

**From:** [REDACTED]  
**To:** [REDACTED]  
**Subject:** FW: Request - DA 2023/0998 and the Freshwater Beach Reserve Trust - Private and Confidential  
**Date:** Friday, 24 November 2023 8:15:51 AM  
**Attachments:** [Council Report 28 Feb 2023 7.01 Bradfield Park Legal Advice.pdf](#)

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**From:**  
**Sent:** Sunday, 19 November 2023 6:06 PM  
**To:**  
**Cc:**  
**Subject:** Request - DA 2023/0998 and the Freshwater Beach Reserve Trust - Private and Confidential

**Private and Confidential**

Dear Peter,

I am writing to you about DA 2023/0998 and the Freshwater Beach Reserve Trust.

I have concerns that the DA and recent lease are an overreach by Council and the Freshwater Surf Life Saving Club ("FSLSC") in terms of the use of public land.

Given that the DA and the recent lease to the FSLSC are over trust land (the Freshwater Beach Reserve) that is held by Council on trust for the purpose of public recreation in the reserve, I request that Council obtain legal advice and prepare a report (prior to the DA being assessed by the Sydney North Planning Panel) as to the following matters:

1. Whether the trust is a charitable trust (and if so, the consequences of that, see below);
2. Whether Council is an "owner" for the purposes of the EPAA in terms of giving consent to the DA (and if an owner, whether Council has power and/or would be in breach of trust in providing consent to the DA in its current form (see below));
3. Whether the trust land is community land under the LGA and if so what are the consequences for Council, including restrictions on leasing;
4. Whether Council's Coastal Management Plan is a plan of management under the LGA and/or CLMA;
5. Whether Council has power and/or would be in breach of trust in granting exclusive use rights to the FSLC under the DA for the whole of the building given the trust purpose of public recreation in the reserve and given the terms of the Coastal Plan of Management. It is noted that under the lease granted by Council to FSLSC commencing 1 January 2023, Council has granted exclusive rights to the FSLC for the whole of the existing Council building including a large hall (excluding only public toilets and the café outdoor dining area). Given the trust, Council should seek advice as to the legality of this lease;
6. Whether Council has power and/or would be in breach of trust in granting approval / permission for a residence and (commercial) restaurant/function centre in the new building pursuant to the DA (given the trust purpose of public recreation in the reserve and given the terms of the Coastal Plan of Management);

7. Whether Council has the power to grant development consent to the proposed building (including hall, residence, and restaurant) that further encroaches into the Freshwater Beach Reserve and extends beyond the land, premises (building) and terms of the current lease (that incidentally contemplates that Council as lessor not FSLSC as lessee may lodge a DA), where the purpose of that building is not for the enjoyment of the public of the reserve as a reserve.
8. Whether Council has a conflict of interest as trustee, owner, manager, lessor and assessing authority under the DA and if so how that conflict should be managed; and
9. Whether the DA's proposed new (commercial purpose) restaurant/function centre (and proceeds therefrom) are subject to the charitable trust and/or have other fiscal consequences.

A recent report and legal advice obtained by North Sydney Council regarding a similar matter involving land held by Council under a land trust (the Bradfield Park) is attached. The legal advice addresses issues similar to the above.

Like the attached North Sydney Council Bradfield Park report and legal advice, the above requested legal advice regarding Freshwater Beach Reserve (and DA 2023/0998) should be made public by Council.

Regards,

[REDACTED]  
[REDACTED]  
[REDACTED]

### ESTABLISHMENT OF RESERVE TRUST

PURSUANT to section 92(1) of the Crown Lands Act 1989, the reserve trust specified in Column 1 of the Schedule hereunder is established under the name stated in that Column and is appointed as trustee of the reserve specified opposite thereto in Column 2 of the Schedule.

RICHARD AMERY, M.P.,  
Minister for Agriculture, and  
Minister for Land and Water Conservation.

#### SCHEDULE 1

COLUMN 1  
Freshwater Beach  
(D500403, R67810 &  
R64997) Reserve Trust

COLUMN 2  
Reserve No. 64997  
Public Purpose: Public Recreation  
Notified 21 December 1934  
File Ref. MN87H422

#### SCHEDULE 2

COLUMN 1  
Freshwater Beach  
(500403, R67810 &  
R64997) Reserve Trust

COLUMN 2  
Reserve No. 67810  
Public Purpose: Public Recreation  
Notified 19 August 1938  
File Ref. MN87H422

#### SCHEDULE 3

COLUMN 1  
Freshwater Beach  
(D500403, R67810 &  
R64997) Reserve Trust

COLUMN 2  
Dedication No. 500403  
Public Purpose: Public Recreation  
Notified 3 August 1910  
File Ref. MN87H422

## **7.1. Bradfield Park - Legal Advice**

**AUTHOR:** Shane Sullivan, Executive Manager Governance

**ENDORSED BY:** Therese Manns, General Manager

### **ATTACHMENTS:**

1. Advice - Richard Lancaster SC finalised 24 February 2023 [7.1.1 - 11 pages]
2. Summary of advice Richard Lancaster SC [7.1.2 - 3 pages]
3. Letter from Tf NSW Bradfield Park South and Landowner's Consent 27 February 2023 [7.1.3 - 2 pages]
4. Letter to Tf NSW from General Manager on 24 February 2023 [7.1.4 - 2 pages]
5. CONFIDENTIAL - Letter of advice - Proposed Compulsory Acquisition - Bradfield Park [7.1.5 - 19 pages]

### **PURPOSE:**

This matter was deferred by resolution of Council on 27 February 2023 to this Extraordinary Meeting.

The purpose of this report is for Council to consider legal advice obtained with regard to Bradfield Park and a proposal by Transport for NSW to acquire and/or develop part of Bradfield Park North for the purpose of the *Sydney Harbour Bridge Cycleway Project*.

### **EXECUTIVE SUMMARY:**

The most recent advice obtained by Council and a summary of that advice is provided as an attachment to this report.

On 27 February 2023, Council received a letter from Transport for NSW seeking land owners consent in relation to the Sydney Harbour Bridge Northern Cycleway Access project. A copy of this letter was circulated to Councillors on 27 February 2023 and is attached.

Transport for NSW had previously offered Council \$1.5m as a contribution towards Council's planned improvements to Bradfield Park South. In response, Council has outlined the considerable investment required to progress the Bradfield Park Masterplan. They have now advised that should Council provide land owners consent before the end of February 2023 they will be a position to make a further contribution of \$1m bringing their contribution to a total of \$2.5m.

Land owners consent is required for the purposes of lodging a section 60 application under the Heritage Act 1977. Transport for NSW note that should land owners consent not be provided in a timely manner that these funds of \$2.5m would be expended on additional costs to the project due to the delay.

In accordance with Councils resolution of 14 November 2022, legal advice has been obtained and confirms the ability of the NSW Government to compulsory acquire parcels of land within Bradfield Park.

Further, the advice provides that, in relation to Trust Land, the Council is the legal owner of the land and has full capacity, as a matter of property law, to give or withhold owners consent for the use of land for a specific purpose on the basis that it is acting consistently with its trust obligations.

The advice provides that there is a strong argument available that the development of a publicly accessible cycleway is consistent with the use of the Trust Land for the purposes of public parks and public recreation.

Should land owners consent not be provided, this would also result in the project being progressed via the State Significant Infrastructure pathway and compulsory acquisition of the land owned by Council. This process does not require Council's owners consent and Transport for NSW would lodge a Development Application with the NSW Department of Planning for the Minister for Planning to determine.

On the basis that TFNSW is adamant that the project will be progressed in its current form, albeit through a different approval process, it is recommended that Council accept the contribution towards improvements in Bradfield Park South and provide owners consent to allow the Section 60 application to progress.

The following documents are attached to this report:

1. Advice from Richard Lancaster SC finalised on 24 February 2023
2. Summary of the advice from Richard Lancaster
3. Letter from Transport for NSW dated 27 February 2023 seeking land owners consent
4. Letter to Transport for NSW dated 24 February 2023
5. Advice (CONFIDENTIAL) dated 22 March 2022 from Sparke Helmore

The attached legal advice dated 11 March 2022, in the schedule of lands (page 3 of 14) identifies the relevant interests in the lands associated with the Sydney Harbour Bridge Northern Cycleway Access project. This is provided as a confidential document.

Should Council wish to discuss this advice dated 11 March 2022 it is noted that the confidential document includes advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the grounds of legal professional privilege and because consideration of the matter in open Council would be, on balance, contrary to the public interest as it would affect Council's ability to manage legal matters effectively and in the best interests of the community. As such should this matter be discussed it should be considered in closed session.

#### **FINANCIAL IMPLICATIONS:**

TFNSW has offered \$2.5 million in funding towards Bradfield Park South improvements. Should they progress to compulsory acquisition of Council land, compensation would be applicable under the *Land Acquisition (Just Terms Compensation) Act 1991*.

**RECOMMENDATION:**

**1. THAT** the Council resolves to provide land owners consent as requested for those lands of which Council is the owner thus enabling the lodgement of an application under Section 60 of the Heritage Act 1977 for the Sydney Harbour Bridge Northern Cycleway Access project.

**2. THAT** Council resolves that the identified attachment to this report (11 March 2022 legal advice) is to be treated as confidential in accordance with section 11(3) of the Local Government Act for the following reason under section 10A(2) of the Local Government Act:

*(g) advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege*

It is further noted that release of this information would be, on balance, contrary to the public interest as it would affect Council's ability to manage legal matters effectively and in the best interests of the community.

## LINK TO COMMUNITY STRATEGIC PLAN

The relationship with the Community Strategic Plan is as follows:

### 5. Our Civic Leadership

#### 5.1 Lead North Sydney's strategic direction

## BACKGROUND

At its meeting held 24 January 2022, Council resolved as follows:

1. **THAT** the provision of a rideable bike ramp is and remains a high priority for NSC.
2. **THAT** Council seek to urgently work with TfNSW to refine the design.
3. **THAT** any final concept must address the following:
  - a. The heritage advice from the NSW Heritage Council and other Heritage authorities that does not support the impacts on Bradfield Park North, the loss of open space and the disastrous impacts on the heritage item, that being the Sydney Harbour Bridge itself.
  - b. That TfNSW amend any winning design to avoid cyclists exiting the ramp in Bradfield Park North and address issues which funnel cyclist onto Middlemiss Street and into the roundabout at Lavender and Alfred Streets.
  - c. That TfNSW note that the Council is not seeking a delay but is seeking a solution which avoids the devastating impacts on the heritage items and on public open space.
  - d. That Council urge TfNSW that in addressing the solution consideration is given to the submissions made by members of the public which avoid the impacts on Bradfield Park North and the Sydney Harbour Bridge and outlines how this cycleway will link to existing cycle routes on the Pacific Highway and Warringah Freeway.

At its meeting held 23 May 2022 Council resolved the following:

1. **THAT** Council advise TfNSW that it is not prepared to consent to compulsory acquisition of land required at Bradfield Park for the construction of a cycle ramp in advance of the final form of the ramp being formally authorised with the necessary statutory approvals including but not limited to approvals under the Environmental Protection and Biodiversity Conservation Act 1999 (Cth).
2. **THAT** if compulsory acquisition is pursued by TfNSW subsequent to formal approval as per 1 above, it is Councils' preference that compensation be determined by negotiation under s29 of the Land Acquisition (Just Terms Compensation) Act 1991
3. **THAT** the report be treated as confidential and remain confidential until Council determines otherwise.

4. **THAT** Council continues to advocate for a dedicated lane for cycling and active transport on lane 8 of the Sydney Harbour Bridge and urges TFNSW to continue to pursue this option.

At its meeting held 14 November 2022, Council resolved as follows:

1. **THAT** Council resolves that the General Manager engage Senior Counsel on behalf of Council to advise:
  - a. Given the proclamation of the Governor of NSW dated 19 March 1939 (the Proclamation) vesting in North Sydney Council the lands now known as Bradfield Park, whether the titles to that land need to be the subject of an application to amend to bring them in line with that Proclamation.
  - b. Whether the land that comprises Bradfield Park or a part thereof can be compulsory acquired by the NSW Government either pursuant to the provisions of the Land Acquisition (Just Terms) Act 1991 or any other Act of the NSW Parliament.
  - c. Whether North Sydney Council can, without breaching the trust established by the Proclamation, agree to transfer any interest in or right to the land that comprises Bradfield Park or any part thereof to the NSW Government for the purpose of building ramp between the Sydney Harbour Bridge and a road contiguous with Bradfield Park.
2. **THAT** Council resolves to request the Premier of NSW to direct Transport for NSW to refrain from taking any action seeking to acquire an interest in or right to Bradfield Park or any part of it for any purpose until the advice being sought has been received and considered.

Advice was sought in accordance with the resolution and provided to Councillors on 5 December 2022.

Further advice was subsequently sought and provided on 22 February 2023. A copy of this advice is included as an attachment. Also provided as an attachment is a summary of that advice.

On 27 February 2023, Transport for NSW wrote to Council seeking land owners consent and a copy of that letter is attached.

Also attached as a confidential attachment is advice received by Council in relation to a proposed compulsory acquisition which noted from Sparke Helmore.

## **CONSULTATION REQUIREMENTS**

Community engagement is not required.



## North Sydney Council

### Proposed compulsory acquisition of Bradfield Park North

1. My instructing solicitors, Sparke Helmore Lawyers (Mr Alan McKelvey), act for North Sydney Council (**Council**) and seek my advice on questions arising in respect of a proposal by Transport for NSW (**TfNSW**) to acquire part of Bradfield Park North for the purposes of the “*Sydney Harbour Bridge Cycleway Project*”.
2. I have been provided with observations and the documents referred to in the observations, including:
  - (a) Letters from TfNSW to the Council dated 24 December 2021 and 21 February 2022 in relation to the proposed acquisition, either by agreement or by compulsory process under the *Land Acquisition (Just Terms Compensation) Act 1991* (**Just Terms Act**);
  - (b) an advice from Sparke Helmore to the Council dated 16 March 2022;
  - (c) a written opinion of Michael Hall SC dated 2 December 2022; and
  - (d) a Council notice of motion dated 11 November 2022, with an attachment setting out background information, prepared by Councillor Mutton.
3. Bradfield Park North is a park located in Milsons Point adjacent to the northern end of the Bridge. TfNSW intends to acquire part of the park for the purposes of building and upgrading cycleway access to the Sydney Harbour Bridge on its western side. TfNSW provided Council with Sketch SR5816, which indicates the proposed size and route of the cycleway area on an aerial photograph overlaid with lot boundaries.
4. It appears from the materials provided to me that the Council is the registered proprietor of two lots in the Bradfield Park North precinct, namely:

- (a) Lot 1 in DP 873687. This lot is the land shown as having an area of 5,216m<sup>2</sup> with boundaries to Burton Street, Alfred Street and Fitzroy Street. The title search shows the land in Lot 1 is subject to two registered leases – one to La Capannina Italian Restaurant Pty Limited, another to Axicom Pty Limited; and
  - (b) Lot 1 in DP 236183. This small lot is shown as having an area of about 19m<sup>2</sup> with a boundary to Alfred Street, located a short distance north of Cliff Street.
5. I also note that I have been provided with the following:
- (a) A title search for Lot 18 in DP 54205. Lot 18 is an area of land immediately to the north of Burton Street. The register shows that the registered proprietor of Lot 18 is the “*Minster for Public Works*”. The register has a notation that states “SEE 35M2274 FOR PT VESTED IN MUNC. NTH SYD. ON TRUST FOR PUB RDS & PKS ETC”. I do not have a copy of the dealing / plan with the number 35M2274;
  - (b) A copy of a plan CP 8904 – 3000, which is titled “*Plan – Shewing land to be vested in the Council of the Municipality of North Sydney for park & recreation purposes*” and which appears to be dated March 1935. I note that the shaded area on the plan runs north from Burton Street and appears to extend over land including what is now Lot 18 in DP 54205, Lot 1 in DP 236183 and a number of other lots;
  - (c) A cadastral records enquiry report for the area, dated 7 March 2022, which shows some areas of land located adjacent to Alfred Street with the identifier 8904 – 3000 R;
  - (d) The areas in (b) and (c) above are referred to in the observations as the “*Crown Plan Land*”.
6. I am instructed that by proclamations published in the NSW Government Gazette on 24 March 1935 (pp 1346-1347) and/or a further proclamation, which was published in the Gazette on 24 February 1939 (pp 912-913) in similar terms, applying to the land described in the schedules to those proclamations, the Crown Plan Land was vested in the Council on trust for public parks and public recreation.

7. In the interests of precision, I record the following:
- (a) The expression of the operative parts of the Governor's 1935 and 1939 proclamations was: "*in pursuance of subsection three of section eleven of the Sydney Harbour Bridge (Administration) Act, 1932, and of all other powers me thereunto enabling, vest the lands described in the Schedule hereto in the Council of the Municipality of North Sydney for an estate in fee simple upon trust for public parks and for public recreation and for the purposes of public parks and public recreation*";
  - (b) The Schedules to the proclamations contain a detailed description of various areas of land, by reference to a combination of bearings; the location of streets; the location of land affected by other dealings; and land comprised in identified certificates of title. It is not possible for me either to identify, or to confirm, from the Schedules the location and boundaries of the land described in the Schedules;
  - (c) To the extent that the area of some lots, such as Lot 18, appear to overlap the Crown Plan Land, it is not accurate to say that those lots are currently vested in the Council. Under our Torrens system, the legal ownership of land vests in the registered proprietor. To the extent that the Council considers that there are areas of land of which it ought to be regarded as the owner, notwithstanding that Council is not the registered proprietor, it is beyond the scope of this opinion to advise whether or not that is the position and, if it is, how that state of affairs could be rectified;
  - (d) The precise delineation of legal and equitable interests in the land in and around Bradfield Park North is not apparent from the materials provided to me;
  - (e) The letters from TfNSW seek to negotiate an acquisition, or progress a compulsory acquisition, of the land described by lot and DP, or other title, as set out in an updated table included in the 21 February 2022 letter. I am not in a position to know, from the materials provided to me, whether or not the Council has an interest in land (within the meaning of the Just Terms Act) in all of the areas identified in the table;

(f) In the circumstances, I will advise on the assumed basis that there are at least some areas of land in Bradfield Park North in which Council holds an interest subject to a trust for the purposes of public parks and public recreation (**Trust Land**).

8. I set out below the specific questions that I have been asked and my answers to each question.

**What land in Bradfield Park is held on trust by Council under the 1935 and 1939 proclamations? Please address the nature of the trust.**

9. As to what land is held on trust – the materials provided to me do not permit the precise identification of the area(s) of land in Bradfield Park held on trust by Council under the 1935 and 1939 proclamations. I refer to paragraph 7 above.

10. As to the nature of the trust – in respect of the Trust Land, as I have defined it in paragraph 7(f), the nature of the trust follows from its source, namely proclamations of the Governor pursuant to s 11(3) of the *Sydney Harbour Bridge (Administration) Act 1932*. I advise on the basis that the ownership of the relevant land (and any interests in land) and any trusts over the land have not changed in any material way since 1935 and 1939 – that is, I assume that the relevant land retains its character as Trust Land in the present day.

11. In Jacobs' *Law of Trusts in Australia* (8<sup>th</sup> Ed, 2016) at [5-21], p 59 (footnotes omitted), the authors state:

The High Court has reviewed, in *Bathurst City Council v PWC Properties Pty Ltd*, the long history of 'public trusts' created by Crown grant. Those obligations may be enforceable at the suit of the Attorney-General as a matter of public law, but do not give rise to a trust enforceable in equity.

12. In *Bathurst City Council v PWC Properties Pty Ltd*, the High Court considered the meaning of the term "trust" in a schedule of the *Local Government Act 1993*. The Court referred to a general rule that a term such as "trust" is "to be taken, unless a contrary intention appears, as having been used by the legislature in its legal and technical sense" (at [45] 585-584) but nevertheless concluded (at [67] 592) that:

The term "trust" in cl 6(2)(b) of Sched 7 is apt to include those governmental responsibilities which, whilst not imposing a trust obligation as understood in private law, may fairly be described as a "statutory trust" which bound the land and controlled what otherwise would have been the freedom of disposition enjoyed by the registered proprietor of an estate in fee simple. The trust was "not

a trust for persons but for statutory purposes". It would be no answer to the existence of such a constraint that there was lacking a beneficial owner of the nominated lots with standing in a court of equity to enforce observance by the Council of the dedication of the nominated lots to the provision of parking spaces. It had been within the competence of the Attorney-General to seek to restrain action incompatible with "the due exercise of the powers of the [C]ouncil or the due discharge of its duties".

13. In my opinion, the "trusts" referred to in s 11(3) of the *Sydney Harbour Bridge (Administration) Act 1932* and the trust established pursuant to that provision by the 1935 and 1939 proclamations have the underlying character described in *Bathurst v PWC Properties* at [67] – that is, their nature is a "statutory trust" which bound the land and controlled what otherwise would have been the freedom of disposition enjoyed by the registered proprietor of an estate in fee simple. There is no identifiable beneficiary of the land subject to such a trust, although it would be open to the Attorney General to take action, on behalf of the public, to restrain the Council from dealing with the land in any way inconsistent with the purposes of public parks and public recreation.
14. The question next arising is whether the trusts established by the proclamations are charitable trusts. In my opinion, based on the decision in *Willoughby City Council v Roads and Maritime Services* [2014] NSWLEC 6, (2014) 201 LGERA 177, the trusts established by the proclamations should be regarded as charitable trusts.
15. In *Willoughby v RMS*, two parcels of land that were owned and held by Willoughby Council for "the purpose of a public park, public reserve or public recreation area" were compulsorily acquired by RMS. Biscoe J held that:
  - (a) At [11]: At the date of acquisition, Council held Sites 1 and 2 on trust for public purposes. They were charitable purposes because they were beneficial to the community: *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 583.
  - (b) At [22]: Land such as Sites 1 and 2 vested in a council as at 1 July 1993 and "subject to a trust for a public purpose" are taken to be classified as "community land", which a council has no power to sell or otherwise dispose of: ss 26, 45(1) and cl 6(2)(b) Schedule 7 of the *Local Government Act 1993*; *Save Little Manly Beach Foreshore Inc v Manly Council (No 2)* [2013] NSWLEC 156 at [73] - [81] per Biscoe J. ... At

general law, a trustee of land for a charitable purpose with no power of sale is obliged to use the land for the charitable purpose in perpetuity unless, in appropriate circumstances, the trustee can obtain the approval of the Court to sell the land and apply the proceeds to some new charitable scheme *cy-près*; *Sydney Sailors' Home v Sydney Cove Redevelopment Authority* (1977) 36 LGRA 106 at 114 (NSWCA); and

(c) At [35]-[36]: The Attorney General was not a necessary party to the compensation proceedings in the Land and Environment Court, rather “*the trustee Council is competent to bring these proceedings for compensation for the full market value of Sites 1 and 2*”, and any compensation awarded to the Council will be impressed with the same trust.

16. I emphasize two other significant aspects of that decision.
17. First, there was no submission or finding in *Willoughby v RMS* to the effect that the RMS did not have statutory power to acquire the trust land by compulsory process. On the contrary, the decision is based on a lawful compulsory acquisition of the land held by Willoughby Council subject to a charitable trust for public purposes. I will return to the question of power to acquire below.
18. Secondly, the decision draws attention to the classification of land under the *Local Government Act 1993*. In my opinion, it is likewise appropriate to regard any Trust Land in Bradfield Park North as having a “*community*” classification under the *Local Government Act 1993*. One of the consequences of that classification is that the Council “*has no power to sell, exchange or otherwise dispose of community land*” (s 45(1)) and such land is otherwise subject to regulation in accordance with the provisions of Division 2 of Part 2 of Chapter 6 of the *Local Government Act 1993*.
19. Finally, the question for advice about the nature of the trust also calls for an indication of what I consider it means to own land on trust for the purposes of public parks and public recreation. There are quite a number of decided cases in which trusts for such purposes have been considered. Of particular authority is the decision of a five-member bench of the NSW Court of Appeal in *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (Goomallee Claim)* (2012) 84 NSWLR 219, [2012] NSWCA 358. In the reasons for

decision of Basten JA, with which the other members of the Court agreed, his Honour said at [31]-[33]:

31. ... in *Attorney General v Cooma Municipal Council* (1962) 8 LGRA 111, the Full Court held that the construction of a tourist information centre was not permissible on land reserved for the purposes of public recreation because it was not a use of the land for that purpose: at 121 (Manning J). Herron ACJ dissented, but applied a similar test, as to whether the tourist information centre could properly be described as "ancillary to" the enjoyment of a park as a park (at 115), as indeed did Jacobs J from whose judgment the appeal was brought (see per Manning J at 119). The other member of the majority, Brereton J, stated at 118:

"To my mind the dedication of land 'for purposes of public recreation' necessarily involves the use of such land *by the public* for their recreation; land used by an individual or a council to manufacture or provide entertainment media for some subsequent enjoyment by the public or to disseminate information as to where recreation may be found is not land used for public recreation. It is obviously not necessary that the public must at all times have access to all parts of the land; indeed the type of recreation provided on it may require the exclusion of the public from parts of it, but any restriction upon the public's access to the whole of the area for the purpose of recreation can be justified only on the basis that it is in the interest of the public and to provide for their recreation *within the area* that they are so excluded from part of it."

32. In *Waverley Municipal Council v Attorney General* (1979) 40 LGRA 419, a question arose as to the power of the local council to construct buildings in Bronte Park. This Court held that the power of the council to erect improvements was limited, in respect of Bronte Park, to improvements the purpose of which was "to promote or [was] ancillary to" the use and enjoyment of the public park for public recreation: at 428 (Hope JA, Glass and Samuels JJA agreeing).
  33. To make lands available for public recreation it may be necessary for a manager to have control of the land in order to maintain it. It may also be appropriate to allow for the construction of sporting facilities for public use. Other facilities may be constructed which are ancillary to public recreation, such as public toilets. It may be appropriate for areas to be fenced to control public access, for example by shutting gates at sunset. All of these activities on land and the vesting of land in bodies other than the Crown in order to carry out such activities could reasonably be held to be in furtherance of, or incidental to, the relevant public purpose.
20. In my opinion, there is a strong argument available that the development of a publicly accessible cycleway is consistent with the use of the Trust Land for the purposes of public parks and public recreation. A cycleway permits the recreational activity of cycling and, in my opinion, it would be appropriate and consistent with a trust stated in those general terms to allow for the construction

of a safe and effective structure to permit cyclists to travel from Alfred Street up to the cycle path on the western side of the Sydney Harbour Bridge.

21. Nevertheless, the Council is not in a position to agree to sell or otherwise dispose of the Trust Land to TfNSW for the purposes of a cycleway because the relevant land is community land and such dealings are prohibited by s 45(1) of the *Local Government Act 1993*. For that reason, I have previously given advice in conference to the effect that Council should require that TfNSW acquire the land it requires by compulsory acquisition in accordance with the Just Terms Act.

**What interest does Council have in the land held on trust under the subject of the 1935 and 1939 proclamations?**

22. As described above, in respect of land that retains its character as Trust Land in the present day, the Council has been vested with the fee simple and is the legal owner of the land, which is an interest it holds subject to the trust for public parks and public recreation.
23. Further, in my opinion, the interest held by the Council in any Trust Land in Bradfield Park North is an “interest” in land within the meaning of the definition in s 4 of the Just Terms Act. Upon the compulsory acquisition of that interest in land, the Council would be entitled to claim compensation in accordance with the provisions of the Just Terms Act.

**What authority does Council have to make decisions concerning the ownership or lease of any land held in trust under the 1935 and 1939 proclamations?**

24. In relation to Trust Land, as I have defined it in paragraph 7(f), putting aside the classification of the land and its consequences, the Council is the legal owner of the land and would have had full authority to make decisions concerning the ownership or lease of the land. Whether or not the Council would, in particular circumstances, be acting consistently with its trust obligations in giving effect to those decisions is a separate question.
25. However, since the Trust Land is classified as community land, s 45 of the *Local Government Act 1993* provides that (1) the Council has no power to sell, exchange or otherwise dispose of community land; and (2) the Council may grant a lease or licence of community land, but only in accordance with Division



2 of Part 2 of Chapter 6 (which refers to, among other things, the requirement for a plan of management and sets out restrictions on leasing in s 46).

**What power does the State have to use the land held in trust under the 1935 and 1939 proclamation for the public purpose of transport?**

26. In relation to Trust Land, as I have defined it in paragraph 7(f), the State of New South Wales does not have power to use the land for any purpose without the consent of the owner of the land. As noted below, if TfNSW acquires the land by publication of an acquisition notice in the Gazette, TfNSW will be vested with the land freed and discharged from all trusts and it will have all the powers of an owner of unencumbered land to use the land as it wishes, according to law.

**If the land held in trust under the 1935 and 1939 proclamations has been created by Parliament what is the process to unwind the trust?**

27. As noted above, the 1935 and 1939 proclamations were made by the Governor pursuant to statutory authority conferred by s 11(3) of the *Sydney Harbour Bridge (Administration) Act 1932*.

28. The process to “*unwind the trust*”, which I understand to mean the mechanism by which the trust may be brought to an end, is clear in the case of a compulsory acquisition. By operation of s 20(1) of the Just Terms Act, on the date of publication in the Gazette of an acquisition notice, the land described in the notice is by force of the Act, vested in the acquiring authority and “*freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, easements, rights, charges, rates and contracts in, over or in connection with the land*”. That is, land in Bradfield Park North that is acquired by TfNSW by publication of an acquisition notice in the Gazette will be “*freed and discharged from*” all trusts over or in connection with the land.

**What capacity does Council have to give owner’s consent (in property law) for the land held trust under the 1935 and 1939 proclamations to be used for a specific purpose?**

29. In relation to Trust Land, as I have defined it in paragraph 7(f), the Council is the legal owner of the land and has full capacity, as a matter of property law, to give or withhold owner’s consent for the use of the land for a specific purpose.

30. Whether or not the Council would, in particular circumstances, be acting consistently with its trust obligations in either giving or withholding owner's consent is a separate question.

**Anything else that arises from the letter from Councillor Mutton that is not addressed in the above specific questions.**

31. The only matter I would raise in addition to the issues addressed above is a further observation about the power of TfNSW to acquire the Trust Land.
32. In my opinion it follows from what I have set out in paragraphs 15 and 17 that the fact that land is held by a Council subject to a charitable statutory trust for public purposes is not an impediment to the compulsory acquisition of that land by TfNSW pursuant to its powers of compulsory acquisition.
33. However, it is necessary to consider further the provisions of the *Sydney Harbour Bridge (Administration) Act 1932*. The Act does not appear to have been repealed or amended in any presently relevant respect. The focus of attention has been on s 11(3), which empowered the Governor to make the 1935 and 1939 proclamations. But any ongoing effect of s 11(2) should also be considered. The subsection provides that no part of the "said lands" – which appears to include any "said lands" that are subject to proclamation by the Governor under s 11(3) – "shall become vested in" the identified authorities or "in any body or person other than the Board" (emphasis added). The "Board" is defined in s 2 to mean the State Transport (Co-ordination) Board.
34. In the time available to me to prepare this advice, I have not had the opportunity to research and consider relevant statutory provisions since 1932 that might have the effect that TfNSW is to be regarded as the modern-day successor of the Board (or any of the State authorities referred to in s 11(2)). If TfNSW is not the successor to the Board or any of the other entities referred to in s 11(2), and if s 11(2) has continuing force and effect, there may be an argument that s 11(2) prevents the Trust Land from being vested in TfNSW – that is, that s 11(2) is a barrier to the effective compulsory acquisition of the Trust Land. The analysis of that question would also need to consider the resolution of the apparent inconsistency of State laws in which an older, specific law may operate inconsistently with a later, general power or compulsory acquisition.



Richard Lancaster SC  
Martin Place Chambers

24 February 2023

Summary of advice:

Council has received an advice from Richard Lancaster SC dated 22 February 2023. The advice is provided on the basis that Council holds an interest in some areas of land in Bradfield Park North (**Trust Land**). In summary, the advice provides answers to the questions set out below.

**What land in Bradfield Park is held on trust by Council under the 1935 and 1939 proclamations? Please address the nature of the trust.**

1. Some lots, such as Lot 18, appear to overlap Crown Plan Land. It is not accurate to say that Crown Plan Land is vested in Council. Land only vests in Council when Council is the registered proprietor of the land.
2. The nature of the trust in respect of the Trust Land follows from its source, namely proclamations of the Governor pursuant to s 11(3) of the *Sydney Harbour Bridge (Administration) Act 1932*. That trust is a “statutory trust” which bound the land and controlled what otherwise would have been the freedom of disposition enjoyed by the registered proprietor of an estate in fee simple. There is no identifiable beneficiary of the land the subject of the trust, although it would be open to the Attorney General to take action, on behalf of the public, to restrain the Council from dealing with the land in any way inconsistent with the purposes of public parks and public recreation.
3. The trusts established are “charitable trusts”.
4. It is appropriate to regard any Trust Land in Bradfield Park North as having a “community” classification under the *Local Government Act 1993 (LGA)*.

**What interest does Council have in the land held on trust under the 1935 and 1939 proclamations?**

5. In relation to the Trust Land, the Council has been vested with the fee simple and is the legal owner of the land, which is an interest it holds subject to the trust for public parks and public recreation.
6. Further, the interest held by the Council in any Trust Land is an “*interest*” in land within the meaning of the *Land Acquisition (Just Terms Compensation) Act 1991 (Just Terms Act)*.

**What authority does Council have to make decisions concerning the ownership of any land held in trust under the 1935 and 1939 proclamations?**

7. Putting aside the classification of the land and its consequences, Council has full authority to make decisions concerning the ownership or lease of the land, provided Council is acting consistently with its trust obligations.

8. However, since the Trust Land is classified as community land, s45 of the LGA provides:
  - a. the Council has no power to sell, exchange or otherwise dispose of community land; and
  - b. the Council may grant a lease or licence of community land, but only in accordance with Division 2 of Part 2 of Chapter 6 of the LGA (which refers to, among other things, the requirement for a plan of management and sets out restrictions on leasing in s 46).
  
9. For these reasons, Council should require that TfNSW acquire the land it requires by compulsory acquisition in accordance with the Just Terms Act.

**What power does the State have to use the land held in trust under the 1935 and 1939 proclamation for the public purpose of transport?**

10. The State of NSW does not have power to use the land for any purpose without the consent of the owner of the land.
  
11. If TfNSW acquires the land under the Just Terms Act, TfNSW will be vested with the land freed and discharged from all trusts and it will have all the powers of an owner of unencumbered land to use the land as it wishes, according to law. The Trust will be brought to an end.

**If the land held in trust under the 1935 and 1939 proclamations has been created by Parliament what is the process to unwind the trust?**

12. The process to *unwind the trust* is clear in the case of compulsory acquisition. Any Trust Land that is acquired by TfNSW by publication of an acquisition notice in the Gazette will be *freed and discharged from* all trusts over or in connection with the land.

**What capacity does Council have to give owner's consent (in property law) for the land held in trust under the 1935 and 1939 proclamations to be used for a specific purpose?**

13. In relation to Trust Land, Council is the legal owner of the land and has full capacity to give or withhold owner's consent for the use of the land for a specific purpose, provided it is acting within its trust obligations.
  
14. In relation to use following consent, the NSW Court of Appeal has found that the power of a council to erect improvements in respect of a park was limited to improvements the purpose of which was *"to promote or [was] ancillary to"* the use and enjoyment of the public park for public recreation. Therefore, there is a strong argument available that the development of a publicly accessible cycleway is consistent with the use of the Trust Land for the purposes of public parks and public recreation. It would be appropriate and consistent with a trust stated

in those general terms to allow for the construction of a safe and effective structure to permit cyclists to travel from Alfred Street up to the cycle path on the western side of the Sydney Harbour Bridge.

## Transport for NSW



Ms Therese Manns  
 General Manager  
 North Sydney Council  
 200 Miller Street  
 North Sydney NSW 2060

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Re: Transport for NSW and North Sydney Council

27 February 2023

Dear Therese

I refer to your letter of 24 February 2023 and our previous correspondence to North Sydney Council (Council) on 19 September 2022 and 16 February 2023.

Transport for NSW (Transport) is committed to working with Council and the community to deliver some truly exceptional and lasting benefits for residents, workers and visitors to North Sydney.

The NSW Government has recently announced a new foreshore park at Berrys Bay, and an expansion of public open space at Lavender Bay. We also continue to work collaboratively with Council on the North Sydney Integrated Transport Program with the objective of delivering place-based outcomes for the North Sydney CBD, aligned with Council's vision. These projects and others demonstrate a genuine effort and investment by NSW Government into place outcomes for North Sydney and importantly, the benefits we can continue to deliver for the community by working together.

With the community front of mind, and to support further amenity, active transport and open space outcomes, Transport proposes a further contribution of \$1 million towards Council's planned improvements to Bradfield Park South, bringing our total proposed contribution to \$2.5 million. These works, as detailed in the Concept Design Report by Oculus and endorsed by Council on 25 June 2018, would be subject to a Development Application and further engagement and design review by Transport to ensure the proposal aligns with Transport requirements, including the protection of key transport assets at this location. Our contribution towards these works could be made via a grant or works in kind, subject to a funding deed, depending on Council's preference.

You are aware that we are urgently seeking confirmation of Council's agreement to provide land owner's consent to enable lodgement of an application under Section 60 of the Heritage Act 1977 to progress the Sydney Harbour Bridge Northern Cycleway Access (SHBCNA) project.

We can feel confident progressing this project with the knowledge it has strong community support, significant active transport benefits and that the options and impacts to open space and heritage have been thoroughly evaluated and substantially mitigated through a robust design excellence process, reinforced by independent expert and agency advice.

On this basis, Transport progressed a Review of Environmental Factors (REF), which was placed on public display at the end of last year, and again received overwhelming support. Council requested that we follow this planning pathway, rather than the State Significant Impact (SSI) pathway, and we supported this view on the basis it would be a faster and less expensive process, given that SSI is typically used for major infrastructure projects.

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If land owner's consent is not provided by Council by the end of February 2023 and Council resolves not to provide land owner's consent, it will delay the project by impacting key activities that were intended to be undertaken concurrently and we will need to progress the project via the SSI pathway. In this case, the proposed contribution of \$2.5m towards improvements at Bradfield Park South would need to be re-directed to cover the additional time and costs associated with progressing the project via an SSI pathway. We would much prefer to see these funds directed towards community benefits.

The SHBCNA project and the proposed contribution to works at Bradfield Park South offers an opportunity for Council and Transport to work together collaboratively to deliver a positive legacy of open space, active transport and community benefits at this iconic location. We hope you will consider our proposal favourably so we can continue to work together towards this positive outcome.

Sincerely,



Steve Issa  
Executive Director, Community & Place  
Transport for NSW

Cc: Kiersten Fishburn, Deputy Secretary, Cities & Active Transport  
Transport for NSW

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## NORTH SYDNEY COUNCIL

24 February 2023

Steven Issa  
Executive Director, Community and Place  
Greater Sydney  
Transport for NSW

By email: [steve.issa@transport.nsw.gov.au](mailto:steve.issa@transport.nsw.gov.au)

Dear Steven,

Thank you for your letter dated 16 February 2022. Having commenced with North Sydney Council in late November, I have welcomed the opportunity to meet your team and hear about their work on key projects within the North Sydney Local Government Area.

The many NSW Government projects underway within the North Sydney Local Government Area clearly demonstrates the importance of our Local Government Area to the State's economy and liveability. The challenge Council is now facing is to ensure the interest of the State is balanced with that of the local community, both this generation and the next.

It is important to make clear that North Sydney Council is a strong supporter of active transport and reducing car ownership. In addition to the numerous cycleway projects, education programmes and shared space initiatives, we are one of the largest supporters of car share and continue to look for opportunities to reduce congestion from our roads.

The Sydney Harbour Bridge Cycleway project is a great example of the difficult balancing act between State and Local interests. It is questionable whether sufficient consideration has been given to both this generation and the next. Council's current position remains unchanged, and in its view are lacking in both respects.

Access to the iconic Sydney Harbour Bridge for cycling should be a key strategy for any State Government. It is Council's view that this strategy should be equally befitting to the active transport movement as the Bridge is to the Harbour. Equally as visionary as the Bridge in its original design. For this reason, Council has continually encouraged the NSW Government to prioritise active transport and remove removal of one lane of vehicular traffic in favour of cycleway on lane 8.

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I acknowledge that survey results in relation to the project have received support. However, at a local level, the project has created concern. In a committed attempt to save their park and assist TFNSW in achieving better bicycle access to the Harbour Bridge, the community had put forward alternative proposals. In their view, these proposals should be given more consideration.

In 2003, Council completed the embellishment of Bradfield Park North, at a cost of \$2.3M in 2003 dollars. The community is proud of this public space and we have developed a masterplan to continue to improve the amenity through Bradfield Park Central and South. These spaces are used both locally and globally, with the southern end situated on the harbour. The plans in three parts are expected to cost in the vicinity of \$5-7M for Bradfield Park Central stage 1, \$15-20M for Bradfield Park Central stage 2, and \$7.5M for Bradfield Park South. As you can see, we have a long way to go.

The offer of \$1.5 million in contributions towards Bradfield Park South is not commensurate with the impact to the local amenity within the only completed section of Bradfield Park North and will not make any significant headway in the broader masterplan for the park. I am therefore unable to accept this contribution on behalf of the council and community.

Yours sincerely



Therese Manns  
**GENERAL MANAGER**

cc: Kiersten Fishburn, Deputy Secretary, Cities and Active Transport · Transport for NSW