

## **6.0 GENERAL MANAGER'S REPORTS**

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| <b>ITEM 6.1</b>          | <b>REVIEW OF MANLY OVAL AND WHISTLER STREET<br/>CARPARKS PROJECT - STATUS UPDATE</b>                        |
| <b>REPORTING MANAGER</b> | <b>DEPUTY GENERAL MANAGER CORPORATE SERVICES</b>  |
| <b>TRIM FILE REF</b>     | <b>2016/217409</b>  |
| <b>ATTACHMENTS</b>       | <b>1 Office of Local Government - Correspondence Former Manly<br/>Council Extraordinary Council Meeting</b> |

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### **EXECUTIVE SUMMARY**

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#### **PURPOSE**

To provide an update on (a) the progress of the independent review of the Manly Oval and Whistler Street Carparks project, and (b) feedback received in relation to the 12 April 2016 Council Meeting held by the former Manly Council.

#### **SUMMARY**

On 12 April 2016, at an Extraordinary Meeting of Council, the former Manly Council met in closed session to award the letting of contracts for (a) the construction of a carpark beneath Manly Oval (Abergeldie Constructions), and (b) a 99 year lease of the Whistler Street Carpark and Library site (Athas and Built Group). Subsequent to this, several community members wrote to the Office of Local Government (OLG) to raise concerns about the manner in which the Meeting was held – in particular, the procedures followed to close the Meeting to the public.

At the first Council Meeting of the newly formed Northern Beaches Council on 19 May 2016, the Administrator gave an undertaking to conduct a review of the Manly Oval and Whistler Street Carparks project. This undertaking was given in response to several adverse community comments in relation to this project – that is, the project itself, its viability, and also their concerns (mentioned above) in relation to procedures followed in facilitating the 12 April Council Meeting.

Deputy General Manager Corporate Services was asked to facilitate an independent review of the project. The following firms have subsequently been engaged to conduct the review in a collaborative manner – Value Network, and Ernst & Young. This report sets out the review scope, and the roles and responsibilities of each firm.

At the time of writing of this Report (4 July), both firms are proceeding with their respective reviews. It is anticipated they will be completed within the coming weeks.

On 20 June 2016, the Chief Executive of the OLG wrote to the General Manager Northern Beaches Council outlining that the former Manly Council had not followed correct procedure in the way that the Council Meeting of 12 April 2016 was conducted.

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#### **RECOMMENDATION OF GENERAL MANAGER**

That Council note the update on the Manly Oval and Whistler Street Carpark provided in this report.

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**REPORT**

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**BACKGROUND**

On 12 April 2016, at an Extraordinary Meeting of Council, the former Manly Council met in closed session to award the letting of contracts for (a) the construction of a carpark beneath Manly Oval (Abergeldie Constructions), and (b) a 99 year lease of the Whistler Street Carpark and Library site (Athas and Built Group). These two undertakings were identified in the Manly 2015 Masterplan, and are linked as one project in that the Whistler St site lease will (retrospectively) fund the construction of the Manly Oval underground carpark.

Subsequent to this, several community members wrote to the Office of Local Government (OLG) to raise concerns about the manner in which the Meeting was held – in particular, the procedures followed to close the Meeting to the public. A number of these community members have since raised these concerns with the Administrator.

The former Manly Council signed Deeds of Agreement with the successful contractors – 26 April with Abergeldie Contractors Pty Ltd, and 27 April with Built Development (Manly) Pty Ltd (Athas Holdings Pty Ltd as trustee). These Deeds contemplate detailed contracts being drawn up in the near future.

At the first Council Meeting of the newly formed Northern Beaches Council on 19 May 2016, the Administrator gave an undertaking to conduct a review of the Manly Oval and Whistler Street Carparks project. This undertaking was given in response to several adverse community comments in relation to this project – that is, the project itself, its viability, and also their concerns (mentioned above) in relation to procedures followed in facilitating the 12 April Council Meeting.

Deputy General Manager Corporate Services was asked to facilitate an independent review of the project. The following firms have subsequently been engaged to conduct the review in a collaborative manner:

- Value Network (VN)
- Ernst & Young (EY).

Value Network is a specialist Sydney-based consultancy providing innovative value adding business improvement solutions and strategies to clients. Their principal partners have extensive executive NSW public sector experience in the design, feasibility, management and review of major infrastructure projects; and also in the tendering and contract management of public works activities.

Ernst & Young are an international multi-services firm, providing advisory, assurance, tax and transaction services. The partner commissioned for this review has extensive experience in feasibility studies into large infrastructure projects, and in particular car parks.

Key documents relating to the project were made available by staff from the Southern (former Manly) office in May 2016.

**Scope of Review**

On 10 June 2016, staff convened a meeting with VN and EY to determine the review scope, and to determine roles and responsibilities. Table 1 below sets out the overall scope of the review, and provides an indication of each firm's role.

As can be seen in Table 1, significant effort will be put into robustly testing the overall business case for the project, in order to give Council a level of assurance that the project is viable, represents good value for money, and overall is in the public interest to proceed.

Table 1: Manly Oval and Whistler Street Carparks Project – Review Scope

| Review Area                 | VN Coverage   | EY Coverage   |
|-----------------------------|---|---|
| <b>Business Case</b>        | <p>Linkage to Manly 2015 Masterplan, and to original principles/objectives</p> <p>Review overall project feasibility and viability, including:</p> <ul style="list-style-type: none"> <li>• alternate options considered</li> <li>• risks and their impacts on financial modeling</li> <li>• Concepts, and their development</li> <li>• all relevant approvals (e.g. OLG Capital Works Guidelines)</li> <li>• Financial feasibility and modeling, including linkage with EY's review.</li> </ul> <p>Linkage between Business Case and Procurement Strategy.</p> | <p>Financial feasibility, including:</p> <ul style="list-style-type: none"> <li>• Financial and economic modeling</li> <li>• Assumptions</li> <li>• Cost methodology</li> <li>• Revenue projections.</li> </ul> <p>Work collaboratively with VN to share results and help inform overall project viability.</p> |
| <b>Procurement Strategy</b> | <p>The preferred procurement and contracting strategy is clearly articulated, including the case for and against, and adequately mitigates risks identified.</p>  | Nil   |
| <b>Tender Evaluation</b>    | <p>This will consider:</p> <ul style="list-style-type: none"> <li>• Adequacy of the tender documentation, including allocation of risk</li> <li>• Adequacy of the tender processes, including the extent to which the tender evaluation approached reflected the key value for money criteria</li> <li>• Selection of the preferred tenderer(s), including negotiation, financial closure and deed / contract award</li> </ul>  | Nil   |
| <b>Project Delivery</b>     | <p>Review of:</p> <ul style="list-style-type: none"> <li>• The delivery of the project is underpinned by a robust Risk Management Framework that remains current through all phases of project delivery</li> <li>• Project scope change management i.e. the existence and management of a project change process</li> <li>• How departures from the Business Case rationale are considered, assessed and decided.</li> <li>• How planning approvals are</li> </ul>  | Nil   |

| Review Area           | VN Coverage   | EY Coverage |
|-----------------------|---|-------------|
| <b>Project Status</b> | <p>proceeding, and how changes required are being linked back to the Business Case and overall project viability.</p> <p>Confirmation of current contractual status (deeds, pending contract formation. liabilities).</p> <p>Confirmation of other key legal considerations – e.g. does the project constitute a PPP (public private partnership)</p> | Nil         |

### **Status of Review**

At the time of writing of this Report (4 July), both firms are proceeding with their respective reviews. Additional documentation has been requested to help inform their enquiries, and these have been provided. Preliminary findings will be made in late July, and clarifications with relevant staff will be sought.

### **Correspondence from Office of Local Government**

On 20 June 2016, the Chief Executive of the OLG wrote to the General Manager Northern Beaches Council outlining that the former Manly Council had not followed correct procedure in the way that the Council Meeting of 12 April 2016 was conducted. A copy of this correspondence is attached to this report.

Changes to the Code of Meeting Practice to clarify this will be reported to the August Council Meeting.

### **CONSULTATION**

The purpose of this report is to provide an update to Council on the progress of this review, and on the update from the OLG regarding the 12 April 2016 Manly Council Extraordinary Council Meeting. Further updates will be provided to Council as the review proceeds and is finalised.

### **TIMING**

It is anticipated that the independent review of the Manly Oval and Whistler St Carparks project will be completed in late July.

### **FINANCIAL IMPACT**

The costs associated with the independent reviews of the Manly Oval and Whistler St Carparks Project are being funded from existing internal audit budgets.

### **SOCIAL IMPACT**

In the interests of transparency with our community, the purpose of this report is to provide an update to Council on the progress of this review and on the update from the OLG.

### **ENVIRONMENTAL IMPACT**

The review has minimal environmental impact, and by design is reviewing the adequacy of the environmental assessments undertaken as part of the business case for the Manly Oval and





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Our Reference: A489457  
Your Reference:  
Contact: Dylan Reynolds  
Phone: 02 4428 4100

Mr Mark Ferguson  
Interim General Manager  
Northern Beaches Council  
PO Box 882  
MONA VALE NSW 1660



Dear Mr Ferguson

I am writing about the former Manly Council's extraordinary meeting of 12 April 2016, which was held in the absence of the public to consider tenders concerning the Manly2015 Masterplan.

In response to concerns raised by members of the community, the Office of Local Government wrote to the then General Manager of the former Manly Council, Mr Henry Wong, on 5 May 2016 requesting information about the meeting of 12 April. Based on the information provided, the Office has identified a number of concerns about the manner in which that meeting was conducted.

I have raised these for your information and any necessary corrective action. In particular, you may wish to consider seeking external legal advice on the implications of any statutory non-compliance on the validity of the decisions made at the relevant meeting. The matters of concern are outlined below.

No public notice of the meeting

It has been alleged that while councillors were given notice of the extraordinary meeting no public notice was given of the meeting including on Council's website.

Council has suggested in its response to the Office's letter of 5 May that no public notice was required for the meeting under clause 232 of the *Local Government (General) Regulation 2005*.

This is not the case. Section 9(1) of the *Local Government Act 1993* requires councils to give public notice of all meetings of the council and its committees comprising wholly of councillors. This includes extraordinary meetings. Clause 232 simply excuses councils from the requirement to publish a notice of an extraordinary meeting in a local newspaper. At the very least, notice of the meeting should have been published on Council's website.

Public Availability of the Meeting Agenda

It has also been alleged that no agenda for the meeting was made available at the council's offices and that members of the community were advised that they were not entitled to this because the meeting would be closed to the public.

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Section 9 of the Act requires councils to make the agenda and associated business papers for meetings available for the public at its offices and at each meeting. In the case of a meeting whose agenda includes the receipt of information or discussion of matters that, in the opinion of the general manager, is likely to take place when the meeting is closed to the public, the agenda (but not the business papers) must still be made available to the public but must indicate the relevant confidential items of business without giving details of the items.

**Closure of the Meeting**

It has also been alleged that members of the public were prevented from attending the extraordinary meeting and were barred entry by security guards.

There are two sets of minutes for the meeting in question, one for a meeting of the committee of the whole and another for an extraordinary meeting that appeared to follow. These appear to suggest that Council initially met as "closed committee of the whole" without first resolving into committee as required under section 373 and failed to resolve to close the meeting to the public as required under section 10A of the Act.

In an opinion provided to another member of Council staff, Council's general counsel advised that he was not aware of a requirement for a meeting to be held in the presence of the public prior to it being closed. He also questioned whether the requirements for closure of council meetings applied to extraordinary meetings that were "*intended to be wholly closed*".

Clearly this is not the case. The Act requires all meetings of a council (including extraordinary meetings) and committees of a council (where all members are councillors) to be open to the public. Under the Act a council is required to first resolve to close the meeting to the public in accordance with section 10A, in order to exclude the public. The decision to close a meeting to the public is one that must necessarily be made in the presence of the public.

**Minutes of the meeting**

Where a council resolves to close a meeting to the public, the minutes must specify:

- the grounds relied on under section 10A(2) to close the meeting;
- the matter that is to be discussed during the closed part of the meeting; and
- the reasons why the part of the meeting is being closed, including (if the matter concerned is a matter other than a personnel matter concerning particular individuals, the personal hardship of a resident or ratepayer or a trade secret) an explanation of the way in which discussion of the matter in an open meeting would be, on balance, contrary to the public interest.

A review of the minutes of the relevant meeting indicate that while the first two items are addressed, they do not explain why discussion of the matter in an open meeting would be, on balance, contrary to the public interest.

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Outstanding concerns about Manly Council's Code of Meeting Practice

I note that the Proclamation establishing the new Northern Beaches Council identifies the code of meeting practice of the former Manly Council as the code of meeting practice for the new Council.

I would like to draw your attention to previous concerns that were raised by the Office in relation to the former Manly Council's code of meeting practice. Please find attached our previous correspondence to the former Manly Council dated 18 June 2014 (A379843) and 25 July 2014 (A384983).

Should you wish to discuss any matter raised in this letter, please do not hesitate to contact Mr John Davies, Manager, Council Governance, on 02 4428 4139.

Yours sincerely



**Tim Hurst**  
**Acting Chief Executive**  
**Office of Local Government**

10/6/16

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Local Government

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**COPY**

Our Reference: A379843  
Your Reference:  
Contact: Doug Friend  
Phone: 02 4428 4201

Mr Henry Wong  
General Manager  
Manly Council  
PO Box 82  
MANLY NSW 1655

*Henry*  
Dear Mr Wong

The Office of Local Government has become aware of clause 6.9(2) of Manly Council's Code of Meeting Practice (the Meeting Code). The Office understands that this provides as follows:

*The General Manager, may exclude from the business paper any Notice of Motion which in his or her opinion is out of order, or the General Manager may on his or her own initiative make such alterations, corrections or amendments as will put such Notice of Motion into appropriate form (without changing its substance). In either such event the General Manager shall, as soon as is practicable, inform the author of the Notice of Motion of the action which the General Manager has taken and the reasons for that action.*

This clause would appear to give you as General Manager a broad discretion to exclude Notices of Motions by councillors from the agenda of the Council's meetings and an extraordinary level of control over what business the Council may or may not consider.

As you would be aware, section 360(2) of the Local Government Act 1993 (the Act) provides:

*A council may adopt a code of meeting practice that incorporates the regulations made for the purposes of this section and supplements those regulations with provisions that are not inconsistent with them.*

It would seem that clause 6.9(2) of the Council's Code may be inconsistent with clause 240(2) of the Regulation. This provides that:

*The general manager must not include in the agenda for a meeting of the council 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. The general manager must report (without giving details of the item of business) any such exclusion to the next meeting of the council.*

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Under clause 240(2), a General Manager's power to exclude a councillor's notice of motion from the agenda is limited to motions which are, or the implementation of which are unlawful. The power to exclude matters which are "out of order" gives you, as General Manager, a much broader power to exclude the notices of motions of councillors.

Also, where clause 6.9(2) of the Council's code simply requires the General Manager to notify a councillor when their notice of motion has not been included on the agenda, clause 240(2) of the Regulation requires the non-inclusion to be reported to the next meeting of the Council.

The Council should take immediate steps to review its Meeting Code to ensure compliance and consistency with statutory requirements.

Your assistance in this matter is appreciated.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Ross Woodward', followed by the date '18/6/14'.

**Ross Woodward**  
**Chief Executive**  
**Office of Local Government**



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Local Government

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**COPY**

Our Reference: A384983  
Your Reference:  
Contact: Doug Friend  
Phone: 02 4428 4201

Mr Henry Wong  
General Manager  
Manly Council  
PO Box 82  
MANLY NSW 1655

*Henry*  
Dear Mr Wong

Thank you for your letter of 26 June 2014 about clause 6.9(2) of Manly Council's Code of Meeting Practice (Council's Meeting Code) dated November 2010.

I have noted your comments. The Office does not agree with your view that the expressions "out of order" and "unlawful" are synonymous or that they are used interchangeably in clause 238 of the Local Government (General) Regulation 2005 (the Regulation).

As you would be aware, the Regulations override the Council's Meeting Code to the extent of any inconsistency.

Council should take steps to ensure its Meeting Code complies with and is consistent with the statutory requirements when it is next reviewed.

Your assistance in this matter is appreciated.

Yours sincerely

*Ross Woodward 25/7/14*

Ross Woodward  
Chief Executive  
Office of Local Government