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ENVIRONMENTAL DEFENDER'S OFFICE LTD

ABN 72 002 880 864

Level 1, 89 York Street, SYDNEY NSW 2000 Phone: 02 9262 6989; Fax: 02 9262 6998
Email: edonsw@edo.org.au Website: www.edo.org.au

To: Lane Cove Council

Date: 7 September 2009

Fax: (02) 9911 3600

Pages: [6] (including this cover sheet)

From: Melissa Jolley

Originals to follow: [Yes]

Subject: Cunningham's Reach Boatshed, Linley Point - DA 202/08

Dear Councillors

Please refer to following correspondence, for Council's consideration prior to the Council meeting tonight.

Yours sincerely


Melissa Jolley
Solicitor

Copy to:

Cr Ian Longbottom
Cr Win Gaffney
Cr Keith McIlroy
Cr Scott Bennison

Our Ref: MJ 8165
Your Ref: DA202/08

1/89 York Street
Sydney NSW 2000
Tel: (61 2) 9262 6989
Fax: (61 2) 9262 6998

07 September 2009

Office 1 Level 1
71 Molesworth Street
PO Box 212
Lismore NSW 2480
Tel: 1300 369 791
Fax: (61 2) 6621 3355

Lane Cove Council
48 Longueville Rd
Lane Cove NSW 2066

email: edonsw@edo.org.au
web: www.nsw.edo.org.au

By facsimile: (02) 9911 3600

Dear Councillors

Cunningham's Reach Boatshed, Linley Point – DA202/08

We act for Friends of Cunningham's Reach.

We are a not-for-profit, non-government community legal centre specialising in public interest environmental issues.

We understand that the above development application is to be determined by Lane Cove Council (**Council**) at a Council meeting tonight. We have reviewed the Environmental Services Division Report No. 147 (**Council Report**) upon which Council will make its determination. We raise the following issues of concern for Council's consideration prior to the meeting.

Current use of Cunningham's Reach (the site)

The site is public land. It is currently used by the *general public* for passive recreational purposes including fishing, picnicking, walking, kayaking and relaxation.

Council's legal obligations to manage the site

The part of the site that is Crown land has been reserved under section 87(1) of the *Crown Lands Act 1989 (CL Act)* for a public purpose (being "public recreation" pursuant to Reserve 100210). Control of the public reserve is devolved to Council pursuant to section 48 of the *Local Government Act 1993 (LG Act)*.

Council, as the manager of the site, is required to manage and control the part of the site that is Crown land in accordance with principles of Crown land management set out in section 11 of the CL Act.

The land is also classified as Community land under section 27 of the LG Act. Community land is required to be used and managed in accordance with the Council's "Foreshores" generic Plan of Management.



Proposed use of the site

Once developed, the boat shed facility will be used by Sydney University Boat Club.

It is estimated that approximately 25 athletes would use the facility in the morning and 15 in the afternoon.¹ The facility would be closed on Sunday afternoons.

The aspects of the proposed development that will be available to the general public include the following:

1. A public toilet (open during opening hours of the boatshed);
2. Pontoon and jetty north of the building;
3. Decking of the existing boatshed deck, as upgraded;
4. A fish cleaning table; and
5. Upgraded and extended pedestrian pathway adjacent to the foreshore.

In addition to the above, the facility will house a junior rowing program which will draw rowers from local schools and junior residents from the Lane Cove Local Government Area.

Alienation of public land

We are instructed that the proposal will occupy more than one third of the existing open space currently in public use. In response to this, the Council Report states that:

*"It is conceded that part of the park would no longer be accessible by the public it is considered that the proposed use, along with suggested additional works, would actively promote increased accessibility, patronage and use of this public open space."*²

In a letter to the Council dated 26 June 2008, the Department of Lands made it clear that land reserved or otherwise set aside for public recreation must be open to the public generally as of right.³ Further, that any development on river foreshore reserve must protect and maintain access for the broader community. In that letter, the Department states,

"The Department's position on Clubs on Crown Reserves is that the exclusive use of club houses or other premises by special interest groups for club members or for private functions is not appropriate on public recreation reserves... If the proposed development is to be on land reserved for public recreation, the rowing club must demonstrate that where practicable, public access to facilities is available."

The Department of Lands also requires that the principles set out in Attachment A to its letter must be addressed.

In relation to Principle 1, "The land is not required for public recreation", the Council Report states that:

*"The proposed development would not preclude or diminish public access or enjoyment of the land by the public. It is considered that the public enjoyment of Cunningham's Reach would not be eroded by the proposed development."*⁴

¹ Page 7 Council Report

² Page 35 of Council Report

³ Letter from Department of Lands to Council dated 26 June 2008

⁴ Page 42 of Council Report



We strongly disagree with this conclusion. It is clear from the scale of the proposed development that it will occupy a large portion of the public reserve and create the impression that the land is privately owned or occupied. The scale of the proposed development is acknowledged by Council's own Urban Design Consultant, who states, "... the footprint of the building remains large for the site but is tucked away into the cliff as much as possible in order to keep the foreshore free for pedestrians."⁵

The building will be less than 10 metres from the water's edge and in our view this will discourage the public from accessing and enjoying that part of the waterfront that is dominated by the rowing shed.

Role of Council as Trustee of public land

Public land is provided for the benefit of the general public or the public at large.

The concept of the public trust has been recognised in Australian environmental law for many years. Broadly, the public trust doctrine recognises that the Crown is in the position of a trustee, under an obligation to dispose of or alienate lands in the interest and for the benefit of the people.⁶ It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purpose of the trust.⁷

In our view Council is in a similar position and can be considered as the trustee of Cunningham's Reach as a public place reserved for the purposes of public recreation.

In the Land and Environment Court, Justice Stein stated in *Willoughby City Council v Minister* (1992) 78 LGERA 19 at 27 that:

"Those charged with the responsibility for national parks and public recreation areas need to be alert to ensure that parks remain accessible to the public for their recreation and enjoyment. Great care needs to be taken in permitting commercial uses which may lead to the public use and enjoyment of an area being diminished in favour of private utilisation and enjoyment... Erosions of that purpose, however small they may seem individually, have the capacity on a cumulative basis to drift imperceptibly towards commercialisation of activities within parks, and this may have the inevitable effect of limiting, restricting and inhibiting the enjoyment and recreation of the public at large." [our emphasis]

Proposed development is not for the recreation of the public at large

The Council Report⁸ states the proposed development is permissible with consent on the basis that that it meets the definition of a *Recreation Area* under the Lane Cove Local Environmental Plan 1987 (LEP), and is consistent with the objective of Zone 6(a) Open Space (Recreation).

⁵ Page 46 Council Report

⁶ *Re Sydney Harbour Collieries Co* (1895) 5 LAC (NSW) 243 at 225 – 256.

⁷ *NATIONAL AUDUBON SOCIETY et al, Petitioners v THE SUPERIOR COURT OF ALPINE COUNTY, Respondent, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES et al, Real Parties in Interest* 33 Cal. 3d 419 (1983)

⁸ Page 14 Council Report



Even if the proposed development can be properly characterised as a Recreation Area (and we do not necessarily agree that it can), it does not mean that the proposed development is consistent with the objective of Zone 6(a).

The objective of zone 6(a) is to provide passive and active recreation facilities to meet the community's reasonable identified needs.

We do not consider that the proposed development meets the community's reasonable identified needs.

The LEP does not define *community*, however the Macquarie Dictionary defines the term 'community' relevantly as:

1. all the people of a specific locality or country;
2. a particular locality, considered together with its inhabitants; and
3. the public.

The proposed development is being built to meet the needs of a select group of people, who will not necessarily come from the Lane Cove Local Government Area. It will be used *exclusively* by the Sydney University Boat Club members and will, as outlined above, lead to the alienation and diminished use of the public reserve by the *public at large* and the greater Lane Cove community.

The Council Report claims that:

1. "It is considered that the existing and future public enjoyment of Cunningham's Reach for public recreational activities would not be eroded in the future"⁹; and
2. "The proposed development would provide a permanent and practical facility within the area, which would assist in the health, cultural, social and wellbeing for the local community in particular the youth of the area."¹⁰

We strongly disagree with these conclusions and urge the Councillors to reject them. The proposed development will not provide a recreational facility for the community or the public at large. It is designed for elite rowers and a select few members of the community.

The provision of a fish cleaning table, a pontoon, an upgraded path and a toilet (which will only be open for a few hours in the morning and a few hours in the afternoon and closed on Sunday afternoons - when the reserve will be most frequented by members of the general public), does not in our view justify the alienation of this public reserve from the members of the general public and Lane Cove Community.

Consideration of the public interest

Council is required pursuant to section 79C(1)(e) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) to consider the public interest. The concept of the public interest is wide, and what falls within the public interest may be determined by having regard to the objects of the EP&A Act.¹¹

These objects include:¹²

⁹ Page 15 Council Report

¹⁰ Page 32 Council Report

¹¹ *Carstens v Pittwater Council* [1999] NSWLEC 249

¹² Section 5 of the EP&A Act



- the encouragement of the **proper management**, development and conservation of natural and artificial resources, including agricultural land, **natural areas**, forests, minerals, water, cities, towns and villages **for the purpose of promoting the social and economic welfare of the community** and a better environment; and
- the provision of land **for public purposes**. [our emphasis]

In our view, Council would not be managing public land in the interest and for the benefit of the public if it approves the proposed development.

Another object of the EP&A Act is to provide increased opportunity for public involvement and participation in environmental planning and assessment. The community's response to a proposed development can therefore be regarded as an aspect of the public interest.¹³ We understand that there has been considerable objection to this development amongst the community.

In its consideration of the public interest, the Council Report merely states:

"The proposal is consistent with State Government Initiatives for the efficient and appropriate use of the public land".¹⁴

If the proposed development is approved on this basis, in our view it would be open to challenge in the Land and Environment Court on the basis that Council has not given proper, genuine and realistic consideration to the public interest and issues concerning the proper use of public land.

We emphasise that it is open to the Councillors, when assessing the development application, to reject the conclusions drawn by the author of the Council Report¹⁵ and that the Council has a discretion to refuse the development application if it does not consider the proposed development is in the public interest.

Yours sincerely

Environmental Defender's Office (NSW) Ltd


Melissa Jolley
Solicitor

Copy to:

Cr Ian Longbottom
Cr Win Gaffney
Cr Keith McIlroy
Cr Scott Bennison
Cr Shauna Forrest
Cr Ann Smith
Cr David Brooks-Horn
Cr Pam Palmer
Cr Rod Tudge

¹³ *Kulin Holdings Pty Ltd v Penrith City Council* (1999) 103 LGERA 402

¹⁴ Page 47 Council Report

¹⁵ *Hill v Woollahra Municipal Council & Ors* (2003) 127 LGERA 7



An independent public interest legal centre specialising in environmental law