and mine subsidence approval had not been given to the pathway. The response to these very legitimate questions was 'not to ask questions that cause you stress and anxiety'. Failing to properly brief the council, arguably, contributed to the invalid consent; a cost ultimately borne by the hapless ratepayers.

The Minister for Primary Industries and for Lands and Water, the Hon. Niall Blair, has downplayed the significance of the decision, telling a budget briefing in November 2015 that

the decision did not 'set a general precedent for other Crown land cases'. Others, though, have highlighted its importance; in the July 2015 edition of the *Journal of the NSW Law Society*, for instance, Crown land experts Christopher Conolly and Benjamin Harris stated that 'The NSW Land and Environment Court has confirmed that land can be said to be used for public recreation only if it is open to the public as of right and is not a source of private profit.'

7. Costs

Although Sheahan J. awarded the applicant's costs in full, the NCC and the Crown disputed how this should be applied. Again, the issue was litigated and again, Sheahan J. found in favour of the Friends of King Edward Park by reasoning, for example, 'in the end, the applicant was entirely successful in its challenge, and in obtaining the outcome it sought' (*Friends of King Edward Park Inc. v Newcastle City Council (No 3) [2016] NSWLEC 74*).

That the NSW government sought to engage in litigation over costs appears, in our view, to seriously disregard their July 2008 model litigant policy which, apparently, is founded on 'concepts of behaving ethically, fairly and honestly'. It is difficult to reconcile their actions with the policy's principles to deal with claims promptly, not take advantage of a claimant who lacks the resources to litigate a legitimate claim, pay legitimate claims, avoid litigation and to keep costs to a minimum.

8. Failure to comply with Justice Sheahan's decision.

In 2005 the State government fenced the Headland Reserve off after the derelict bowling club on the site was demolished - see below - and left the Reserve in a completely unkempt and unusable state. The fence, some 15 months after Justice Sheahan's decision remains, which, at best, speaks to an unwillingness by the Crown to comply with the decision. Simply, given Justice Sheahan's decision that as the DA was 'invalid and of no effect' it follows that the public are entitled to access the Headland Reserve as a right. Also, Justice Sheahan ordered that Annie Street Commercial 'be restrained from taking any step to use the subject land for any purpose other than public recreation'. Surely, the fence means the land is not available for public recreation.

So, how is the lack of compliance with his Honour's decision explained? The Friends of King Edward Park have been given various, changing reasons from the government agencies as to why the wire remains. Earlier, the excuses were that the site was unsafe due to the presence of building rubble and debris; more latterly the government has been drawn out to explain that a Provisional Developer's Agreement between Annie Street Commercial and Crown Lands precludes the wire's removal. Yet, in an answer to a question without notice in parliament, the Minister for Lands said that there were no agreements with the developer that prevented the orders of the court being implemented. Curious. Mostly however, the lack of compliance by the Crown is consistent with their opinion that the decision does not mean that the land should be made available for public access.



The Friends of King Edward Park have offered both physical and financial help to remediate the Headland; all rebuffed.

So fifteen months after Friends of King Edward Park won a decisive victory in the Land and Environment Court, the public is still excluded from the Headland Reserve and a large sign, recently erected, warns 'Construction Site, No Entry, Authorised Personnel Only, Penalty \$200.00'.

9. Headland rezoning

While the case 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 refused by the Council in June 2011. 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 and the Parliamentary Counsel's Office without any zoning amendments.

In February 2012 the Friends of King Edward Park made enquiries 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 relevant internet link. 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. The decision to include a schedule 1 was made on existing use provisions, that is, it was based on the DA consented to in 2010 which was being challenged in court and subsequently found to be invalid. The schedule 1 never went

back to Council, it was never put to the public for comment and the Minister's delegate was never advised of it when he had the 2012 LEP gazetted. However, an exception to allow a function centre, kiosk with associated car parking and landscaping had been made. This exception exactly replicates the wording of the earlier DA made by the developer, Mr. Keith Stronach.

A 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.

Intriguingly, the Chief Planning Officer who assessed the objections to the original development, Mr. Wesley Wilson, was also involved in the rezoning. He would have been aware that there was significant public opposition to a function centre on the Headland 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.

How the pro-development rezoning to the LEP was secured was reviewed by the NSW Legislative Council's Select Committee on the Planning Process in Newcastle and the Broader Hunter Region which reported in March 2015. The committee 'found', inter alia, that:

'The committee acknowledges the concerns of inquiry participants regarding the rezoning of the King Edward Headland Reserve and the approval for the construction of a function centre, kiosk and car park within the reserve.

Like inquiry participants, the committee questions why the reserve was spot rezoned, given that the council had earlier rejected a proposal to rezone the land. We are significantly concerned about the lack of consultation and information provided to the community on this matter ...

The committee notes the arguments that the construction of a private function centre contravenes the *Crown Lands Act 1989* ... '

The committee recognised concerns over undue property developer influence but concluded that they had not received evidence to substantiate this concern and would await the judgement. Interestingly though, when interviewed by a journalist from the ABC in May 2015 after the LEC judgement was handed down, the committee's Chair – Reverend The Hon. Fred Nile – believed that there were sufficient grounds over the rezoning and the Development Application for the ICAC to investigate.

10. A Reserve Trust

As explained in section 1 above, in 2005 The King Edward Headland Reserve Trust (No 1011189A) was established under section 92(1) of the Act with the Lands Administration Ministerial Corporation appointed to administer the affairs of the trust pursuant to section 95.

indeed, the Trust was the second respondent in the case before Justice Sheahan. We have recently been told there are no trustees. However at the time of the DA we were told that Mr. Keith Southall and Mis. Karen Henbrow were the trustees. Curious.

Now, the Department of Primary Industries (Lands) does emphasise the significance and key role played by Crown land reserve trusts in caring for 'important land and public assets'... 'for the purposes of facilitating the management of the land on behalf of the public'... and, reinforcing the importance of Crown land to the public, the department insist that a trust 'can only make decisions and take actions concerning the reserve if those decisions and actions are in the interests of the reserve and the public ...'. Understandably, the Trust have obligations, for example, each must provide an annual report to the Minister within three months after the end of the reserve trust's financial year.

So, for the Headland Reserve – such important land and public asset – there apparently are no minutes of meetings.

11. Lease arrangements

In 2009 Annie Street Commercial made a Provisional Developer's Agreement with the Crown Lands department which specified the yearly rental for the proposed development on the Headland Reserve of (only) \$23,500. Of this 50% would be paid to the state government with the balance shared between the Newcastle City Council and the NSW Surf Lifesaving Association. While the rental was based on the advice of a registered valuer and allowed for depreciation, 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.

12. Heritage

In November 2011 the Friends addressed concern that the heritage of King Edward Park was not recognised as state significant. As was noted above, this was a park which had been given to the people of Newcastle in 1863 and which had Aboriginal and European significance. It had been recognised with a listing on the Commonwealth Register of the National Estate but over time the importance of the Register had decreased. Two of our members began to work on a submission for its state listing and in 2012 Dr. Ann Hardy from the Coal River Working Party (CRWP) made the submission for state recognition of the Newcastle Recreation Reserve or King Edward Park as we know it today. Listing is an important element in the protection of the park when major works are about to begin within its boundaries.

At a committee meeting in 2013 the NSW Heritage Committee stated that it 'Considers that King Edward Park, Newcastle is likely to be of State significance' but more work was needed. A further submission with the extra detail was made in the middle of 2013.

Unfortunately, at this stage the process stalled. CRWP were notified that the nomination could not be considered while the site was the subject of legal action. In May 2015 after the judgement was handed down the Heritage Office was again approached about the listing but we were told that there was a large work load and it was not until March this year, four years

after the initial nomination, that the matter finally came up for consideration. The Council, as trustees of the Park were asked for approval but there was an unexplained six-week delay before it was put to the Councillors who unanimously approved its listing. An ordinary person, observing these events could be forgiven for suspecting active obstructionism.

13. Conclusions

This case study has significant value in demonstrating key aspects of the management of Crown land in NSW. We argue that these include:

- A failure of government and its departmental agencies to comply with their obligations over Crown land particularly to act in accordance with the land's dedicated purpose.
- Evidence of the ascendancy of the Executive arm of government over the judiciary (apparent, for example, in the lack of action to comply with Sheahan's judgment on the grounds, paraphrasing, 'we'll do whatever we think is appropriate') and over the legislature which is shown in the responses to questions without notice in parliament.
- Government and its departmental agencies and, in this case, local government, adopt a combatively litigious approach even in circumstances in which they are provided with advice from a leading land and environment lawyer pointing to their legal errors; advice which is subsequently upheld by the court. The NCC security costs case over, in the scheme of things, a mere \$70,000, is very concerning. It is difficult not to infer the approach is designed to 'warn-off' challenges from poorly resourced community groups.
- Government and its departmental agencies have little regard for genuine community consultation; their preference instead is to developer interests which can, as this case shows, even mean acting contrary to their obligations under the *Crown Lands Act*. Cash-strapped local government may be vulnerable to commercial interests over those of the public.
- The case challenges the credibility of local government involvement in decision-making over Crown land.
- The Lands Administration Ministerial Corporation appears to have fewer (poorer?) obligations than Reserve Trusts in protecting the dedicated purpose and amenity of Crown land.
- Much decision-making by government and its departmental agencies lacks transparency: to resort to GIPA processes in an endeavour to uncover how decisions are made is a time consuming, frustrating and costly experience often met with bureaucratic indifference and obfuscation.

14. Recommendations

The Friends of King Edward Park strongly support the principles of Crown land management set out in section 11 of the current Act especially that the 'public use and enjoyment of appropriate Crown land be encouraged' and that any lease, sale and the like actions are subservient to the broader principles of the Act. However, our case demonstrates the failure of government and its agencies to comply with these principles. As to how this mismanagement may be remedied

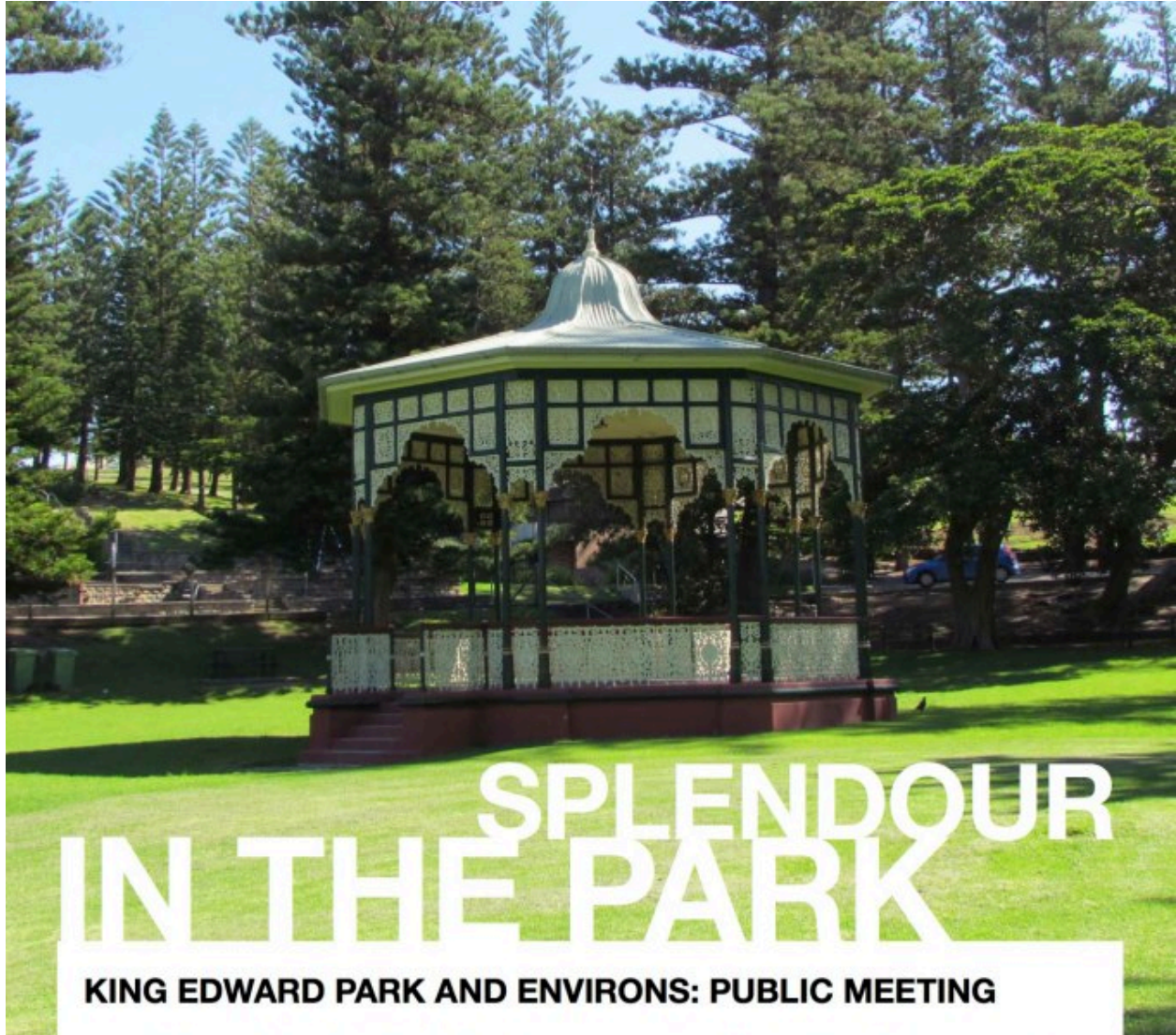
is a difficult question particularly given the very real threat posed by the ascendancy of the executive over the judiciary and the legislature, at least in this case.

Nevertheless, we consider that significant utility could be achieved by:

- Administering Crown land under the present Act. Whatever the deficiencies in the Act, it provides far more protection than the *Local Government Act*.
- Making it illegal for developers to hold local government office.
- Banning developer donations in local government as is the case in the state legislature.
- Corruption-proofing the development application process.
- Strengthening the legitimacy of the Reserve Trust arrangements especially by ensuring they are genuinely established, that there are a minimum numbers of independent, community-based representatives who are trustees and by making full public disclosure of their operations mandatory.
- Ensuring legal aid or the equivalent is made available to community-based organisations in applications before the Land and Environment Court. At the same time ensuring that the Environmental Defender's Office is properly funded by government.
- Finding ways to make accountable those in the public service who make wrong or questionable decisions.
- Preserving intergenerational sustainability – ensuring that land once given to the community is preserved in perpetuity for future generations.
- Ensuring that any new legislation is in draft form to allow for community comment. The publishing of those individual submissions on a website must also be a necessary part of the community consultation. Unfortunately this did not happen with the submissions to the white paper.

Much is at stake, indeed, as Evans (2016: 145) concluded in *King Edward Park Newcastle, NSW A History* 'There is a need for words of warning. While Novocastrians may rejoice that they have a pleasant town park, they should be reminded that their tenure, supposedly given in perpetuity to the people of the city, is a fragile right, to be carefully protected and strongly defended'.

Finally, this case study stresses the vulnerabilities of small community-based organisations such as the Friends of King Edward Park in mounting action over Crown land compared with the limitless resources of the state. Defending the dedicated purpose of the Headland by our association has relied on the indefatigable efforts of many; in this this submission we especially wish to acknowledge the Environmental Defenders Office, Ms. Jacque Svenson, Ms. Felicity Wardaugh and the University of Newcastle Legal Centre, Mr. Tim Robertson SC and Mr. Jason Lazarus. Thank-you.



KING EDWARD PARK AND ENVIRONS: PUBLIC MEETING

A public meeting is to be held to raise the profile of the King Edward Park and its environs, the Obelisk, Arcadia Park and the Headland Reserve.

The meeting is intended to inform the community of the vulnerability of these parks. Your attendance and opinions are necessary to endorse and confirm their immense public value. It is an opportunity to shape Government policy on the use of Public Reserves by letting your representatives know how you feel.

Distinguished speakers will include Architects, Richard Leplastrier and Peter Stutchbury; Archivist, Gianni di Gravio and Cultural Heritage Researcher, Ann Hardy while John Lewer from the Friends of King Edward Park Inc. will outline public action thus far. Together, they will present an

overview of our vitally important public open spaces, the heritage, history, and essential need for public participation.

An independent chairperson will conduct the meeting and open it to general discussion and questions from the floor.

It is intended that a strong public resolution will be passed to our political decision makers that will influence their attitudes to future development of these invaluable and irreplaceable public open spaces.

Date: Wednesday, 29 August 2012

Time: 6:00 - 8:00pm

Venue: Mulubinba Room, Level 1, Newcastle City Hall
290 King Street, Newcastle NSW 2300

Contact: Public officer, (02) 4929 7647

Web: www.friendsofkingedwardpark.org.au

date

29/08/12

location

Mulubinba Room, Level 1,
Newcastle City Hall

time

6:00PM

An initiative of Friends of King Edward Park Inc
and the Hunter Regional Committee of the
National Trust of Australia