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1 December 2014

Revd the Hon Fred Nile MLC
Committee Chairman
Legislative Council on the Planning Process in Newcastle
and the Broader Hunter Region
Parliament House
Macquarie Street
SYDNEY NSW 2000

Sent via email only: teresa.mcmichael@parliament.nsw.gov.au

newcastleplanning@parliament.nsw.gov.au

Dear Committee Chairman

Reference is made to your letter dated 21 November 2014 inviting me to make comments with respect to submission numbers 266 and 324a and requesting a written response by Monday, 1 December 2014.

1. **Submission # 266**

My initial comment is that this submission prima facie appears to be outside the Committee's Terms of Reference and, accordingly, its relevance is questioned. The submission primarily questions Council's decision in respect of the redevelopment of a Council facility which does not relate to a Council planning decision nor a related matter and therefore appears to be outside the scope of the Committee's Terms of Reference.

Nevertheless, the submission questions the process of my appointment as General Manager of Newcastle City Council.

I can only confirm that the processes associated with my recruitment as, initially, interim General Manager, and then subsequently, as the permanent General Manager, was handled by an independent third party recruitment firm engaged by Council. The selection and recruitment process was undertaken by a General Manager Recruitment Panel (Panel) constituted by Councillors appointed by the full elected Council and the final decision for the appointment of both the interim and permanent roles was made by resolution of the full elected Council following consideration of the recommendation of the Panel.

I can also confirm that prior to attending the interview for the interim General Manager role; I had not met any of the Panel members or any of the other elected Councillors of Newcastle City Council.

I confirm that my dealings and relationship with the former Lord Mayor were professional and cordial. This was an intrinsic part of a good working relationship that existed between the two of us which was in the best interests of the City of Newcastle. I believe that I have adhered to and "followed correct

protocols, processes and guidelines at all times" in the course of executing and discharging my responsibilities as General Manager of the City of Newcastle.

2. Supplementary Submission # 324a

I wish to comment on the statement made by Mr John Sutton on the last page of his supplementary submission with respect to his allegation that:

"the General Managerhas without adequate justification – used his authority to obstruct Notices of Motion from Councillor Therese Doyle that would allow the elected Council to receive and discuss a Council report responding [to] the proposed Urban Growth/GPT development.....These matters raise significant probity questions in relation toCouncil's current General Manager, Ken Gouldthorp."

Such allegation is totally false and without any factual foundation. It is unacceptable that Mr Sutton casts aspersions on my good name and character and does so built on falsehoods that, upon examination, do not stand up to any form of scrutiny. Moreover, he does not support his false claims by offering the Committee any substantive evidence. Consequently, his allegation should be rejected by the Committee.

On 15 May 2014 Council staff received a Notice of Motion from Councillor Doyle that recommended:

"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."

The legal advice received by me was that the proposed intention of the motion was contrary to the statutory planning processes for Development Applications to be determined by the JRPP and it was apparent that the proposed motion could result in direct or indirect influence on Council's Planning Officers responsible for preparing the independent report to the JRPP. This conflicted with:

(i) s. 352 of the Local Government Act which relevantly provides:

"A member of staff of 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." and

(ii) clause 4.11 of the Operational Procedures for the JRPP.

It was on the basis of such legal advice that I formed the requisite opinion that the Notice of Motion was unlawful in accordance with Clause 19.5 of Council's Code of Meeting Practice (CMP), and therefore I was obligated to, and decided, not to include the Notice of Motion on the Agenda for the Council meeting held on 27 May 2014.

In compliance with the requirements of Clause 19.5 of Council's CMP (which implements and complies with the requirements of clause 240(2) of the Local Government (General) Regulation, 2005) (Regulation), I reported the exclusion of Councillor Doyle's Notice of Motion to the Council meeting. Specifically, Clause 19.5 requires that "the General Manager must not include in the agenda "any business that ...in the opinion of the General Manager, is unlawful". In addition, "the General Manager must report any such exclusion to the Meeting".

On 7 August 2014, Council staff received a further Notice of Motion from Councillor Doyle in respect of Council obtaining a briefing from Council staff on the Staged Development of sites in the East End of Newcastle (the East End DA (GPT site).

The Operating Procedures for the Joint Regional Planning Panels (September 2012) at 4.11 (**Council representation to the regional panel**) states:

"After 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. The elected Council's submission should not be prepared by persons involved in the assessment of the application, and should be prepared by another Council officer, or a consultant.

A Council submission should not be specifically addressed in the assessment report or recommendations prepared by the Council staff."

Attached, is a copy of the email exchanges between myself and Councillor Doyle in respect of her proposed Notice of Motion dated 7 August 2014. Despite providing a written explanation as to the reasons why it was unlawful for the Notice of Motion to go forward as originally drafted and assisting her to remedy the problem and personally meeting with her to settle the terms of a revised Notice of Motion, she never followed through with my suggested solutions on the way forward. Accordingly, the original Notice of Motion supplied to Council staff on 7 August 2014 was, in my opinion, unlawful, and hence, in accordance with clause 19.5 of the CMP, I was obliged not to include it on the Agenda for the Council Meeting held on 26 August 2014.

For the Committee's information and understanding, Clause 19.5 of Council's CMP relevantly states:

"The General Manager must not include in the agenda for any Meeting 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."

This clause adopts Clause 240(2) of the Regulation.

On the very few occasions that Notices of Motion have been excluded from inclusion on the Agenda for Council Meetings in accordance with my obligations under clause 19.5 of Council's CMP, I have obtained specialist legal/governance advice prior to forming an opinion as to whether they were unlawful. I note that both Clause 19.5 of the CMP and Clause 240(2) the Regulation state "in the opinion of the General Manager". Whilst the proposer of the Notice of Motion and her political party may have a different opinion, I believe that I formed my requisite opinion both reasonably and with due care and diligence.

Yours sincerely

Ken Gouldthorp
GENERAL MANAGER

Attachment: Email exchanges between Cr Doyle and General Manager in respect of her proposed Notice of Motion dated 7 August 2014.

Attachment to Mr Ken Gouldthorp's letter to the Committee of Inquiry dated 1 December 2014

From: Ken Gouldthorp

Sent: Friday, 22 August 2014 11:00 AM

To: Cr Therese Doyle

Cc: Cr Michael Osborne; All Councillors; Councillor Services; Frank Giordano

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

General Manager

The City of Newcastle

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From: Cr Therese Doyle
Sent: Friday, 15 August 2014 11:59 AM
To: Ken Gouldthorp
Cc: Cr Michael Osborne; Councillor Services
Subject: notice of motion re high-rise development

Dear Mr Gouldthorp

After discussions with Michael Osborne, we have decided that we would like to go ahead with the original notice of motion we submitted regarding developments.

I believe that it would be entirely appropriate for you to publish the Notice of Motion as it read in its original form and include arguments why you think it is contrary to the requirements of the Act. However, we believe that it is our right to have this notice of motion published in its original form.

If the legal position against it is clarified in the meeting, I would then be prepared to debate the following motion:

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.

This could then become the motion before the council.

regards,

Councillor Therese Doyle

Sent from my iPad

From: Cr Therese Doyle
Sent: Friday, 8 August 2014 3:18 PM
To: Ken Gouldthorp
Cc: Cr Michael Osborne
Subject: Re: Notice of Motionre CBD SEPPAugust 2014.docx

Hi Ken

Thanks for this. I think that your suggested version of the NOM looks OK but I will take you up on the offer to meet next Monday at 11.30 am if that time is still suitable for you.

regards,

Therese

Sent from my iPad

On 8 Aug 2014, at 3:10 pm, "Ken Gouldthorp"

wrote:

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 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.

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

Ken Gouldthorp

General Manager

The City of Newcastle

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-----Original Message-----

From: Cr Therese Doyle

Sent: Thursday, 7 August 2014 2:24 PM

To: Ken Gouldthorp; Kerry Sullivan

Subject: Notice of Motionre CBD SEPPAugust 2014.docx

Dear Ken

Please advise me as soon as possible if this notice of motion will be included in the business paper for the next ordinary meeting of council. If there is any legal problem with this motion please let me know as soon as possible. I believe that it is in the interests of the people of Newcastle that we discuss this development as a Council, especially at this time.

regards .

Councillor Therese Doyle