Open Letter to all Councillors of Willoughby City Council

Dear Councillors,

I note the Talus Street Trust matter is back on Council's agenda for 27 May meeting. I make the following observations.

As you may recall, for those present, I recently asked three questions of Council's Senior Counsel. These concerned the possibility of the Talus St Reserve land being impressed by a trust, the law around the comments concerning good faith and the statutory provision in the Local Government Act that afforded indemnity to Councillors on this issue, and whether the lease had been breached. You will recall that the advice given on the last point was this matter had not been briefed.

The trust point

Upon checking the legal reasoning conducted to ground the advice, I was not satisfied with what we were told concerning the trust issue. I have informed the GM and the Mayor of this fact.

We are all on notice of this following the raising of the issue by Mr Owens, and his continued communications, such that we, as possible managers, must take the issue seriously and, in my opinion, be proactive in satisfying it beyond any reasonable doubt.

If the land is impressed with a trust we are all are arguably exposed personally by reason of the serious issues raised by Mr Owens. To reiterate, this concern arises with my being, along with all Councillors, a possible member of the board managing this trust.

The personal liability arises as my prime and absolute duty in respect to any trust is to act only to protect the trust. Failure to do so, could result in personal liability for all past and present managers of the trust. Given the seriousness of this issue the matter in my opinion needs to be properly addressed by a suitably qualified and experienced person in such matters.

I have retained one of Australia's most pre-eminent Queen's Counsel, Mr Finkelstein QC from Melbourne - a retired Federal Court judge, to advise me on the issues raised by local lawyer Mr Owens in his detailed correspondence to us.

I am yet to receive Mr Finkelstein's written advice but I can say I have had a telephone discussion with him about the possibility of a trust being impressed on the Talus St Reserve. The land is so impressed in learned Queens Counsels' opinion. This makes all Councillors managers of the Talus Street Reserve land trust.

Mr Finkelstein has confirmed to me orally that he agrees with the fundamental premise of Mr Owens that there is a trust; and that the High Court decision of Rutledge applies. As to application of the general law trust concepts and duties applying as a result, I am awaiting further advice. There is no doubt that these liability issues are very arguable before a court of law, it being a matter of how far these ancient doctrines have advanced in modern times, and advancing they have been in recent decisions. This has been a cause of my concern since 2011.

It is therefore already clear to me that we, as managers of this trust, cannot properly and in good faith rely on the advice given by Mr Tomasetti SC on this matter. These conclusions have serious ramifications for us (and Council) if we - being on notice of all the facts notified to us by Mr Owens (see for instance his detailed note to us of 10 March 2011) - choose to ignore the issues he raises.

The good faith point

It has been my understanding that Councillors were to receive an advice on the good faith point asserted by the GM and his legal advisors.

This is confirmed by the fact that one morning after we received Mr Tomasetti's advice, whilst walking to work in the CBD, I was stopped and informed that research could not find any law on the good faith point of which learned counsel had told us "there was an abundance of law and it would not be difficult to locate same".

After inquiring of the person who was talking to me who he was, I was informed that he was Mr Tomasetti's instructing solicitor on behalf of Council. I informed the gentleman that it was inappropriate to speak to me and that he should go back to the GM. I note we as Councillors have yet to receive the advice, which we were told would be forthcoming.

It is of no surprise to me that research revealed no good law on the indemnity of Councillors on the points in this matter. I have long held the view that no indemnity exists by virtue of the Local Government Act. If trust law is in play, then no Act will offer such indemnity if there has been a lack of good faith.

Other matters

Written advice on the occupation of Talus St Reserve only being known in July 2011

This advice from Council Officers to Councillors is at odds with well-established facts. The date of July 2011 is around when Mr Owens came and spoke to Council in open forum. I make these observations:

- I have seen the documents that show Council has known all about Love & Deuce's occupation since no later than 1994.
- It is known that by 1996, the trust property had become known as the Love & Deuce Tennis Centre because the Acoustic Report proving that is actually in Council's files.
- I have also seen the May 1999 Plan of Management that records the question: is subleasing to Love & Deuce legal and known to Council.
- I have also seen the company searches on Love & Deuce obtained by Ms Buck and Mr Tobin in 1999 when they were managing the renewal of the lease.
- As Ward Councillor when first elected, a local resident living adjacent to Talus St Reserve contacted me concerning the noise off the courts at 7am caused by Love & Deuce's activities on the site. I know officers went down there to investigate. I also know that the resident was declared 'a vexatious complainant' by the GM, under an undisclosed provision, which it seems, does not exist in any Act and all of this well before 2011.
- I have no idea why Mr Tobin advised Crown Lands in 2011 and 2012 that Council only discovered Love & Deuce's involvement in July 2011. But we as managers of this public trust need to get to the bottom of this. Again, the reason why this needs to be done is we owe a duty to the trust.

Document on the public record not advised to Council

The 1999 lease renewal deal resulted in the Tennis Club being given a rent discount if they allowed Humpty Dumpty to stay in possession rent-free. For some reason, Council set the rent at the extraordinarily low sum of $14,000 per year. It has to be noted that at this time Love & Deuce and Humpty Dumpty were in occupation on the site generating private income.

It has since been determined (including by reference to public audited accounts) that Humpty Dumpty was at the very same time paying rent to Love & Deuce for some 10-20 metres of office space on the trust property that exceeded the whole rent being paid to Council for the whole 15,000 square metres of the Reserve.

If a trust is impressed on this Reserve, then we as custodians of this public trust need to satisfy ourselves of these facts which are either in the Council file or on the public records and accessible.

I have always pondered why this information was not provided in a report to us as Councillors after July 2011. Now with the benefit of Queen's Counsel's verbal advice, being on notice of this information, I as a manager of the Trust have a duty to ascertain the full facts.

As managers of a trust, everyone of us, are imbued with the duty, no matter what acts or actions we may take personally. Therefore, extreme caution and prudence needs to be exercised to exercise our obligation to the Trust. Further, a duty to a trust does not wane with the passing of time or intervening acts or actions.

Questions on Notice

On the Council file is a copy of a series of Questions On Notice I sent to the GM in July 2011 after Mr Owens spoke to Council. These questions were clearly received because they are on the file; but they have never been listed in the Council Papers or answered. Why?

Following that address, I went to the State Library and the law books and undertook my own research and then wrote the questions. The reason is Mr Owens had placed all of us on notice because if he

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was right at law, then our standing as Councillors no longer applied. We were custodians of a trust: a very different matter with a whole lot of different personal liabilities. That is what the Owens address in Open Forum around in July 2011 did to us all.

My questions went to issues about the existence of a trust and the conduct of meetings of the trust body.

All matters concerning the Reserve Trust require a separate meeting of the trustee, not mixed with other Council business. That is a fundamental principle of trust law. That meeting may only proceed after adequate notice to the people of NSW as is made clear by Crown Lands in its Trusts Handbook that we must all follow. Following my preliminary advice from Mr Finkelstein QC, we as Councillors cannot keep ignoring this fundamental principle: I raised this issue with Councillors back in 2011 and my requests for separate trustee meetings were ignored. I keep calling the conflict at every Council meeting when the Reserve Trust matters are listed for this very fundamental principle.

I should also add that all meetings concerning this PUBLIC trust must be held in public, not in secret. Because public trusts must not be a source of private profit, there is simply no reason to take this meeting into confidential on some basis that it concerns "commercial in confidence" matters. The public needs to know ALL details of how we are managing this trust.

Conclusion

As I pointed out when the matter was recently deferred, and I was acting Chairman, the status quo of the physical activity on the Reserve site will continue in the current holding over period of the lease. In my opinion, what is at large is the legal issue concerning whether the land is impressed with a trust.

Currently there are two agency inquiries but these are not the main issue for us. Indeed, they are not before us and should not be as they sit elsewhere.

The issue is one of custodians of a trust, and if we are, how the conduct of a lessee of the land impacts on us as custodians. That conduct has involved on my understanding the breach of the permitted use of the site, (which changes in legal effect because of any trust), unauthorized works on the site, such works attended by council officers for many years, Love & Deuce apparently receiving rent from a charitable interest, even after a discount of rent was given to NSTA to allow the accommodation of that charity rent free, and importantly, this without disclosure to the trust manager.

All of these matters are on the public record or in the Council file. We as managers for the trustee need to carry out our own investigation, as it seems the full facts have not been advised to us by Council Officers over a two-year period even though they have been placed before us all by Mr Owens.

On the preliminary verbal advice I have received from Mr Finkelstein QC's all of these issues are alive as we are custodians.

It is my opinion that Councillors, in their capacity as custodians, and as not Councillors, need to brief a suitable Senior Counsel, at the indemnification of the trust (which is permissible) with a full brief to ascertain our obligations in this matter, and personal exposure.

Regards

Stuart Coppock

28 May 2013

Deputy Mayor

B.A.; LLB; LLM; Master of Tax Laws

COPPOCK to COUNCILLORS
28 MAY 2013

From: Stuart Coppock <stuartcoppock@optusnet.com.au>
Date: Thu, 20 Jun 2013 21:26:00 +1000
To: Councillors All<Elected_Representatives@Willoughby.nsw.gov.au>
Subject: Advice

Dear Fellow Councillors,

I refer to my last communication regarding the Talus St Reserve. I attach another copy of that document with typographical errors corrected.

Whilst I have been away, the final written advice from Mr Finkelstein QC was sent to me.

A pdf of that advice is also attached. I draw your attention to the last three paragraphs.

I reiterate that I obtained this advice because I regarded the actions of the Council Executive in briefing its Senior Counsel - who provided verbal advice in a closed session were deficient. You might recall in that closed session that when I put certain serious issues to Senior Counsel, he responded to the effect "he had not been briefed" on those points. This is a matter of profound concern to me. I also note the "good faith" advice which was promised in that closed session has not been provided to Councillors. I suspect that the law which we were told was "in abundance" on the point I raised, is not abundant at all.

What this means is the promised protection to each of us "of a good faith mistake" might be not be available and indeed illusory. So as I previously advised, I sort my own advice for my own protection and to ensure that if the protection of this public trust was an issue the application of the rule of law was applied. Given the seriousness of this matter, I now share that advice with you.

As officers of the managing body of the trust, we obviously must take this advice from one of Australia's pre-eminent lawyers very seriously. We need to act to remedy the current position as identified by Mr Finkelstein QC.

I have already provided to the Mayor a solution which allows the Talus Street site to continue be used for tennis but which at the same time remedies the legal issues arising out of the trust. For some reason, my suggestion has apparently been ignored. However, I observe that Willis Park has now been structured in such a way that any Crown land issues have been resolved. I ponder why Talus Street has not had the same solution applied to it. My suggestion to the Mayor was based on the principles adopted at Willis Park. Instead, a majority of councillors adopted - for Talus Street - a recommendation that is void at law and which leaves the Tennis Association, Council and us exposed to future legal action. This should be a matter of great concern to all of us.

It is not good enough to pass the recommendation as occurred on 27 May 2013 and wait to see what the Attorney General or the Crown Lands Minister might do when we - as members of the trust's governing body - were on notice of the issues now addressed by Mr Finkelstein QC, issues inadequately addressed by Council's barrister because of an inadequate and incomplete briefing and a failure of those with the carriage of the matter to properly appreciate the rather esoteric principles of trusts, Crown land grants and the High Court decisions (in particular the decision of Mr Justice Windeyer's decision in Rutledge which has been applied without demur across Australia since it was handed down in 1959 – this is very significant).

We owe it to the Tennis Association to resolve this in the way proposed by Mr Finkelstein QC. To the extent the Association needs assistance, we can use the Willis Park model to overcome those issues. They are not insurmountable.

Finally, there is the unresolved matter that the reports to Councillors on this public trust matter have been misleading and incomplete. This needs to be of concern to all of us. I simply find it difficult to comprehend that this complex issue has been handled in the manner it has, particularly when we have all been on notice of these issues, and when the same officers endorsed a good solution elsewhere in the City when the same legal issues are in play. The GM really needs to explain why the different treatment because I do not understand why this has occurred and am unable to see any logic in the different approaches.

Regards

Stuart Coppock

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20 JUNE 2013
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