

Michael Conder
[REDACTED]
[REDACTED]



05 March 2018

Attention [REDACTED]

**Willoughby City Council Special Rate Variation
Northbridge Plaza Car Park
Submitted 12 February 2018**

I refer to my telephone conversations with your Office today.

I confirm that I intend to lodge a submission by email to you relative to the above later this week. As mentioned, I am enclosing copies of three earlier letters written by me that relate to my submission that I am not able to scan into my computer and which I kindly ask be read with it. They are:

1. My letter dated 27 January 2017 to [REDACTED], Planning & Infrastructure Director Willoughby City Council pertaining to the failure of Council to follow your Guidelines for submission of its Application in 2017 and which I believe are now repeated.
2. My email letter dated 5 October 2009 to [REDACTED], Northbridge Ward Councillor, dealing with the proposed rezoning of the Northbridge Public Carpark from 'Special Uses' to 'Business' which raises the same issue that is being traversed in my pending submission to you.
3. My letter dated 14 November 2008 (as Public Officer of The Northbridge Progress Association Inc.) addressed to its President and Committee Members entitled 'Steps in the Privatisation of Northbridge's Public Car Park' commenting on Council's receipt of legal advice from Council's lawyers, dated 30 October 2008. Such legal advice declared that rather than Council holding its title in the public car park upon a constructive trust, as this writer had earlier suggested to Council officers, [REDACTED] wrote (and I quote) 'there is a statutory trust which limits the use of the land to the public purposes for which it was obtained by the Council' namely that of parking and a baby health centre.



It is submitted that the terms of this statutory trust preclude the Willoughby City Council from not only making this current application, but for it to do so without approval of the Attorney General, resonates bad faith on its part to the very persons who would be most affected by Council placing a discriminatory levy in the nature of a fine upon an entity that itself stands guardian of the same public interests that Council is obliged to protect. Pertinent to the failure of the applicant Council to follow the consultative process required by your

published Guidelines from which this conclusion has been drawn are the statements appearing in paragraphs 3 to 10 (both inclusive). They should make it clear that 'those persons who use the car park from time' (to again quote the legal advice) have not been consulted as a precondition to this application being made to you; and their paramount interests ignored.

I should be obliged if you could acknowledge receipt of this letter by email or phone upon receipt. If my letters are to be posted on your website, I should be obliged if you could redact my address and phone numbers.

Thank you again for your courtesy in assisting me.

Yours Faithfully,



Michael Conder


Michael Conder
[REDACTED]

Tel [REDACTED]

Mobile [REDACTED]

Email: [REDACTED]

[REDACTED] Planning & Infrastructure Director,
Willoughby City Council,
[REDACTED]

27 January 2017

Attention [REDACTED]

Dear Sir,

Special Rate Variation Council's Northbridge Public Car Park at the Plaza

I write to express my dismay at the lack of transparency in the procedural steps being taken by Council designed to fund the cost of anticipated works to Council's Northbridge public carpark at the Plaza by way of imposition of a Special variation rate (SVR) sought to be imposed upon a 'small portion of the business community located around the site of the car park'. Council's resolutions of November 28 last would indicate it is proceeding down a path that threatens to overlook my rights and those of other members of the public who use its Northbridge public car park, as well as unfairly impacting upon the residential and business amenity of the whole of the Northbridge community. I write as a resident of Northbridge of some 38 years, ratepayer of the City of Willoughby, and member of the public who regularly accesses it.

I should ALSO mention that on Monday 23rd instant I forwarded an email to you on the same subject (copy attached) to alert you and Northbridge Ward Councillor, [REDACTED] of my concerns, bearing in mind the perceived urgency in Council to meet a deadline that I believe cannot be met for reasons that appear more fully below.

SUMMARY:

COUNCIL'S NOTIFICATION OF INTENTION TO IPART TO APPLY FOR A SPECIAL RATE VARIATION 2017/2018 YEAR:

MISLEADING STATEMENTS CONVEYED BY COUNCIL TO IPART: PAGES

**HOW COUNCIL'S PUBLIC CAR PARK AT NORTHBRIDGE SERVES THE
COMMUNITY OF WILLOUGHBY AND THE STATE**

**IPART GUIDELINES TO COUNCIL AND COUNCIL'S OBLIGATIONS TO THE
COMMUNITY OCCASIONED BY THE STATUTORY TRUST**

**COUNCIL'S OBLIGATIONS TO THE COMMUNITY OCCASIONED BY THE
STATUTORY TRUST WHEN READ WITH THE CAR PARK COVENANT**

**PUBLIC SAFETY GOVERNS COUNCIL'S DECISION TO UNDERTAKE THE CAR
PARK'S 'ESSENTIAL' WORKS**

UNINTENDED OUTCOMES OF COUNCIL'S PROPOSED SVR

**UNFAIRNESS OF THE PROPOSED SVR UPON THE SHOPPING CENTRE
OWNER, ITS TENANTS AND THE NORTHBRIDGE COMMUNITY**

**IPART EXPECTS COUNCIL TO ADVISE CONTAINMENT STRATEGIES TO
AVOID A SVR**

**ALTERNATIVE STRATEGIES EXPLORED FOR USE OF THE PUBLIC CAR
PARK SITE TO THE MUTUAL BENEFIT OF COUNCIL, THE COMMUNITY, THE
PLAZA OWNER AND THE STATE:**

- A. Contribution to the requirement of the car park works:
- B. Long term planning:

CONCLUDING REMARKS

ATTACHMENTS: 1. Email letter from MJ Conder to Council dated 23 January 2017
2. Copy letter from Council to IPART (██████████) undated

* * * * *

**COUNCIL'S NOTIFICATION OF INTENTION TO IPART TO APPLY FOR A
SPECIAL RATE VARIATION 2017/2018 YEAR**

Council is seeking to raise a SVR to fund the cost of its scheduled car park works that are recorded earlier by it to be required to have it conform with Australian Safety Standards, ancillary works and to make improvements. The number of car spaces in the carpark will be reduced to satisfy the statutory requirements for public safety. The sought for proposed rate levy is stated by Council officers to be 'the only viable option for securing external contributions, especially those which target the beneficiaries of the car park'.

Although not mentioned in its November 28 resolutions, Council would appear to be relying upon section 495 of The Local Government Act 1993 (LGA) to target those as yet unnamed ratepayers; and it would appear from Council's letter to IPART of November 28 last, that 'the Special [variation] rate will affect [only] a small portion [of the whole] of the business community located around the site of the car park'.

Section 495 of The Local Government Act 1993 provides:

'495 Making and levying of special rates

(1) A council may make a special rate for or towards meeting the cost of any works, services, facilities or activities provided or undertaken, or proposed to be provided or undertaken, by the council within the whole or any part of the council's area, other than domestic waste management services.

(2) The special rate is to be levied on such rateable land in the council's area as, in the council's opinion:

(a) benefits or will benefit from the works, services, facilities or activities, or

(b) contributes or will contribute to the need for the works, services, facilities or activities, or

(c) has or will have access to the works, services, facilities or activities.'

According to the published draft minutes of its meeting on November 28, Council, having received a Report from Council officers, resolved to notify IPART (Independent Pricing and Regulatory Tribunal) of its intention to seek a SVR commencing in the 2017/2018 financial year for 'the Northbridge Plaza Car Park' in the following terms:

'1. Council notes the timeframes for a Special Rate Variation (sic) to IPART in particular:

a IPART being notified of Council's intentions by 9th December 2016

b A final application being submitted to IPART (on line and in hard copy)

by mid-February 2017.

'2. Council proceeding with:

a. Confirming who will benefit from the proposal

'3. Consultation with key stakeholders in relation to the proposed works and the possible Special Rate Variation beginning in the 2017/2018 Budget Year.'

I am informed by Council officer, [REDACTED] that on November 28, 2016 Council wrote to IPART advising that it will be applying for a Special rate variation (sic) under Section 508A of the Local Government Act. (See Attached IPART NOTIFICATION) Such notification of intention records that Council is seeking up to \$1,400,000.00 for the 2017/18 year and up to a similar amount for the following financial year 2018/19: a total of \$2,800.000.

Significantly, Council's Notification states: 'The Special rate will affect a small portion of the business community located around the site of the car park.'

MISLEADING STATEMENTS CONVEYED BY COUNCIL TO IPART ARISING FROM MISAPREHENSION:

- Council does not state that the proposed special rate variation will affect owners of rateable land located around the site of the car park: it refers only to 'the business community'. As only owners of rateable land in Council's area may be levied, **there are a number of inferences to be drawn from Council's statement to IPART that are misleading, namely:**

1. That only owners of rateable land conducting a business upon their land surround the site of the car park; and that of those conducting a business, only a small portion are proposed to be levied. **Comment 1:** There are many residences in Harden Avenue and along Eastern Valley Way, including an over 55 retirement village, that abut Council's public car park whose residents and visitors are members of the public who access it either regularly, or from time to time, who are not sought to be targeted with Council's proposed SVR. Council should explain to IPART and the Northbridge community why it is targeting Northbridge businesses that are located around the site of its community car park when it is all members of the public, wherever they may reside or are located, either inside or outside the City of Willoughby, who are entitled to use it. **Comment 2:** Council should comply with the Guidelines published by IPART on December 23, 2016 to enable assessment by it, the public, the Northbridge community and individual ratepayers of the merits of the proposed SVR.
2. That owners of rateable land 'located around the site of the car park' carrying on a business that are proposed to be levied **represent only a 'small portion of the business community of Northbridge.** **Comment 1.** To my knowledge, a single owner of rateable land surrounding the site of the car park carries on the business of a shopping centre that constitutes the major business carried on, not only surrounding the site of the car park, but the major business of the suburb of Northbridge. Council should explain to the Northbridge community and to IPART why it is seeking to mislead IPART by conveying an impression that its application for approval of a SVR is of minor consequence to the business and residential amenity of Northbridge.
3. Council has flagged its intention, when lodging its proposed Application under section 508A of the LGA, not to consider it important enough to advise IPART of one critical factor (among others) that would guide it in its decision making, namely; that 'the small portion of the business community located around the site of the carpark' represents the substantive part of the whole of the Northbridge business community.

Comment 1. In targeting what is in reality the substantive part of the business community of Northbridge with a proposed SVR amounting to up to \$2,800,000 over the next two financial years, **Council will be adversely affecting the whole of the residential and business amenity of the Northbridge community that relies upon its freely accessible public car park.** The peninsular suburb of Northbridge has more than two thousand two hundred (2,200) residences, many commercial and professional businesses, cafes, health service providers and importantly, two educational institutions that are located across the road from the site of Council's Northbridge's public car park. One only has to look at the parking restrictions that exist along Sailors Bay Road from Eastern Valley Way to Northbridge Junction, imposed by Council at the insistence of successive state governments reflecting safety constraints demanded to allow commuter traffic from outlying suburbs clear passage through our suburb at all times, to see what an environmental disaster

would have been visited upon the suburb without the presence of its freely accessible public car park.

Comment 2. Without members of the Northbridge community being able to access Council's public carpark in order to patronise Northbridge's commercial and professional businesses, offices, health service providers and its pre-school facility, or to visit neighbouring individual residences and the residential apartment blocks on either side of Sailors Bay road, and the businesses being carried on at either side of Northbridge Junction and Strathallen Avenue, **none would financially viable if they were not as freely accessible as they are found to exist today. The reason is only too apparent: because there would be insufficient public off-street parking available to them that Council's public car park provides to the Northbridge residential and business community.**

Comment 3: Any owner of rateable land conducting its business around the site of the car park would already incur substantial NSW Land Tax to government based upon a UCV enhanced by its immediate presence to Willoughby's community car park at Northbridge. Council's proposed SVR (if it were to be approved by the State government and Council, and were be levied as planned) cannot but be viewed by members of the public who access the public car park as imposing an unreasonable charge (in the nature of a supplementary land tax) upon that 'small portion of the business community located around the site of the car park' rendering those businesses at which they shop more expensive, or even uncompetitive, when compared to those of their neighbours down the road, or within walking distance, **who will incur no such SVR, but will still enjoy the patronage of members of the public accessing their businesses by parking their motor vehicles at Willoughby Council's Northbridge community car park.**

Council needs to explain to IPART why such discrimination should occur.

Comment 4. Such discrimination flags the reason why Council's proposed SVR is almost certain not to receive approval from members of the Northbridge community as members of the public who use its public car park. To date, Council has not taken steps to ascertain their views, and will be required to do so before it lodges its proposed application under Section 508A of the LGA to IPART.

4. In its Report to Council's meeting of November 28 and elsewhere, Council officers have used the colloquial terminology, 'Northbridge Plaza Car Park'. **Comment 1.** Such nomenclature so used by Council officers is representing that Council's public car park at this location is designed solely for the benefit of the owner of the Plaza, when the opposite is true for reasons herein stated. It should properly be described as the **Willoughby Community Car Park at Northbridge.**

Comment 2: The description so used by Council may have already misled councillors, ratepayers, members of the public, ARUP (that has been charged by Council with the task of investigating its usage by the public), and those reading the November 28 resolutions of Council, including IPART --- as to its correct statutory trust held status.

Action: Council should amend any documentation that so misrepresents the car park's community held status and ensure that any future Integrated Planning & Reporting documentation planned to be lodged in support of its proposed SVR complies fully with the Guidelines published by IPART on December 23, 2016.

HOW COUNCIL'S PUBLIC CAR PARK AT NORTHBRIDGE SERVES THE COMMUNITY OF WILLOUGHBY AND THE STATE:

- I do not believe that it will take an ARUP survey to conclude that Council's proposed SVR will be viewed by the peninsular suburb community of Northbridge (in particular), as well as that of the neighbouring suburbs of East Willoughby and Naremburn, as being an unfair and unreasonable imposition of a cost and expense upon their residential and business amenity **that should rightly be borne by all the ratepayers of Willoughby.**

Comment 1. Council officers' Report to Council reveals a lack of awareness as to why its public car park was acquired in the first place, as long ago as 1962. Such public car park was put in place by its then Willoughby Municipal Council, not just to provide a better shopping experience for members of the public at Northbridge's then downtrodden shopping centre --- and so relieve them of a compulsory trek to the cluttered shopping centres of Chatswood, Crows Nest, or the City of Sydney --- but also to afford a measure of relief to its residents, businesses, commercial enterprises and educational institutions suffering from noise and air pollution of commuter generated traffic congestion passing through its suburb.

Comment 2. Such urban vicissitudes were occasioned by a lack of off-street parking in the suburb and an ever increasing flow of commuter traffic edging its way along the major traffic artery that passes through our peninsular suburb in two places in close proximity to each other. Successive state governments have, and still do, demand that commuters from as far afield as Ku-ring- gai and the Northern beaches should be able to pass through Northbridge to Sydney's CBD as speedily as possible, whilst allowing only limited domestic ingress and egress to it in peak hour times.

Comment 3. When Council acquired its Northbridge public car park in 1962, the proposed Warringah Freeway that would have enabled through traffic to be diverted away from the suburb was in the process of being abandoned at the instance of the residents of Castlecrag. Just as Castlecrag citizens could see that its residential and business amenity would be permanently adversely challenged by the intrusion of an expressway through its pristine suburb, so also did Willoughby Council --- prompted by concerned Northbridge residents, and its now near one hundred year old Northbridge Progress Association, and the parents of pupils at Shore School who had much to lose --- act to put in place what is now the Northbridge community car park at the Plaza. They did so for an additional critical purpose: to ensure that it would serve the interests of the public that would use it, both then, now and in the future to ameliorate the plight of its residents and businesses and their religious and educational institutions from a loss of their government promised improvement in their residential amenity that the Freeway would have provided.

- The above comment exposes the basic misapprehension that I believe exists in the mindset of Council as to the fairness of seeking to raise a SVR against 'the small portion of the business community' thought by Council to benefit from their customer's and patron's use of Council's public car park: **it is overlooked that they do so in their capacity as members of the public.** Council has already engaged ARUP to determine 'who is to benefit from Council's proposal' [to carry out its proposed works on its public car park]. Members of the public who reside within the Northbridge community may well

be found to be the majority of its users. However, any survey so undertaken on behalf of Council to determine 'who is to benefit from Council's proposal' by seeking to ascertain where members of the public using it propose to visit, must be viewed as a wasteful task. From what is stated below, such survey cannot arrive at any different conclusion than that which the law has already expressed for Council to act upon: Council's community public car park at Northbridge Plaza is held upon statutory trust for all the members of the public that use it. Council's public carpark, classified correctly for use as 'community land' under the Local Government Act, and not 'operational land', serves to highlight that it is located where it is so situated in the best interests of the whole of the Willoughby community (who, not unsurprisingly) are responsible for its maintenance and upkeep.

Action: Council should act to ensure that its proposed submission to IPART is not based upon flawed assumptions and a lack of transparency to the community that has the most to lose by its adverse impact.

Action: Council should comply with the Guidelines published by IPART on December 23, 2016 to enable assessment by it, the public, the Northbridge community and individual ratepayers of the merits of Council's proposed SVR.

IPART GUIDELINES TO COUNCIL AND COUNCIL'S OBLIGATIONS TO THE COMMUNITY OCCASIONED BY THE STATUTORY TRUST:

- It is this lack of attention to the need for transparency that I believe has contributed to Council failing to first reacquaint the Willoughby community (and it would also appear, IPART) that it holds title to its public carpark in the nature of a fiduciary for the benefit of members of the public who use it; declared by the Court to exist in terms of a statutory trust. **Comment 1.** It is a role that Council is required to fully embrace, not seek to hide from the community. It is a role that is superimposed upon that of the legal requirement specified by IPART in its recently updated Guidelines as obliging council's to make full and true disclosure when seeking a SVR under the LGA. It is role that I view, as a former practising lawyer, is that of a quasi- that places an obligation upon Council to first act to seek the approval of members of the public having the benefit of use of its public car park and child care centre, **before** seeking to exercise its legal rights under the LGA to seek approval from IPART to raise a future SVR upon selected owners of rateable land in its area.
- On 23 December 2016, IPART released a new and comprehensive set of Guidelines for council's to follow when considering applying for a SVR to their general income in the 2017/18 year. The criteria is stated in the Fact Sheet that accompanies the Guidelines to relate to, and again I quote:
 1. reasons for the proposed SVR
 2. community awareness and engagement
 3. impact on ratepayers
 4. approval and public exhibition (where required) of Integrated Reporting and Planning (IP&R) documents, and
 5. cost savings --- past and future

Comment 1. There are a number of essential requirements stipulated on page 2 of IPART's Fact Sheet, a reading of which would indicate that Council has not yet put in place the necessary preliminary requirements for it to make any such Application to IPART by its deadline of February 13 next; and certainly would not be able to do so when it is clear that engagement procedures for public awareness of its proposal, and its outcome which IPART would expect to receive, are not to hand.

Item 4 of the criteria Guidelines, (for example) states:

'The relevant IP&R documents must be publicly exhibited (where required), approved and adopted by council before the council applies to IPART for an SV to its general income.'

Comment 2. No such consultation with the Northbridge community has yet been attempted, to my knowledge. Under the **Fact Sheet Guide Lines** that were published by IPART as late as December 23 last, Council will be required (inter alia) to produce evidence of the outcome of due and transparent consultation with the communities of (I should think), Northbridge, Naremburn, East Willoughby, Castlecrag, Middle Cove and Castle Cove (at minimum), demonstrating the need for, and purpose of a different revenue path being pursued by it as that contemplated by the SVR; that the community is aware of the need for and the extent of the rate rise; and that Council has examined alternatives to such a rate rise or in this case, a SVR against other rateable land that has a more equitable outcome. The first inkling of Council's intentions that this writer had was an unheralded statement made by the Mayor at the Annual General Meeting of the Northbridge Progress Association on Thursday 24 November last, three days before Council's meeting on Monday 28th November. On that Thursday evening, Mayor Gail Giles-Gidney (thankfully) mentioned that Council was proposing to seek a Special rate levy **against the Plaza owner for the cost of works on its public car park at the Plaza**. Such item was not placed on the Agenda for business at the NPA's AGM, either because it was deemed of insufficient importance to be treated as Special Business as required under its Constitution, or because there was insufficient time afforded the secretary of the NPA to insert a notice of it in its community circulated '202' newsletter. In the event, there was no mention made on Council's Meeting Agenda on the 28th November for the necessity of a public meeting to be called before the application to IPART was to be lodged. The whole exercise appears to have been hastened and then dictated by a perceived need to have a notice of intention to seek a SVR to IPART in its hands by December 9 last.

Comment 3. In deference to the integrity of Council officers, such IPART Guidelines of December 26 are spelt out in much greater detail than those existing at the time of Council's resolution of November 28. It is clear that **councils are first required to sign off to the community on such matters as are being traversed in this paper BEFORE they lodge their intended applications:** in this case by February 13, 2017. Suffice to again say, that public consultation has not yet started because on November 28 Council stated that it is not yet in possession of sufficient information to know 'who is to benefit from the proposed works'.

Comment 4. As earlier mentioned, the ARUP survey findings appear irrelevant to Council's proposed application in so far as section 495 of the LGA is concerned — the law has already provided the answer: the benefit of Council's proposed works to

be carried out on its public car park is a benefit afforded all the members of the public who use it. It is an answer that Council officers would appear not to have been appraised, or were not prepared to accept applies to Council's proposed application under Section 508A of the LGA when promoting their Report to Council for discussion on November 28.

Comment 5. Council's Tabled Report indicates that it is intended to consult with stakeholders **after** Council had received a sought for approval from IPART and before it had made its decision to raise the levy upon as yet unnamed ratepayers, but the implied terms of the statutory trust would indicate that any possible levy should be first be approved by the members of the public who use Council's community carpark and Child Care Centre **and that its outcome be made known to IPART when making its application under Section 508A of the LGA.** As a member of that public I have not been consulted by Council; and I am concerned that other members of the public are fully informed of their rights and Council's statutory obligations under the statutory trust and the car park covenant in goodtime for them to consider Council's proposals.

COUNCIL'S OBLIGATIONS TO THE COMMUNITY OCCASIONED BY THE STATUTORY TRUST WHEN READ WITH THE CAR PARK COVENANT:

- **Criterion 3 of the IPART Guidelines of December 26 2016** shows how this independently structured statutory body expects to assess applications for special variations of rates for the 2017/18 year. It states in its opening sentence: **'We require councils to show us why they consider the impact on ratepayers to be reasonable. . .'** In the instant case, Council has announced that it is seeking to target 'a small portion of the business community located around the site of [its public] car park'. There are no named ratepayers; these are yet to be confirmed. But the Mayor has told members of the NPA at its AGM that the Plaza owner abutting the car park is to be targeted to fund the cost of works.

Comment 1. Council, when making its application to IPART pursuant to its resolutions of November 28, will be obliged to demonstrate why it is 'reasonable' that the Plaza owner, AMP Capital Limited (in its capacity as trustee), should be expected to pay such SVR that might be levied against it. Council is being required to first demonstrate to the public and to the Northbridge community why it considers the proposed SVR is 'reasonable'. I perceive this to be a difficult task in the light of what has earlier been stated here concerning the presence of the statutory trust over Council's title to the car park and the obligations placed by it upon Council to the public who use it. However, **Council also has the additional task of explaining to IPART why it should seek to negate its statutory obligations to the very entity that it is now seeking to have pay for something that an enforceable deed supported by another statute, the Conveyancing Act 1919, requires it (Council) to perform under the car park restrictive covenant.** As a member of the public, I have not seen that explanation, and believe that I am entitled to do so before Council's application is lodged with IPART.

Comment 2. Council is responsible for maintaining its Northbridge community public carpark both under the general law, under the implied terms of the statutory trust, and under the restrictive covenant that saw Council become the owner of its public car park, by way of transfer from its former owner in 1962 (excised from the title to the land upon which the Plaza shopping centre now stands). Before it was so transferred to Council, the car park land was first paved, drained and landscaped for council's planned use as a public car park and child care centre in consideration of the transferor's planned redevelopment of what has become the Plaza Shopping Centre. The benefit of the restrictive covenant was attached to the land of the owner of the Plaza shopping centre retained in its ownership at the time; the burden of the covenant was attached to the land transferred to Council as required by law for it to be legally enforceable under the provisions of section 88 of the Conveyancing Act 1919. The covenant provides that Council shall only use the land so transferred to it for its stated purposes of a public car park and a child care centre.

Comment 3. In declaring that Council holds title to its public car park on statutory trust for the benefit of members of the public that use it, the Court is according a benefit to a class referred to as 'members of the public'. As such, that class possesses a right *in personam* and not a right *in rem*, if my memory of the law gained many years ago, still serves me correctly. It is a personal right that attaches to a class as such. It is a personal right that DOES NOT attach to any member of that class as an individual member of that class, as an owner of land (*in rem*), let alone as the owner of 'rateable land in Council's area' as section 495 of the LGA provides. **It is a right that attaches to members of the public, wherever its members may reside.** Importantly, by definition in the Conveyancing Act 1919, a corporation includes a person, such that the Plaza owner as a corporation can be included in that class.

Comment 4. When one considers that the land the subject of the restrictive covenant is to be used ONLY as a public car park and a child care centre, it can be seen why the court later took the view that others, not being land holders, but having a right to access its use, have, and do expect to continue to enjoy the benefits that the statutory trust affords them. The Court would have looked past the covenant's strict requirement for legality for attaching a 'benefit' and a 'burden' to particular land to be enforceable to see where the rights of the ultimate beneficiaries lay by use of the words 'public car park' by its draftsman; and it did so by placing Council in a position of a quasi-fiduciary to the community. The Plaza owner and its assigns then become just one among many in the community entitled to use Council's public car park; and would be entitled to do so under the terms of the statutory trust independently of the car park covenant, in my view. Members of the public who use it would also expect Council to improve it to meet current safety standards and the socio-economic needs of that same public.

Comment 5. It is therefore the statutory trust that governs the legal status of Council's public car park and child care centre; and that status commands Council direct its opinion as to those who will 'benefit' from its proposed scope of works under Section 495 of the LGA, namely, the public as the class that uses it. As the court's declaration implies that those who benefit from it, or contribute to its need, do so as members of the public, it follows that there can be no owner of 'rateable land in Council's area' under Section 495 of the LGA that

'(a) benefits or will benefit from the works, services, facilities or activities, or(b) contributes or will contribute to the need for the works, services, facilities or activities, or(c) has or will have access to the works, services, facilities or activities, in my humble opinion.

PUBLIC SAFETY GOVERNS COUNCIL'S DECISION TO UNDERTAKE THE CAR PARK'S 'ESSENTIAL' WORKS:

- There is every indication that Council has already determined that the stated 'essential works' at Northbridge's community car park are to be carried out to ensure the personal safety of members of the public [who use it] and to otherwise comply with Occupational Health and Safety law that requires it so to do. The carrying out of the works is thus dictated by concerns of public safety of the person and the law that requires Council as owner to so perform such works from the moment the safety issue arose. They have become 'essential' works which, if the owner of the rateable land having the benefit of the car park covenant, having become similarly appraised of the necessity for Council to act under the provisions of the statutory trust and the car park covenant, would be fully justified in insisting that Council carry out. One does not know whether Council has been so requested to carry out such works by the owner holding the benefit of covenant, but I do know, anecdotally, that Council has asked such owner to contribute to its cost: and such request has been refused. Council would appear to have then met such refusal with the current procedures outlined in its November 28 resolution.

Comment 1. Having reached a decision to schedule the 'essential' works to be carried out, based upon considered advice that it is in the interests of safety of the members of the public that use Council's public car park for such works be carried out as soon as possible, I believe Council cannot later form another opinion under Section 495 (2) (a) of the LGA that is patently inconsistent with it: namely, to single out a ratepayer or two from that class of members of the public to pay for works that are to be performed for the benefit of every member of that class.

Comment 2. By virtue of the implied terms of the statutory trust, I believe Council is estopped from denying to the public the right that exists in members of its class of users of the car park and child care centre to have Council not act otherwise than in the interests of that class. As earlier mentioned, it is the Northbridge residential and business communities that would be adversely affected by any disavowal by Council of those rights. **As members of that class of the public who use Council's community car park, they are entitled to have the costs of these 'essential' works paid for by all the ratepayers of Willoughby and not one who is also a member of that class.**

UNINTENDED OUTCOMES OF COUNCIL'S PROPOSED SVR:

1. Council officers may have neglected to look at the overriding provisions of the statutory trust; and I should also think, the issue and deed estoppel that I believe would arise at the instance of the Plaza owner, if a possible proposed SVR is

sought to be raised against it. The same position would also apply to the Plaza owner's anchor tenant, if its shopping centre owner then sought to apportion such levy raised and pass its apportioned cost on to its major tenant. As mentioned above, in addition to the general law, Council has a legal obligation under the restrictive covenant that attaches to the rateable land in the ownership of the Plaza owner to maintain its adjacent Northbridge public carpark and child care centre at its own cost and expense.

2. As a long term lessee of the Plaza owner, [REDACTED] (or subsidiary corporation), having the benefit of the carpark covenant as a permitted assign of part of the land on the Real Property Act title, and rightfully possessed of an awareness of the implications of the statutory trust over the carpark land in favour of the public who use it, would be mindful that it, too, can resist payment of any levy sought to be passed on to it by the Plaza owner under the usual provisions of such a long term lease that requires the leasee to pay increases in rates and taxes. I should imagine, if it so finds itself in such position, [REDACTED] would resist payment, firstly, by reason of having the benefit of such covenant as a permitted assign under the Conveyancing Act and the holder of a registered lease under the provisions of the Real Property Act that affords it such protection by having its benefit attached to the land; and secondly, by reason of a constructive trust that in my opinion as a retired lawyer, could well be impressed upon the Plaza owner as lessor, not to simply pass on a liability imposed upon it by a flawed application of the law. And, I believe, it would be entitled to do so if it were to be adjudged by the court to be unconscionable for the Plaza owner to do so. The Plaza owner, faced with such an unpalatable outcome of having to bear the cost and expense of such SVR itself, and armed with any perceived flaw in Council's projected process for raising such a SVR levy against it, would surely be advised to act to protect its rights. This a nightmare scenario that should never happen; and certainly not upon the Northbridge community.
3. Consultation first undertaken with tenants of the Plaza shopping centre and beyond, may well have guided Council to a different procedure than that now proposed. It is the small shop keepers who do not have the benefit of long term leases that would be immediately placed in an untenable position if, under their short term tenancy agreements, (under three years) unregistered under the Real Property Act, they are obliged to pay a share of an unexpected levy imposed upon the owner of rateable land. Needless to again say, I believe a substantive part of the business community would be polarized by an injudicious and unreasonable imposition of a levy that in equity should be borne by all the ratepayers of Willoughby.

UNFAIRNESS OF THE PROPOSED SVR UPON THE SHOPPING CENTRE OWNER, ITS TENANTS AND THE NORTHBRIDGE COMMUNITY:

IPART GUIDELINES 2&3 require evidence from Council that the community is aware of the need for, and extent of, a rate rise; and that the impact on affected ratepayers must be reasonable. The Guidelines indicate that councils 'should clearly show the impact of any rate rises upon the community.'

Comment 1. It is unreasonable, in my view, as a member of the Northbridge community and a Willoughby City rate payer, for Council's proposal to raise a SVR upon 'a small portion' of the Northbridge 'business community that surrounds the site of the car park', when such business community itself forms a substantial part of the whole of the Northbridge business community; and Council's proposal to exact a SVR a single ratepayer, stands directly in an unwarranted apposition to the amenity of both its residential and business communities.

Comment 2. The possible saving to me as a ratepayer of not paying an apportioned share of the planned cost of 'essential' works sought by Council's proposed SVR does not equate with the intrinsic value of the impairment to the residential and business amenity of the Northbridge community AND the precedent that it would set for councils and government in the future to act to hack away at such valued incorporeal asset.

Comment 3. I believe the Northbridge community will see any SVR passed on to its already struggling small shopkeeper tenants of the Plaza shopping centre being compelled to raise their prices to the point that they may well become uncompetitive with others who enjoy the benefits of the community's public car park location, **but do not incur any such charge.** It does not take rocket science to see that any additional costs borne by tenants and leasees will ultimately be borne by their customers and patrons, who will be found to be a majority of the residents and ratepayers of Northbridge.

Comment 4. I envisage the business community in the Plaza shopping centre so targeted by Council's proposed SVR vigorously lobbying IPART, Council, the State government and the whole of the Northbridge community claiming that they are being discriminated against for the reasons earlier stated. It will be viewed by all shopkeepers, tenants and leasees in the vicinity of Council's public car park, being the substantive part of the business community of Northbridge (those impacted and those not so impacted) as a charge that should fairly be shared between all the members of the public accessing the car park (who are not necessarily ratepayers) with all of the rate payers of the City of Willoughby who, as I have outlined above, participate in its benefits one way or the other. However, they cannot form any such view when not properly informed by Council of the rights of the public in its car park. They will be more likely to view public timed entry to the car park as being the most appropriate way to implement the abovementioned sharing paradigm when Council fully discloses the unique circumstance that the Northbridge community carpark provides, not only to the residential, business and commercial amenity of the whole of Northbridge, but the needs and demands of surrounding suburbs and beyond. At the moment there is unwarranted antagonism between Council and the Northbridge community occasioned by the misapprehensions that exists in both for the reasons explicated here.

Comment 5. On a similar note, but applying the same rationale that should see the proposed SVR abandoned by Council, the Northbridge community could well be mistakenly asking Council why Shore School, whose parents and carers use the carpark when attending events nearby, should remain exempt from such a SVR. The answer, overlooked by the community, can be found in the vast size of the carpark

land when it was originally vested in Council's ownership in 1962: it was always intended to be used on a Saturday or any other sporting or special event day by visitors to its neighbouring school and sporting complex. There are still a good many residents alive today who would remember the community angst generated against those parking across their driveways on sporting fixture days at Shore Oval --- that Council's community car park went a long way to relieve. It is inescapable to my mind at this date, that Council would have seen that this large area of land to be transferred to it would readily accommodate, not only the car parking needs of plaza patrons, but also the future parking needs of all those businesses and commercial interests nearby extending along Sailors Bay Road to Northbridge Junction, as well as the educational and religious institutions nearby; along with those patronising the child care facility. [Please note I was not educated at Shore school, nor were my children, and now my grandchildren].

Comment 6. The IPART Guidelines above would require Council to demonstrate why it has been caught short in not providing for the proposed works to be carried out on its public car park to be sourced from general revenue and not by a SVR. Council should always have been ready, given the passage of time over the last fifty-five years, to have its budget prepared for the 2017/18 year that would allow for the substantive part of its cost of upkeep of its community car park at Northbridge sourced from general revenue. I believe it will be evident from the information required to be placed before IPART by Council with any proposed Application that no such funds have been set aside. Yet, Council has been aware of its unique position as holding title to Northbridge's community car park upon statutory trust for some ten years, but has chosen to sit on its hands. There is scant mention in the [REDACTED] Report of what monies have been set aside or expended on the maintenance of its carpark over the years. A sum of fifty thousand dollars every year has been mentioned. Such sum would cover the apportioned cost of a ranger enforcing the two hour parking limits that already exist. But in all the years that I have been a resident, I have never heard of one person who has incurred a fine for parking beyond the stated two hour limit. There is no mention of any income from fines having been received. Any report to IPART, if it were to proceed at a later date in a future year, should expand upon the each of the years of expenditure incurred, and not just that amount apportioned over all of Council's public car parks.

Comment 7. Council received a completely concrete paved, drained and landscaped car park back in 1962. I have only seen a few trees removed in recent years and some repairs to its concrete apron. Council, and the community it supports under the statutory trust, has already enjoyed the benefit of more than fifty years of use of the carpark at very little cost when amortised over that half century. It has done so in circumstances where it is evident that the carpark has served to take myriads of parked vehicles off the street to the benefit of the Northbridge community and the city of Willoughby, neighbouring shires and councils and successive state governments.

Comment 8. It is the suburb of Northbridge whose earlier forward planning was put aside by the failed diversion of traffic away from the suburb more than fifty years ago that is the direct outcome that has prompted the current debate. Seeking to place a levy on a rateable business owner in the car park's immediate vicinity is a very poor

option when so many alternatives are available for Council to implement in consultation with the community.

Comment 9. It has been suggested anecdotally that angst arises in Willoughby ratepayers living outside the environs of Northbridge's community car park, and possibly also by those in state government exercising oversight of planned council amalgamations seeking budget cost-cutting measures justifying their forced merger. Such angst, it is thought, arises because they see customers of the anchor tenant of the Plaza shopping centre, Woolworths, as being the main user of its facilities and not paying for its upkeep. I comment again, that it is overlooked by such populists that customers of such anchor tenant are members of the public who have an entitlement to access and use Northbridge's community car park — **for whatever purpose they may have after parking their cars.** Moreover, without the presence of the business of that supermarket tenant, the public would have none of the small shopkeeper tenants and no shopping experience that it expects of their residential amenity.

Comment 10. It is inescapable to my mind that members of the public who access Council's Northbridge car park will not accept any imposition of a rate levy that it perceives will unfairly impact upon their shopping experience at the Plaza and their patronage of its surrounding businesses and other facilities earlier mentioned. They will perceive it rendering their shopping experience more expensive by dint of Council unfairly and unreasonably having targeted an owner of its major business that itself is an active member and participant in the Northbridge community.

The Plaza owner would be entitled to think it has done its level best to support the community that supports it. A few days ago, I asked the Plaza shopping centre manager to detail to me the activities that the Plaza owner has supported in the community. I was advised that the owner:

1. has supported Northbridge Rotary Club as the major sponsor for their annual fireworks for many years;
2. a year earlier sponsored a "Pictures on the Pitch" outdoor film evening in conjunction with Rotary again, with funds raised going to Taldumande Youth Services;
3. supported the Northbridge Football Club for many years as a sponsor;
4. makes space available for various community groups throughout the year for fundraising, school and community support activities, such as St Thomas' Primary School raffles, RSL commemoration and ANZAC day collections, the Girl Guides, Little Sisters of the Poor and Smith Family (Tree of Joy in conjunction with Northbridge Rotary).
5. has supported Northbridge Rotary in its fundraising book stalls from time to time in the centre; and
6. if there are ever any natural disasters in Australia or abroad, welcome Northbridge Rotary to come into the centre to 'shake a bucket' and fundraise;
7. hosts a volunteer JP Service every Tuesday for the benefit of the community.

Years earlier, the Shopping Centre owner paid some \$200,000 of expenses incurred by Council to service providers to it when seeking formulation of a Master Plan for the redevelopment of the car park in consultation with the community that Council

now seeks to levy with a monstrous charge. It failed because it was perceived as not meeting the needs or demands of the community; but he plaza owner tried to be part of the community. [Please note, I have no brief to write this letter on behalf of the Plaza owner or anyone else].

IPART EXPECTS COUNCIL TO ADVISE CONTAINMENT STRATEGIES TO AVOID A SVR:

- It is, perhaps, elements of a government bureaucracy that assert that 'one size fits all' who are most likely to be unaware that it was the predecessor of the Plaza owner who, in 1962, transferred to Council such a vast area of land for its use as a public car park that in today's dollar terms would be valued with its 'Business' Classification under Council's Draft LEP as being worth no less than 200 million dollars. In doing so, both parties to the transaction went a long way towards assuring the residential and business amenity of Northbridge for future generations; but not just the Northbridge community. Rather for the whole of the City of Willoughby assailed as it then was by demands of successive state governments to allow commuter traffic from outlying suburbs to speed through its residential streets. Members of the public residing at Northbridge were fortunate enough, through their own efforts, to have received the benefit of the foresight of community minded leaders in Council sixty years earlier. It is a cherished amenity secured to the suburb all those years earlier to which others may aspire to have, but governments and councils, in an age of austerity beyond the age of entitlement, now realise they are obliged to seek the co-operation of the private sector to achieve. North Sydney Council's redevelopment of its integrated public car park with Woolworths at Crows Nest is a prime example. When this equation is considered, it is my view that Council does need to work harder to explore how it can make better economic use of its community's car park, whilst preserving the major elements of the statutory trust and working within State environmental and planning controls.
- Ratepayers of the Willoughby community will consider that they should not be penalised or placed in any worse position than that experienced by others in the City accessing Council's other public car parks, whether adjacent to a sporting or recreational field or otherwise. With a proposed merger of council's on foot, that view would extend to that experienced by the communities of North Sydney and Mosman. The extensive public car parking facilities behind the shopping centres in Miller Street at Cammeray and behind Military Road at Mosman Junction, are exemplars of such public car parking that is no different to that of Council's community car park at Northbridge adjacent its major shopping centre.
- The Willoughby community accessing its car park will perceive that timed entry to the carpark is the only fair way for Council to exact a reasonable charge to defray its cost of maintenance; but it needs to permit free access for a minimum period of two hours to all, and (to reflect the views of others canvassed by this writer) three hours for ratepayers who have parking permits issued. In that regard, is noted that Council has recently recorded that as a

matter of principle, three, and not two parking permits per rate payer should be available to ratepayers. Timed entry and exit to the car park should easily be able to be secured without the necessity of installing parking metres. I say this because one councillor to whom I have spoken on the subject was under the mistaken belief, until corrected by a council officer days before Council's meeting on 28 November, that timed entry via parking metres to the carpark was unable to be implemented whilst its land was classified 'community land' under the LGA: that it first had to be reclassified as 'operational land'. Such misapprehension appears to have been repeated in Council officer's Report to Council tabled on November 28 that 'installation of parking meters' to the site 'have proved unsuitable'. Today's technology does not require the installation of parking meters (as I believe was the subject of the proposal when last canvassed more than ten years ago). Embedding sensors in the car park spaces is a means that works in North Sydney, I am told; even more efficiently than the community would like.

- Sadly, it is somewhat ironical, but resonant of why a planned levy of the Plaza owner can be viewed unfair, that the residents of Pyalla street who also had much to gain by the creation of a Council carpark all those years ago, now have their residential amenity once again being threatened by an overdevelopment of land on their doorstep by a 154 place child care facility in the midst of existing road traffic congestion. Council should not be surprised that many of the mothers and carers of children planning to access that facility, rather than endure the parking congestion that the development would create opposite the Shore preparatory school, sporting and hospitality facilities, will opt to use Council's carpark to do, or not do, their shopping at the Plaza --- after first walking their children to the planned facility. Traffic congestion does trump on-site parking; and time for a two working family is now more than doubly important to what it was fifty years ago when there was only one breadwinner.

ALTERNATIVE STRATEGIES EXPLORED FOR USE OF THE PUBLIC CAR PARK SITE TO THE MUTUAL BENEFIT OF COUNCIL, THE COMMUNITY, THE PLAZA OWNER AND THE STATE:

A. Contributing to the requirement of the car park works: heavy vehicles of businesses and possible application of Section 495 (2) (b) of LGA

I have not sighted the detail of the car park works that may be classified as 'improvements', rather than 'maintenance'. My recollection is that the law makes no distinction between maintaining, repairing and carrying out improvements to land burdened with a restrictive covenant that requires it to be used for stated purposes. Safety to members of the public would appear the governing factor occasioning a reduction in the existing number of car parking spaces. Where works are being carried out to make improvements to the car park's structural integrity, specifically to satisfy the particular use of say, heavy commercial vehicles that pass through the car park land and are of such a bulk and weight that they are likely to cause damage to the integrity of the structure of, for example, its concrete paved apron surface that the proposed scope of works is designed in part to remedy, and such offending vehicles can be identified as serving the business needs the lessee from the owner

of rateable land surrounding the site of the carpark, then, by following formal procedures, I posit the thought that there could be room for Council to make application to IPART for such SVR under Section 495 (2) (b) of the LGA as being works that 'contribute or will contribute to the need for the works, services, facilities or activities.'

Comment 1: There is nothing stated in Council officers' Report that would indicate that the ARUP survey is seeking such information upon which Council's [further] opinion under this sub-paragraph could be based if planning to submit its proposed application to IPART for a SVR.

Comment 2. Consultation with the owner of the rateable land, in conjunction with the owner of the offending business being carried on, would usually precede any such enquiry, as being a requirement to be sighted by ARUP, in my view.

B. Long term planning:

- IPART Guidelines to councils seeking a SVR show that it expects to be informed of alternative strategies planned to be put in place in the future to overcome the need for a SVR. Council has mentioned that a proposed sale of the car park site has failed. To my knowledge, the only attempt made by Council for 'sale' was that undertaken some ten years ago when negotiations took place with the then Plaza owner and the community that would have seen a redevelopment of the car park by a third party, the sale of a small part of the car park land to the Plaza owner, the advanced permission by Council to the Plaza owner of an increase in its retail floor space by 10%; and the further 'sale' of an area of the car park land to the rear of the car park for over 55 housing.
- I believe that the proposal failed because of lack of disclosure to the community; because it was perceived at a committee level of stakeholders not to meet with the needs of the community for environmental reasons; and because it unnecessarily involved the Plaza owner in the proposals when none appeared necessary. This, I believe, was occasioned by (1) a lack of awareness of the legal position that Council saw of its own rights qua the owner of the Plaza under the car park covenant, and (2) awareness of the implied terms of statutory trust that ultimately came to be spelled out by the court; and (3) critically, for all concerned, a much greater value to be applied by the Valuer General to the car park land (occasioned by a court decision involving the Leichardt Municipal council); and (4) ultimately, the Global Financial Crisis that followed soon after.
- What has since transpired is that the car park land has been rezoned from its former 'Recreational Use' status that hitherto carried a perceived minimal value by the Valuer General, to that of a 'Business' zoning that reflects its vastly increased value. It is this value, which must be estimated to be in the order of at least 200 million dollars, that I believe, drives the cause of frustration in those guiding Council's proposed SVR. It is a value that vests in community, and not to be found in the general revenue accounts of the City as an operational asset by virtue of the statutory trust; and it is something that I believe the community will surely fight to see that it is not wasted or fall into the hands of others who wish to exploit it to their advantage. The existence of

the statutory trust is, perhaps, a reason why the cost of the car park 'essential works' were not allowed for in Council's operational budget for 2017/18.

- **I believe Council might consider the following thoughts, to be explored, fine-tuned and implemented as advised by some merchant banker with property development expertise:**
 1. timed entry to the car park with free two hour parking, and possibly three for ratepayers (as a concession to the value of their amenity interest under the statutory trust);
 2. seeking a declaration from the court under section 89 of the Conveyancing Act 1919 to limit the physical dimensions of the car park land under the terms of the restrictive covenant to a height above standard datum that would permit the building of a two storied car park on the site; the (public) community would need to be a party to the proceedings; the plaza owner may well consent to the order;
 3. ensure that the substantial part of the roof structure of a redesigned car park would (inter alia) have solar panels installed allowing for DC electricity to be generated, stored and supplied to say, the Plaza complex and neighbouring businesses at an agreed market price, discounted upon conditions to be decided appropriate that would make the proposal attractive to both in accordance with varied terms of the car park covenant.
 4. Excess electricity capacity could be fed to other residents and businesses of Northbridge that would defray their rates on an agreed percentage discount.
 5. Solar panels would be supplied and installed by a provider (upon tender) at no cost to Council who would maintain them and be involved in the supply conduit of electricity that would assure Council (and ultimately a long-term leasee of the car park) a suitable income stream; government approval would be required;
 6. the child care centre location be incorporated into the new two storied car park; or relocated elsewhere, perhaps near a piazza with a barista upon a variation of the car park covenant;
 7. simultaneously with the above, the air space over the car park beyond the determined height of standard datum to permit car park development, be determined as to value, and with the approval of government, (if necessary by act of parliament) sold to a developer able and willing to be covenanted to use its given stratum height for residential apartment living to support sustainable development of say, 20% of its acquired stratum in a location acceptable to Council and government; (say, near a train station earmarked for proposed Very Fast Train regional development.)
 8. the owner of the Plaza shopping centre be also afforded a non-assignable option for a period of say 12 months, to acquire at market value a stratum (or a series of strata) of the air space from above the car park to be applied by it solely for residential apartment 'sustainable development' either above its Plaza shopping centre site on Sailors Bay Road, or over the residential land believed by the writer to be in its ownership on Eastern Valley Way abutting Council's community car

- park. Such strata of development would be in addition to current permissible three story development;
9. secure the presale of the planned redeveloped car park by long term lease carrying the positive covenants to perform (supported by bank guarantees) as contemplated above, preceded by a change of the car park land classification from 'community' to 'operational' land under the LGA;
 10. seek a consequential order from the court, following the variation order of the car park covenant, declaring the statutory trust dissolved by the above.

CONCLUDING REMARKS:

I believe that Council's proposed SVR, if it were to proceed at this time as foreshadowed by its resolution of November 28, will be rejected by IPART. It would do so for all the reasons above, but primarily for the reason that it will be viewed by members of the public who access their community car park, and whose views Council must first secure --- to be in the nature of a fine --- a penalty sought to be imposed upon 'a small section of the business community', but having the consequence of polarizing the whole of the Northbridge residential and business community.

That public will surely view it, as I do, as an ill-considered interference with the prized freedom of accessibility to its car park amenity that it values and has enjoyed for more than half a century. I **simply ask the question: did we see only the ratepayers of Chatswood suffering a SVR by being asked to foot Council's bill for its over budget Concourse development that all Willoughby City ratepayers were promised by a former mayor, now deceased, would not cost them any increase in rates?**

Sadly, this proposed chipping away at prized community values is seen by your correspondent to be now in the course of being accomplished by a lack of transparency to those most affected --- those at this moment who are unaware that they are being asked to believe that what can easily be later turned into a perpetual annual super tax of up to \$1,400,000 levied on a small number of its business community surrounding the site of its community car park IS NOT in the cold, hard light of day, an unconscionable imposition of a tax levied on all the ratepayers of Northbridge who happen to be members of the public who use a car park that was always intended for their benefit and for other members of the public who are not ratepayers.

It is my view, as a member of that public, that such proposed SVR has none of the liberal values that residents of our suburb espouse. Rather, it possesses all the hallmarks of a populism that would seek to polarize and then set aside the qualities of life and amenities enjoyed by Northbridge residents, businesses, and the cultural and educational institutions that they so readily support. The proposal, in my view, smacks of a socio-political ideology that this writer believes can easily become the unseen and unwitting precursor to the future outcome of current State government policy of forcing councils of disparate interest to merge. Inevitably, there will be a dilution of the role that established progressive communities such as Northbridge play; ultimately to be replaced by a self-serving cabal of vested interests played out

on the one hand by those only too willing to sacrifice the demands of good governance and community amenity for development at any cost; and on the other hand, what one could be excused for thinking is a neo-Marxist ideology of pursuing 'sustainable development' at every socio-economic level in pursuit of cost-saving exercises that place little or no value on the residential and business amenity of communities viewed as having over-achieved: in the case of Northbridge --- for more than one hundred (100) years by generations of its hard working and civic minded citizens.

The proposed forced council amalgamation is a policy that I was initially prepared to take on board as an overall benefit to the state; but the issues raised in this letter have caused me to rethink that any amalgamation of councils that may abolish the existence of [statutory] trusts and restrictive covenants given by councils to third parties in the interests of development, as was early mooted in the media, I believe; but which I have not been able to confirm --- would be unacceptable to the community --- and I believe, to our new Premier.

I began drafting this letter more than a month ago. In the last few days a new Premier of NSW, and leader of the Liberal Party that governs our state with the Nationals has assumed office. I was delighted to learn that our own hard working and dedicated local member, Gladys Berejiklian, was appointed unopposed following Mike Baird's resignation. I have forwarded many words to Gladys over the years on a variety of community issues. As our sitting local member, I shall be forwarding a copy of this letter to her to consider what I have commented upon at length. In good time, I expect that she will get back to me. That is her style, and why I suspect she will be loved by the electorate and the state for what she accomplishes.

Attachments: 1. Copy Email from Michael Conder to Council for the attention of [REDACTED] dated 34 January 2017
2, Copy scanned letter from Council to IPART (refer [REDACTED] undated

Yours Faithfully,

[REDACTED]

Michael Conder
LLM (Sydney) Dip. Art. (AGNSW)

Michael Conder

From: Michael Conder [REDACTED]
Sent: Monday, 5 October 2009 6:23 PM
To: 'John Hooper'
Cc: Peter McNair [REDACTED] Peter McLachlan
[REDACTED] Malcolm Lye
Subject: NORTHBRIDGE PUBLIC CARPARK

- [REDACTED]
1. [REDACTED] has told the NPA September 30 general meeting that, according to a directive issued by the NSW Department of Planning, where car parks are 'attached' (quoting a report in The 202) to shopping complexes, future Council LEP's should show them having a 'Business' zoning rather than that of a 'Special Use' zoning. (Inquiry should be made as to the exact wording of that presumably written directive). The land is currently zoned 'Special Uses:

Physical Attachment and Abutment to a Commercial site

2. The word, 'attached' can mean *physical attachment* or *contiguous attachment* in that wider sense used in law. In that wider legal sense, the dedication of land to Council by developers as a condition of Consent to shopping centre development is probably what is intended.
3. I do not believe anyone can suggest that the Northbridge Carpark is physically 'attached' to the Plaza Shopping Centre. However, it is important to draw attention to the physical attributes and topography of the Northbridge Carpark to reflect upon whether simple abutment to a commercial entity is sufficient to bring it within the meaning of 'attached'.
4. Northbridge Carpark has no common walls or an overhead connecting bridge which adjoins or forms part of a commercial site, as in the case of say, Westfield Plaza or Chatswood Chase car parks. Only one of the boundaries of the Northbridge Carpark abuts the title boundary of the Plaza shopping centre; and it does so at ground level without the aid of any physical structure. This position should be contrasted with Council's upper car park which is incorporated within the leased Woolworths complex.

Abutment to the Baby Health Centre

5. Indeed, there is no structure presently erected upon the Northbridge Carpark land other than Council's Baby Health Centre, and perhaps a Council notice board. It would be appropriate to state that Northbridge Carpark physically abuts the Council's Baby Health Centre --- truly a 'Special Use' category; and certainly not a use associated with a business or commercial site.
6. Northbridge public Carpark exists for those who patronize the Baby Health Centre as much as for those who patronize any shopping centre. The car park is available for use by members of the public not limited by their intended use once leaving the car park. The presence of *'the carpark covenant'* over Council's title confirms this. In addition, I believe that the existence of the Statutory Trust over the Northbridge Carpark land supports its public benefit use beyond that of any possible 'attachment' to a commercial site. This will now be discussed as it informs upon the concept of attachment as it is used in the legal sense of contiguity. This is where one is encouraged to look at the terms of any development consent approval relating to development.

Existence of the Statutory Trust provides a nexus beyond that of contiguity to a commercial site

7. The car park land upon which Council's Baby Health Centre is erected was **not dedicated** to Council by an owner proposing to build a shopping centre complex upon the residue of land retained, nor was it transferred by such owner to Council in terms of a development Consent approval. Rather, it was transferred upon terms that were negotiated following the issue of a Development Consent when a dispute later arose as to what was intended by the parties under the stated conditions of Consent. (See Council's lawyers letters and the Report of the Commissioner of Inquiry where evidence was taken from Mr. [REDACTED]). It was as a consequence of those later arrangements undertaken by the parties that Council's lawyers (and other informed opinion) believe a Statutory Trust for public purposes was created in the Northbridge Carpark land similar to that which existed in the Bathurst Case recently decided in the High Court of Australia. **And it is that Statutory Trust that demands that any zoning of the land should be consistent with its terms and, at the very least, should not be seen to derogate from it.**
8. The transfer of the carpark land to Council went further than any simple dedication of land enabling Council to deal with it in whatever manner it might later deem fit. At that date the restrictive provisions of the Local Government dealing with Classification of land were not in place. It was a transfer of land upon terms that sought to control its use in a manner that was perceived to secure a benefit not only to the transferring owner, **but also to that of the Council acting upon behalf of the public, and in particular, the community of Northbridge.** The legal benefit taken by the owner over the land transferred was a covenant secured to ensure its continuing use by members of the public as a public car park and as a baby health centre, **and no other.** The owner acted to ensure that such use could not be changed for some other use inconsistent with that legal benefit which the then owner [REDACTED] or his company) perceived should always remain vested with the owner for the time being of that residue land upon which he proposed to build a shopping complex. The right to release vary or modify the covenant was vested in the owner so transferring the land to Council. Moreover, that expressed right was not limited by the necessity of the owner to secure the consent of any third party (such as Council) as provided by the Statute. It will be later argued that such right, whilst legally vested in the owner of the land for the time being of the residue land, is constrained by the terms of the Statutory Trust mentioned.
9. The perceived quid pro quo for the Northbridge community was that acceptance by Council of the transfer of the car park land and the granting of *the carpark covenant* over the land so transferred to the Plaza owner created a Statutory Trust for public purposes over such land. Whilst it might be thought that the Northbridge Carpark is 'attached' to the Plaza complex because one of its boundaries happens to abut that complex, the existence of the Statutory Trust informs upon the much wider public use benefit created --- a benefit far and beyond that of the private interests of the Plaza owner and neighbouring shopkeepers and businesses. In brief terms, the Statutory Trust reflected that the community of Northbridge enjoys a public use benefit that is wider than that of the restrictive terms of *the carpark covenant* expressed in the transfer. It is the overlapping referred to by Malleson's lawyers in its October 2008 advice to Council. That public use benefit, I suggest, goes beyond that of mere attachment of the car park land --- whether by abutment, contiguity or connectivity, to a commercial site. **The following paragraphs will indicate how that public use benefit extends beyond any so-called attachment to a commercial site.**
10. [REDACTED] has acknowledged that those attending Shore Oval have just as much right to park their cars in the Northbridge Carpark as those patronizing the Plaza shopping centre and shops and businesses nearby. There are thus other members of the public who have an entitlement to park upon the car park land beyond those who patronize the Baby Health Centre, the Plaza and adjacent businesses. They include any of those residents who may find it convenient to park their motor vehicles there for a purpose that is not associated or connected with the Plaza Shopping Centre or adjacent businesses. It may extend to commuters to the city who park their cars there.
11. It cannot therefore be said that the Northbridge Carpark 'attaches' solely or even restrictively to those who patronize business or commercial interests nearby. Rather, it can be asserted that the Northbridge Carpark is there for those who customarily use it for the parking of motor

vehicles and for accessing on foot the services of the Baby Health Clinic or to thereafter engage in whatever private pursuits they might choose. This was the advantage that was afforded to Northbridge residents by the terms of the Statutory Trust. They perceived that it would solve future traffic problems in their suburb along with the planned Warringah Freeway that would avoid the onrush of through traffic in the years to come. They also saw it as a means of providing for the influx of visitors to the adjacent Shore Playing Fields on particular Saturday sporting days: and for many years it did.

The overlapping interests of the public under the Statutory Trust with those of the Plaza owner under the carpark covenant.

12. At the earlier NPA general meeting in February, the City Council's hard working Town Planner made the comment that 'the beneficial owner' of the *carpark covenant* is the Plaza owner. [REDACTED] would have borrowed that terminology from the words 'beneficial ownership' where used by Council's lawyers, [REDACTED] in the October 2008 letter of Advice to Council to describe the title interest of the Plaza owner under the provisions of the *carpark covenant*. I believe this to be an inaccurate (albeit unintended) application of legal terminology that requires correction to avoid misunderstanding. The Registered Proprietor for the time being of the title to the Plaza land (as it was at the date of its creation) is stated in terms of the Conveyancing Act 1919 to have 'the benefit of the covenant under the instrument that created it (in this case a Real Property Act Transfer) in the early 1960's, if my memory serves me correctly. It is a legal right created by statute that is attached to the land in ownership of a dominant tenant over the land of a servient tenant. As such, the Plaza owner from time to time, is said to be the person (or entity) having the benefit of the covenant. However, the title holder is not treated in law as 'the beneficial owner' of that covenant. That legal owner simply has the right to enforce the terms of the covenant by virtue of the provisions of the Conveyancing Act 1919.
13. Such legal owner is also the person or entity having the right to exercise the *power* to release, vary or modify the covenant over the car park land in legal ownership of Council. The covenant states that the servient land shall not be used for any other purpose other than that of a public car park and baby health centre. The Plaza owner (and it would now appear, a third party owner adjacent) has the legal right to require enforcement of the restraint expressed in that covenant for what are the public purposes stated. However, for the Plaza owner to have the beneficial ownership of that covenant is to say that both the legal and equitable title to the benefit of that covenant are vested in one and the same person or entity. I believe such conclusion does not allow for the overlapping nature of the statutory trust that is stated by Council's esteemed lawyers to have been created simultaneously with the creation of that covenant. Trusts cannot be noted on a Real Property Act title. The trusts upon which the AMP holds its title are not so noted. Nor are the trusts created by the terms of the aforementioned Statutory Trust for public purposes.
14. Council's lawyers have stated that the terms of the statutory trust are not known, but are believed to 'overlap' those of the *carpark covenant*. It has been stated by Council's lawyers that members of the public are not the beneficiaries of the statutory trust in the sense that it is not a trust 'in favour of the public'. However, there is no authority cited for that proposition, one would assume, brought about by the admission from Council's lawyers that the terms of the statutory trust have never been defined. An alternative view, I believe, is that a member of the public is a beneficiary of that statutory trust, but it is only the Attorney General, on behalf of that member of the public who has the ability, upon information laid before him, to act to enforce its terms.
15. I believe that there is support for a view that there is an 'overlapping' between what might otherwise be thought to be an antimony or paradox --- here expressed as a benefit given to the title holder of land in private ownership to enforce the provisions of a negative covenant for use of land only for two specific public purposes --- as opposed to those terms of a statutory trust (albeit that they are stated to be unknown) over the same land that provides a benefit to the public to use the land for *public purposes*: public purposes more akin to those of Open Space zoning and Community use. Those public purposes do not lend themselves to Business use zoning, which in turn infers commercial use inconsistent with that of public benefit use. The

'overlapping', I suggest, now extends to the perceived added measure of control or enforcement afforded the Plaza owner in recognition that the Plaza owner may not always fit within the taxonomy of (a member of) the public.

16. However, in my humble opinion, it cannot be claimed that the Plaza owner from time to time possesses any right (as opposed to a legal power) beyond that of a member of the public having the right to approach the Attorney General to require the Crown (represented by Council as legal owner of the car park) to have the car park land not used for any other purpose other than what are the stated public purposes in *the carpark covenant*. Those public purposes cannot ever be private purposes, as those terms are mutually exclusive. It follows that the fact that a power is added in the instrument of transfer to the right of the Plaza owner to enforce the provisions of *the carpark covenant*, cannot place the Plaza owner in any better position in law or in equity to that of any member of the public. The Plaza owner may not necessarily be a member of the public having the benefit of the statutory trust for public purposes. The Statutory Trust was created (brought into existence) with the full knowledge and consent of the first dominant tenant, namely the Transferor and Registered Proprietor of the land that both transferred the land to Council and simultaneously created *the carpark covenant* over the land. The trusts so created therefore bind the land in the nature of a constructive trust --- but in this case as a Statutory Trust. Trusts of any nature are never allowed to be noted on the title of Real Property Act land.
17. The Plaza owner has a right (as opposed to a power) common to both, that is shared with members of the public. As that right in the public is claimed to be only exercisable at the hands of the Attorney General, it follows that the right of the Plaza owner to enforce its covenant is simply a right to require the Crown by its *alter*, the Council, not to use the Northbridge Carpark otherwise than for the public purposes stated. The Plaza owner's right is therefore no more and no less than that which is vested in any member of the public. It follows that the owner of the Plaza site (as delineated at that date of creation of *the carpark covenant*) cannot claim beneficial ownership of that right permitting it to assert rights which are private or more 'beneficial' to it beyond those of any other member of the public. The owner for the time being of the Plaza land cannot therefore (with respect) hold 'the beneficial ownership of *the carpark covenant* whilst ever the Statutory Trust exists.
18. Moreover, I argue that the Plaza legal owner of *the carparking covenant* can only ever enjoy the same right as that of any member of the public. Were the Plaza owner to seek to release, vary or modify the terms of *the carpark covenant*, then I believe the issue will be brought to a head. It is then that one's attention is drawn to the fact that such action may be effected *in law* without the consent or approval of the Council. **It is then that an unwanted antimony may be thought to arise, the synthesis of which can only occur when it is accepted that the right of the Plaza owner to exercise its statutory right afforded by the law is constrained by the terms of the statutory trust for public purposes that overlaps the covenant itself.**

Implications arising under the Masterplan process and any proposed Rezoning

19. If the foregoing propositions are followed to their logical conclusion, it may deduced that the Plaza owner's right to release, vary or modify *the carpark covenant* can only be exercised by first deferring to the rights of the public under the statutory trusts for public purposes. For it to be asserted otherwise, in my humble opinion, would provoke the demand in the community that Council, as presumed trustee for the public of its public car park, should make immediate application to the Court for a Declaration as to the rights of the public in its Northbridge Carpark. **I believe that this issue needs to be resolved before any resuscitation of the Masterplan process. I hasten to remind you that it is upon any reclassification of the car park land from 'Community' to 'Operational' land that the provisions of the Statutory Trust will be abolished --- leaving the Plaza owner with an ostensible prima facie controlling hand in the process under the terms of the *car park covenant*, if the issue is left unresolved. And there is no certainty that the present NSW government will leave the provisions of the Local Government pertaining to Classification in their present form, or indeed at all. Any proposed rezoning of the Northbridge Carpark thus takes on added significance.**

20. Moreover, when it is considered that almost every issue and concern here has been touching upon the rights of the community to be properly consulted in the Masterplan process where a perceived conflict of interest exists, I believe Council should move to address the imbalance in representation on the Masterplan Reference and Technical Working Group Committees to properly reflect the dominant interest of the public, the broader community and the Northbridge residents. **I believe that legal advice should now be sought from lawyers independent of those of Council and the Plaza owner to advise on the wide range of issues adverted to here.**
21. I comment that consideration of plans for development over the car park stratum for residential, commercial or business development cannot but help benefit the Plaza owner. Any proposed rezoning of lands along Eastern Valley Way can only benefit the Plaza owner, who is believed to own some of them. Proposed rezoning of the Northbridge Carpark to a Business Use can only benefit those same owners where, if a Special Use or Open Space zoning were to occur, planning principles would dictate that most of those existing residential properties should retain their Residential zoning. Best Practice Guidelines and transparency would dictate that such perceptions of conflict be properly managed to assuage community concern. This position is exacerbated by the Town Planner's honest admission (made at an earlier meeting) that redevelopment of Northbridge Carpark can only now take place with the assistance of an injection of funds generated by the disposal of part of the car park stratum for residential purposes. Now, if the NSW Department of Planning is to have its way, one would have to assume a disposal for commercial or business purposes. That is not to say that limited disposal should not take place to provide better parking facilities for the community.
22. It is further submitted that any altered proposed rezoning of the land cannot be inconsistent with the provisions of the Statutory Trust, nor the Classification of the land as 'Community land' under the Local Government Act. To do so, would be to derogate from the longstanding principle in equity that a trustee has both the right and obligation to uphold the provisions of a trust of which it is a trustee and not to act to derogate from the rights of those to whom it stands in a fiduciary position. Such principles of transparency and private law ethics are now very much a part of the obligations of government as witnessed by the recent decision of the Land and Environment Court in the Catherine Hill Bay Appeal. I suggest that it is not appropriate for Council in any later re-classification process to leave the community it represents without the means of fully protecting itself from the very actions that it would seek to employ as developer -- actions that would inexorably lead to the community being deprived of the opportunity of properly voicing their concerns at the appropriate time. **Belated as it is, I suggest that it is at this moment that Council should act to protect the Northbridge community and the public by fully funding the cost of the community representatives under the Masterplan process and before that, act to ensure that it is possessed of independent legal advice. This has very much relevance to what has already occurred.**
23. When one considers the size of the Northbridge Carpark at the time of transfer of the car park land in relation to the then floor space ratios of the approved Plaza shopping centre, it is an inescapable conclusion that Northbridge Carpark was brought into existence to provide for public car parking beyond that of the Plaza shopping complex. It is sad that when Council later saw fit to approve further development of the Plaza in recent years, it did so without considering the presence of the Statutory Trust for public purposes that then existed, but with which it was not fully acquainted. This much is evident from the correspondence between Council and its lawyers, [REDACTED] and the outcome of the Public Inquiry earlier mentioned. Council can be excused for not being aware of the principles enunciated in the decision of the High Court in the Bathurst Case as being applicable to it. However, the fact remains that the public and the Northbridge community have already been shortchanged by overdevelopment on the Plaza site -- where car parking spaces within the original parcel of land transferred have been counted as if they were set aside and available for use solely for the requirement of the Plaza owner!

[REDACTED] thank you for reading me out.

Yours Sincerely,

Michael Conder

MICHAEL CONDER

LLM (Sydney) Dip. Art (AGNSW)

A handwritten signature, possibly reading 'A', is located in the bottom right corner of the page.

Michael Conder



14 November, 2008

The President and Members of the Committee,
Northbridge Progress Association Inc.
By email to each

Steps in the Privatisation of Northbridge's Public Car Park

1. Almost five years ago to the day, [REDACTED] Town Planner, held an Inquiry by way of public hearing into a proposal by the Willoughby City Council to re-classify the Plaza Carpark from 'community' to 'operational' land under the provisions of the Local Government Act. In January 2004, he issued his Report based upon written submissions earlier made and oral evidence submitted to him at the public hearing. In prefacing his Conclusions and Recommendations (including a recommendation* for the re-classification to proceed) the Town Planner found that *'[t]he reality of the Northbridge Plaza Car Park is that it operates as an ancillary use to the privately operated Northbridge Plaza. It does not operate as a community use.'* This finding has been shown to be incorrect by the content of the legal Advice of Council lawyers, [REDACTED] dated 30 October 2008.

*[The Recommendation for re-classification was never acted upon, perhaps because the then owner of the Plaza Shopping Centre (PSC) viewed the agreed plans for leasing the Carpark between Council and the owner, as recommended changed by Neil Ingham, to be unsatisfactory. In the event, the former owner sold to the current owner. The Northbridge community can be grateful for those recommendations, as it was he who alerted the community in his Report to the possible existence of a constructive trust in favour of the public in the Council owned Carpark.]

2. Reading the Report (which I commented upon to you in May 2008) it would seem that little or no evidence was brought before the Inquiry as to the use by the public of the baby health centre situated on the Carpark land. The same would have to be said of the use by the Northbridge community of its Carpark independent of that of its patronage of the Plaza Shopping Centre (PSC). For some forty years, the public, and Northbridge residents in particular, had been led to believe by the presence of a covenant imposed upon the Carpark land expressed to be made for the benefit of the owner of the PSC, that the Carpark was not theirs to claim. Now, Council's legal advice, prompted by the NPA to be

secured, has advised that ***'there is a statutory trust which limits use of the land to the public purpose for which it was obtained by the Council'*** all those years ago, namely that of parking and a baby health centre.

3. What this means, the legal advice suggests, is that members of the public, being ***'those persons who use the car park from time to time'***, are not in any way restricted to those who might patronize the various shops and businesses within the PSC — that those members of the public have a legal right to park their vehicles in the Carpark irrespective of the 'beneficial interest' of the owner of the PSC expressed in terms of its covenant. It has been stated in the legal Advice that the interests of the public and those of the PSC owner, overlap.
4. That clarification of the rights of the public made by Council's lawyers in what might now properly be called The Northbridge Carpark, rather than by its eponymous misnomer, 'The Plaza Carpark', has profound future implications for the Northbridge community. They start with the Masterplan process currently underway and the role of its Reference Committee (RC) and its Technical Working Group (TWG).
5. Under Council's terms of reference establishing the Masterplan process, it is the RC that was entrusted by Council with the task of guiding the TWG in looking at options for redevelopment of the PSC and Carpark 'in consultation with the public'. Importantly, and of most immediate concern for the community of Northbridge and the City of Willoughby, is that ***one is now able to fairly conclude from the legal Advice received, that the public consultative process so far undertaken in the Masterplan process has been deficient.*** This is something which the NPA had been asserting to the RC for some time, as it was evident that if 'a constructive trust' in favour of the public were found to exist, as Neil Ingham had believed — and Council's own lawyers had themselves mooted, but not explored — then the consultative process that had earlier been undertaken and handed to the RC by the TWG, was inadequate.
6. The conclusions drawn by the lawyers that a 'statutory trust' in favour of the public exists over the Carpark, rather than that of a 'constructive trust', has relevance here only as to those by whom the respective trusts may be enforced. No individual member of the public or group representing the public may seek to enforce the public rights vested in them by a 'statutory trust'. That would be left to the NSW Attorney General. Alternatively, the owner of the PSC may seek to enforce the terms of the covenant, it would seem, if that owner formed the view that the Carpark was not being used by the public for the public purposes of a carpark and baby health centre. That is where, the stated 'overlapping' of the interests of the public and those of the owner of the PSC in the Carpark could occur. It should be observed that if the owner of the PSC were to be ascribed any 'selfish' interest in the benefit that it possesses under its covenant, it could be said to be only that of ensuring that a 'public car park' be maintained on the Council's land, along with that of the public baby health centre. There is a right of both presence and maintenance of the public's interest in the Carpark. This is important when one is asked to look at what has transpired and what is planned to occur.

7. It is clear that the Council has an obligation to maintain the physical attributes of its Carpark and its serviceability to the public for the public purposes stated. The cost of maintenance of the Carpark was becoming onerous, issues of safety and shelter were constant, and its sloping topography, a problem for the aged and disadvantaged. It was against this background of cost, inconvenience and safety when added to the demands of the PSC to expand further upon adjacent residential lands acquired by its owner, that the present call for a Masterplan process was initiated upon the initiative of the City's Mayor. It was he who perceived that the future of the Northbridge Carpark should be guided by those in the community that used it; and this is how the legal Advice has turned out, dispelling any thought that might have existed, that the Carpark was not operated for community purposes, but *'operate[d] as an ancillary use to the privately operated Northbridge Plaza'*. However, whilst the legal Advice was being sought by Council on matters of concern in the consultative process, the TWG, independently of the RC, elected to proceed with the preparation of sketches of considered development options and spatial concepts for a redevelopment of both the PSC and the Northbridge Carpark reflective of what it then believed was the outcome of appropriate public consultation, including those that did not comply with Council's terms of reference calling for the submission of a Masterplan providing for not greater than 10% additional retail space.
8. However, the legal Advice now secured makes it clear that the RC and the TWG should extend its consultative process to the needs of those *members of the public who use the car park from time to time* in the broadest sense of those words. It had been considered that the provisions of the Carpark covenant, perhaps by usage, or the earlier remarks of Neil Ingham, had negated the need in the TWG and the RC to consult with that wider class of members of the public extending beyond the immediate precincts of the PSC who use the carpark from time to time.
9. Those members of the public can now be seen to include:
- those customers who patronize the shops and commercial businesses within walking distance of the car park; their owners, their staff and employees;
 - the teachers and support staff of the Baptist Pre-school opposite Harden Avenue in Sailors Bay Road and the Shore School preschool in Eastern Valley Way and the parents and child carers of those attending such preschools;
 - the employees and staff of the shops and businesses operating within the PSC;
 - the guests and other invitees of residents in the surrounding streets within walking distance of the car park, whose off-street parking is restricted or severely limited by parking restrictions or congestion;
 - those invitees and staff of schools, churches, nursing homes, community facilities, aged care accommodation, medical practitioners, dentists and other health care providers operating within walking distance of the car park;
 - Those who commute to the City.

The list of members of the public is not exhaustive; and their intensity of use of their Car park is presently unknown. Inquiry of interest has centred on those who use the facilities of the PSC.

10. The future demands of the public to use its Carpark are material to all stakeholders when considering any plans for its development. It is not clear from the legal Advice whether the public include those who, from time to time, **will seek** to park in the Carpark. As the eminent lawyers in their Advice point out, the High Court in the **Bathurst Case**, foreshadowed that the future requirements of the patrons of that public car park dictated that their demands would vary from time to time, and that as a consequence, the terms of the statutory trust for public purposes should remain flexible. It would follow that the **extent of future use of the Carpark by the public** is a matter of consideration for the RC.
11. The public consultative process has not so far taken into consideration the potential expansion of the custom of businesses and commercial developments now or planned for Northbridge Junction and Town Centre, as contemplated by its draft Master Plan, not yet approved by the Minister. The RC may safely say that they are left with the guidance of flexibility by the High court's decision in assessing the extent of the future requirements of the public for parking in its Carpark and should take them into consideration.
12. One would also be confident in assuming in this day and age of intensified urban living and limited funding available for State infrastructure, reinforced by the introduction of congestion tax to be levied on its North-side commuters, that the demand for public parking on the public's Northbridge Carpark can only increase at a rapid pace.
13. It is also follows that the demands for additional retail space within the PSC over and above that which the WLEP now permits, should be made subservient to those demands of the public, now and in the foreseeable future, to park in any redeveloped Carpark. In turn, those demands of the public can only be accommodated within the environmental guidelines of the community relating to traffic and intensification of use and effect upon the residential amenity of Northbridge, not forgetting those needs of the public to access the services of its baby health centre.
14. Those constraints of intensification of public use of the Carpark must in turn be first made subservient to the existing and future demands of the Northbridge business and commercial interests and their customers, occasioned, or foreshadowed by the draft Masterplan for Northbridge Junction and its planned Town Centre. They cannot be divorced from them, as the legal Advice now makes clear.
15. It also follows that it would be inappropriate for the RC, the TWG or Council to now consider setting aside for disposal at a later date Carpark land currently subject to the statutory trust for public purposes simply to accommodate the financial needs or demands of any stakeholder, including the Council as developer. These are perceived to be non-tradable rights of the community, I suggest. That this view is confirmed is evident from the conclusions of Council's lawyers that the Carpark covenant over Council's title can do no more than reinforce what the statutory trust implies; namely, that the Carpark is there for public purposes.

16. I believe I can safely say that **public purposes does not does not allow for development for private purposes**. This has important consequences when one follows the path of any properly considered and approved Masterplan to the next step, namely the reclassification process contemplated by Council. As mentioned in the legal Advice it will have the effect, upon re-classification of the Carpark, of abrogating the statutory trust that presently exists in the public and to also remove the overlapping covenant of the owner of the PSC **for ever. It will then allow privatisation of the community's public carpark for purposes not constrained by the consultative process that is now incumbent upon Council to pursue ; and as is reiterated by its lawyers in their legal Advice as being 'desirable' for Council to continue, should it be intent on going down such path.**
17. It is imperative, in the writer's opinion, for both Council and the owner of the PSC to be totally transparent with the public when dealing with proposals to be placed before its members which may materially impact upon the terms of the statutory trust that exists over the Carpark for its use for public purposes. Both should be viewed bending over backwards to accommodate the equitable requirements of full and true disclosure of what is contemplated to later happen down the road in the Masterplan process in bringing before the public any material upon which it is asked to deliberate. This is even more pertinent at this point, and not at a later date, where the presentation of plans or concepts for its possible future use for purposes other than public purposes is concerned. Additionally, the public should be given adequate time to consider and consult and to express its views on any proposals laid before it, no matter what stage in the Masterplan process it may have reached. There can be no understanding or arrangement between those two parties that cannot be left undisclosed to the public at this point in time, now that Council is declared by its lawyers to be holding the Carpark land 'on trust for the public purpose of a car park and baby health centre'.
18. **The Council is perceived by the public as being custodians for it of the Carpark. Its obligation is to act in the interests of the public at this date. That obligation is not somehow deferred to some later date when Council might resolve to seek re-classification of the carpark site which, if run to its full course, will see that trust for public purposes extinguished.** For Council to do otherwise, would be to expose it to claims from the public that it has acted improperly--- something that Council's lawyers counsels its client to guard against in terms of paragraph 9 of their Advice. Support for this view comes from the terms of paragraph 5.2 of the legal Advice.
19. Clause 5.2 of the legal Advice of Council's lawyers states that *"TWC [sic] and RC should be made aware of this opinion concerning the statutory trust and informed that any masterplan option proposing a use inconsistent with the statutory trust would require the preparation of a local environment plan ("LEP") to re-classify the land 'operational'."* **It follows that before the TWG embarks upon any future consultation with the public, all those matters requiring transparency more particularly outlined in terms of paragraphs 9.6, to 9.10 (both inclusive) applicable to the preparation of a future LEP, should be made known to the public as part of the consultation process that would lead up to the preparation of the LEP.**

20. It also follows that those elements requiring transparency of Council and any other stakeholder should first be approved by the RC, being the entity responsible under the terms of reference of the Masterplan process to provide guidance and direction to the TWG of such matters. I also believe that the RC should have the benefit of advice from Council extraneous to that of its representation at the RC before being approved by a meeting of the RC, if any public meeting is to be represented to be held under the auspices of Council, or is to be relied upon by Council as having satisfied the onerous requirements placed upon it by being a trustee of a community asset, regulatory authority and potential future developer of the Carpark.
21. NPA has been maintaining for many months now that no planning options in the Masterplan process should be considered until the appropriate legal advice requested was forth coming and made available to the RC. At a combined meeting of the RC and the TWG held earlier this month, the RC was asked to consider the perceived needs of the Plaza owner to expand its retail space into the Carpark itself, and not be limited to lands in its ownership.
22. It is also apparent from the submission of draft conceptual spatial plans prepared by the TWG, that Council officers are prepared to recommend to Council appropriating a good portion of the public's Northbridge Carpark to itself for disposal or lease, not only for retail or commercial use, but also for subdivision into residential allotments, leaving a smaller two level Carpark available to be possibly on sold to the private sector. If it is found on proper future inquiry that the interest of the public in its carpark is much greater than that presently contemplated, then the actions contemplated by the TWG are clearly premature, in the light of the lack of proper consideration and discussion by the RC of the implications of Council's lawyers' legal Advice. As I am advised, NPA's representative, [REDACTED] had sought to have the legal Advice made public as a first step in a future consultative process providing transparency: so far this has not happened.
23. Council's lawyers have advised that Council would be able to implement a Masterplan proposal clearly inconsistent with the statutory trust which currently limits the use of the Carpark land to the aforementioned public purposes by the earlier activated process of re-classification from its 'community' use to an 'operational' use, upon certain conditions. Those conditions, as outlined in the lawyers' Advice, deal with requirements for public consultation, exhibition of plans and transparency as to Council's intentions, including the removal of the statutory trust and the removal of the Plaza covenant; and one would presume, any financial arrangements that are contemplated to be made with interested stakeholders upon a fulfilment of a Masterplan process.
24. Members of the RC have not had the opportunity to assess any of the implications of the legal Advice that was forwarded only a few days before its meeting. Some of the implications of that legal Advice are traversed by the writer, but neither the NPA nor, I suggest, other members of the RC have been alerted to those demands for expansion available by the planned zoning changes for the area known as Northbridge Junction and Town Centre, still awaiting Minister's Consent for approval. Inquiry has confined itself to the demands of the PSC to

increase its own retail floor space, even to the extent of asking the RC and TWG to consider options for development over the ten percent increase contemplated by Council in its resolution. Now it is considering plans that can only be implemented by the privatisation of a public asset, the diminution of its size, the elevation of its height, the charging of fees for car-park entry to satisfy at the very minimum, the imposition of parking levies, (recently increased by the NSW State Government) and the excision of lands for disposal by Council for residential and commercial purposes. All these contingencies need to be advised to the community, I believe.

25. It is the composition of members of the TWG and RC dominated by the Council representatives, the Plaza owner, and a representative of the shopkeeper tenants of the Plaza owner that are seeking to steer matters forward with an undue haste inconsistent with transparency to the community. The community's interest can only be viewed adversely impacted by the attempt of the TWG to convene what is mooted to be a public meeting scheduled to be held early next month. The Northbridge community has not had the time to be advised of the implications of the Legal Advice of Council lawyers, let alone given the time to provide a considered response. Sadly, whilst the lawyers have stated that its Advice should be made public to the RC (which itself under the terms of reference of the Masterplan process is a representative of the community in that process) the NPA has been placed in a position where Council's town planner, (not Council itself), has failed to support the release of Council's legal Advice to the public at this time, thus preventing the NPA from properly conferring with the community it represents --- whilst at the same time, joining with other members of the TWG to call a public meeting of 'consultation' within an impossibly short time; and without approval of its Notice of Meeting or Agenda by the RC. I believe it clear that the legal Advice of Council's lawyers is an integral part of the requirement for transparency and that extreme care needs to be exercised in providing the utmost transparency of the intentions of those steering the Masterplan process. The legal Advice should be able to be circulated with any Notice of Public meeting.
26. As has been earlier noted, Council invited the NPA and other community representatives into the Masterplan process to ensure that the community and public interests were fully protected. The NPA (for one) accepted its perceived role as a vital community participant in the process. The process established was achieved, I understand, following pressure by Councillors supported by the NPA. That **Council acceded to this inclusive process** --- and did not simply leave the formulation of such a Masterplan to the owner of the Plaza (because of perceived lack of funding) --- was brought about by the recognition that Council should maintain the very transparency to the community that its lawyers now declare is imperative for Council to follow. That this course of conduct arises by dint of the of the Northbridge Carpark being classified for community purposes, and because Best Practice Guidelines issued by the NSW Department of Planning issued in January 1997 dictate that it should do so. Such Guidelines clearly enunciate that where Council is both owner of public land, intending developer and also regulatory authority, it should take every step to include the public in any process that would seek to modify, vary or extinguish those community rights.

27. The RC is charged with the responsibility under THE TERMS OF REFERENCE 'for guiding the implementation of a wider community consultation programme'. NPA is a member of the RC. I maintain the view that when the NPA accepted that role from Council to sit on the Review Committee and Technical Working Group as community representative in the Masterplan process, a remedial equitable constructive trust came into existence, actionable at the instance of NPA, estopping Council officers from exercising their voting rights in that RC and TWG where it would be unconscionable for them to do so. The Mayor's stated intention for proper community consultation in the Masterplan process would be thwarted. Clearly, if Council officers are now to disregard the directions or guidance of its RC, and that guidance accords with the Advice of Council's lawyers on public consultation as being incumbent upon Council to adopt to avoid an inference of improper conduct, then circumstances may well exist giving rise to a remedial constructive in the NPA and other members of the public.
28. NPA and other member representatives of the community are entitled to believe that in accepting their representative roles in the Masterplan process they would not later find themselves having to argue against the outcome of a process that would seek to deny transparency to the very community it represents. NPA, I feel sure, would not wish to be placed in a position where it has participated in a decision of a Review Committee's recommendations and decisions brought about by Council representatives and councillors exercising their voting power in contravention of Council's lawyers clearly stated directives on transparency.
29. NPA needs to have these matters explored at a general meeting of its members. For the NPA to be deprived of that ability to discuss and consider the outcome of the legal Advice that it was largely responsible in having the Council secure, without being able to instruct its representative on the RC at future meetings of the RC, could never have been within the contemplation of a transparent process of consultation and guidance earlier laid down by Council for the NPA to have in the Masterplan process. Its Ward Councillors should be suitably advised and the matter brought before Council as soon as possible, in my view.
30. None of the above can be considered as legal advice, but only the considered comment of your Public Officer, in so far as I believe it affects the NPA in the obligations to the community it has chosen to represent in the Masterplan process. The Committee may well wish to secure such legal advice, or may elect to request the RC to so secure it, not relying upon anything stated here.

Yours faithfully,

Michael Conder (sgd)

MICHAEL CONDER (Public Officer)
LLM (Sydney) Dip. Art (AGNSW)

Michael Conder

[REDACTED]

[REDACTED]

07 March 2018

Attention [REDACTED]

**Willoughby City Council Special Rate Variation
Northbridge Plaza Car Park
Submitted 12 February 2018**

I refer to my letter posted to you dated 5 March and the three documents that were enclosed with it.

As indicated, I am writing to express my concerns that Willoughby City Council, in making its application to you dated 12 February 2018 for permission for a Special Variation Rate levy to be raised upon a single rate payer, has not complied with your published Guidelines for Assessment. Indeed, that its application portends a breach of the Local Government Act and should be withdrawn. Why I believe this to be so is spelt out in my letter to Council dated 27 January 2017 ('January 27 letter') but will be made more explicit in this letter.

I ask that you first read my copy letter to the President and members of the of the Northbridge Progress Association Committee dated 14 November 2008, then my email to former Northbridge Ward Councillor, John Hooper, dated 5 October 2009 to give you an idea of what happened under Council's previous attempts to fund the cost of upkeep of its public car park at Northbridge Plaza. If you would then be good enough to read my January 27 letter (perhaps more broadly that is now necessary as its most relevant sections (pages 7-11) are reproduced below for your convenience), but to bear in mind that when it was written in 2017 it addressed Council's 2017 application to you for a similar SVR that had to be withdrawn because of pending council amalgamations.

Additionally, at that earlier date, I had not located in my stored files the then unreported decision of Bathurst City Council v PWC Properties Pty Ltd ('**The Bathurst Case**'), a decision of the High Court of Australia handed down on 30 September 1998. It is that decision that saw Deborah Townsend of Council's then named lawyers, [REDACTED], on 30 October 1998 issue legal advice to it that records that Council holds title to the land the subject of this SVR application upon terms of 'a statutory trust for public purposes'. It is the legal advice which was sought at the request of this writer earlier made of Council in his capacity as Public Officer of the Northbridge Progress Association and alluded to in my letter abovementioned and to John Hooper.

It is also that legal advice that was earlier acted upon by Council when it withdrew from an early Master Plan process (funded in an amount of \$200,000 by the very entity to whom Council would now seek to levy) that precluded Council from disposing of any part of its Northbridge's public car park in contravention of that 'statutory trust for public purposes' without the approval of the Attorney General.

It is my submission that Council has ignored the substance of that legal advice and the basis of reasoning of the decision of the High Court in the Bathurst case in now seeking your permission to raise a SRV upon a single Willoughby rate payer who is but one member of the public entitled to the benefit of that trust for public purposes along with all the other ratepayers of Willoughby and many others outside it.

I believe that a close reading of the decision of the High Court in the Bathurst Case confirms that simply because a rate payer "may derive a benefit somewhat greater than the general public from a proximate car park" does not negate its charitable or public benefit, let alone entitle it in equity to levy a discriminatory special rate against it based upon that proximity (See par. 37 *ibid*).

The current application by Council to you for an SRV, if it were to be approved, is slated to be followed by Council imposing a levy under Section 495 of the Local Government Act 1993 ('LGA') against a single ratepayer for a substantial stated cost and expense that in terms of both the aforementioned statutory trust for public purposes and also, specifically, under the terms of a restrictive covenant (again not mentioned by Council in this Application) requires Council to maintain it for the benefit of the public. It is not in the nature of an operational asset of the Council that would see Council expecting to make a commercial return.

It is the statutory terms of the aforementioned restrictive covenant that are now encapsulated within the terms of the statutory trust for public purposes, as will be seen from what follows. Why the existence of the statutory trust for public purposes is so important when considering the merits of this application for a SRV is that Council, at the date when this land was transferred to it in 1962, would hold the title to such land under the provisions of then section 526 of the 1919 Local Government Act that sets out its duties and obligations as trustee and not as legal owner. (A similar section exists in the LGA. Section 526 of that Act stated:

"The Council may ---

- (a) accept and hold any real or personal property conveyed, assigned, devised, or bequeathed to it for any charitable or public purpose;
- (b) act in the administration of such property for the purposes and according to the trusts for which the same may have been conveyed, devised, assigned, or bequeathed."

As was pointed out by the High Court in the Bathurst case (par 56) Paragraph (b) of Section 526 empowers "the council to act in the administration of such property [my emphasis] in two respects. The first is for the purpose for which it may have been conveyed, devised, assigned or bequeathed and the second is in accordance with the trusts [my emphasis] upon which the transfer may have been made."

As mentioned above, it is clear from the terms of the restrictive covenant imposed over this land in favour of the Plaza owner's land that Council is required to maintain its public car park and child care centre for what Council has been advised by its own lawyers are held for the public purposes stated. I submit that such requirement encapsulates an essential term of the statutory trust for public

purposes that would negate any power in Council to resile from its terms of administration without leave of the Attorney General.

IPART's Guidelines to councils and Council's obligations to the community occasioned by the statutory trust itself and the statutory trust when read with the car park covenant are explored by your correspondent under two separate headings commencing on page 7 and concluding on page 10 of my January 27 letter to Council. They are restated here (edited for corrections) for your convenience:

**IPART GUIDELINES TO COUNCIL AND COUNCIL'S OBLIGATIONS TO THE COMMUNITY
OCCASIONED BY THE STATUTORY TRUST:**

- It is this lack of attention to the need for transparency that I believe has contributed to Council failing to first reacquaint the Willoughby community (and it would also appear, IPART) that it holds title to its public carpark in the nature of a fiduciary for the benefit of members of the public who use it; declared by the Court to exist in terms of a statutory trust. **Comment 1.** It is a role that Council is required to fully embrace, not seek to hide from the community. It is a role that is superimposed upon that of the legal requirement specified by IPART in its recently updated Guidelines as obliging all councils to make full and true disclosure when seeking a SVR under the LGA. It is role that I view, as a former practising lawyer, is that of a quasi-fiduciary that places an obligation upon Council to first act to seek the approval of members of the public having the benefit of use of its public car park and child care centre, before seeking to exercise its legal rights under the LGA to seek approval from IPART to raise a future SVR upon selected owners of rateable land in its area.
- On 23 December 2016, IPART released a new and comprehensive set of Guidelines for councils to follow when considering applying for a SVR to their general income in the 2017/18 year. The criteria is stated in the Fact Sheet that accompanies the Guidelines to relate to, and again I quote: 1. reasons for the proposed SVR 2. community awareness and engagement 3. impact on ratepayers 4. approval and public exhibition (where required) of Integrated Reporting and Planning (IP&R) documents, and 5. cost savings --- past and future

Comment 1. There are a number of essential requirements stipulated on page 2 of IPART's Fact Sheet, a reading of which would indicate that Council has not yet put in place the necessary preliminary requirements for it to make any such Application to IPART by its deadline of February 13 next; and certainly would not be able to do so when it is clear that engagement procedures for public awareness of its proposal, and its outcome which IPART would expect to receive, are not to hand. Item 4 of the criteria Guidelines, (for example) states: 'The relevant IP&R documents must be publicly exhibited (where required), approved and adopted by council before the council applies to IPART for an SV to its general income.'

Comment 2. No such consultation with the Northbridge community has yet been attempted, to my knowledge. Under the Fact Sheet Guide Lines that were published by IPART as late as December 23 last, Council will be required (inter alia) to produce evidence of the outcome of due and transparent consultation with the communities of (I should think), Northbridge, Naremburn, East Willoughby, Castlecrag, Middle Cove and Castle Cove (at minimum), demonstrating the need for, and purpose of a different revenue path being pursued by it as that contemplated by the SVR; that the community is aware of the need for and the extent of the rate rise; and that Council has examined alternatives to such a rate rise or in this case,

a SVR against other rateable land that has a more equitable outcome. The first inkling of Council's intentions that this writer had was an unheralded statement made by the Mayor at the Annual General Meeting of the Northbridge Progress Association on Thursday 24 November last, three days before Council's meeting on Monday 28th November. On that Thursday evening, Mayor [REDACTED] (thankfully) mentioned that Council was proposing to seek a Special rate levy against the Plaza owner for the cost of works on its public car park at the Plaza. Such item was not placed on the Agenda for business at the NPA's AGM, either because it was deemed of insufficient importance to be treated as Special Business as required under its Constitution, or because there was insufficient time afforded the secretary of the NPA to insert a notice of it in its community circulated '202' newsletter. In the event, there was no mention made on Council's Meeting Agenda on the 28th November for the necessity of a public meeting to be called before the application to IPART was to be lodged. The whole exercise appears to have been hastened and then dictated by a perceived need to have a notice of intention to seek a SVR to IPART in its hands by December 9 last.

Comment 3. In deference to the integrity of Council officers, such IPART Guidelines of December 26 are spelt out in much greater detail than those existing at the time of Council's resolution of November 28. It is clear that councils are first required to sign off to the community on such matters as are being traversed in this paper BEFORE they lodge their intended applications: in this case by February 13, 2017. Suffice to again say, that public consultation has not yet started because on November 28 Council stated that it is not yet in possession of sufficient information to know 'who is to benefit from the proposed works'.

Comment 4. As earlier mentioned, the ARUP survey findings appear irrelevant to Council's proposed application in so far as section 495 of the LGA is concerned --- the law has already provided the answer: the benefit of Council's proposed works to be carried out on its public car park is a benefit afforded all the members of the public who use it. It is an answer that Council officers would appear not to have been appraised, or were not prepared to accept applies to Council's proposed application under Section 508A of the LGA when promoting their Report to Council for discussion on November 28.

Comment 5. Council's Tabled Report indicates that it is intended to consult with stakeholders after Council had received a sought for approval from IPART and before it had made its decision to raise the levy upon as yet unnamed ratepayers, but the implied terms of the statutory trust would indicate that any possible levy should be first be approved by the members of the public who use Council's community carpark and Child Care Centre **and that its outcome be made known to IPART when making its application under Section 508A of the LGA.** As a member of that public I have not been consulted by Council; and I am concerned that other members of the public are fully informed of their rights and Council's statutory obligations under the statutory trust and the car park covenant in goodtime for them to consider Council's proposals.

COUNCIL'S OBLIGATIONS TO THE COMMUNITY OCCASIONED BY THE STATUTORY TRUST WHEN READ WITH THE CAR PARK COVENANT:

- **Criterion 3 of the IPART Guidelines of December 26 2016** shows how this independently structured statutory body expects to assess applications for special variations of rates for the

2017/18 year. It states in its opening sentence: **'We require councils to show us why they consider the impact on ratepayers to be reasonable. . .'** In the instant case, Council has announced that it is seeking to target 'a small portion of the business community located around the site of [its public] car park'. There are no named ratepayers; these are yet to be confirmed. But the Mayor has told members of the NPA at its AGM that the Plaza owner abutting the car park is to be targeted to fund the cost of works.

Comment 1. Council, when making its application to IPART pursuant to its resolutions of November 28, will be obliged to demonstrate why it is 'reasonable' that the Plaza owner, AMP Capital Limited (in its capacity as trustee), should be expected to pay such SVR that might be levied against it. Council is being required to first demonstrate to the public and to the Northbridge community why it considers the proposed SVR is 'reasonable'. I perceive this to be a difficult task in the light of what has earlier been stated here concerning the presence of the statutory trust over Council's title to the car park and the obligations placed by it upon Council to the public who use it. However, Council also has the additional task of explaining to IPART why it should seek to negate its statutory obligations to the very entity that it is now seeking to have pay for something that an enforceable deed supported by another statute, the Conveyancing Act 1993, requires it (Council) to perform under the car park restrictive covenant. As a member of the public, I have not seen that explanation, and believe that I am entitled to do so before Council's application is lodged with IPART.

Comment 2. Council is responsible for maintaining its Northbridge community public carpark both under the general law, under the implied terms of the statutory trust, and under the restrictive covenant that saw Council become the owner of its public car park, by way of transfer from its former owner in 1962 (excised from the title to the land upon which the Plaza shopping centre now stands). Before it was so transferred to Council, the car park land was first paved, drained and landscaped for council's planned use as a public car park and child care centre in consideration of the transferor's planned redevelopment of what has become the Plaza Shopping Centre. The benefit of the restrictive covenant was attached to the land of the owner of the Plaza shopping centre retained in its ownership at the time; the burden of the covenant was attached to the land transferred to Council as required by law for it to be legally enforceable under the provisions of section 88 of the Conveyancing Act 1919. The covenant provides that Council shall only use the land so transferred to it for its stated purposes of a public car park and a child care centre.

Comment 3. In declaring that Council holds title to its public car park on statutory trust for the benefit of members of the public that use it, the Court is according a benefit to a class referred to as 'members of the public'. As such, that class possesses a right *in personam* and not a right in rem, if my memory of the law gained many years ago, still serves me correctly. It is a personal right that attaches to a class as such. It is a personal right that DOES NOT attach to any member of that class as an individual member of that class, as an owner of land (in rem), let alone as the owner of 'rateable land in Council's area' as section 495 of the LGA provides. **It is a right that attaches to members of the public, wherever its members may reside. Importantly, by definition in the Conveyancing Act 1919, a corporation includes a person, such that the Plaza owner as a corporation can be included in that class.**

Comment 4. When one considers that the land the subject of the restrictive covenant is to be used ONLY as a public car park and a child care centre, it can be seen why the court later

took the view that others, not being land holders, but having a right to access its use, have, and do expect to continue to enjoy the benefits that the statutory trust affords them. The Court would have looked past the covenant's strict requirement for legality for attaching a 'benefit' and a 'burden' to particular land to be enforceable to see where the rights of the ultimate beneficiaries lay by use of the words 'public car park' by its draftsman; and it did so by placing Council in a position of a quasi-fiduciary to the community. The Plaza owner and its assigns then become just one among many in the community entitled to use Council's public car park; and would be entitled to do so under the terms of the statutory trust independently of the car park covenant, in my view. Members of the public who use it would also expect Council to improve it to meet current safety standards and the socio-economic needs of that same public.

Comment 5. It is therefore the statutory trust that governs the legal status of Council's public car park and child care centre; and that status commands Council direct its opinion as to those who will 'benefit' from its proposed scope of works under Section 495 of the LGA, namely, the public as the class that uses it. As the court's declaration implies that those who benefit from it, or contribute to its need, do so as members of the public, it follows that there can be no owner of 'rateable land in Council's area' under Section 495 of the LGA that

'(a) benefits or will benefit from the works, services, facilities or activities, or(b) contributes or will contribute to the need for the works, services, facilities or activities, or(c) has or will have access to the works, services, facilities or activities, in my humble opinion.

PUBLIC SAFETY GOVERNS COUNCIL'S DECISION TO UNDERTAKE THE CAR PARK'S 'ESSENTIAL' WORKS:

- There is every indication that Council has already determined that the stated 'essential works' at Northbridge's community car park are to be carried out to ensure the personal safety of members of the public [who use it] and to otherwise comply with Occupational Health and Safety law that requires it so to do. The carrying out of the works is thus dictated by concerns of public safety of the person and the law that requires Council as owner to so perform such works from the moment the safety issue arose. They have become 'essential' works which, if the owner of the rateable land having the benefit of the car park covenant, having become similarly apprised of the necessity for Council to act under the provisions of the statutory trust and the car park covenant, would be fully justified in insisting that Council carry out. One does not know whether Council has been so requested to carry out such works by the owner holding the benefit of covenant, but I do know, anecdotally, that Council has asked such owner to contribute to its cost: and such request has been refused. Council would appear to have then met such refusal with the current procedures outlined in its November 28 resolution.

Comment 1. Having reached a decision to schedule the 'essential' works to be carried out, based upon considered advice that it is in the interests of safety of the members of the public that use Council's public car park for such works be carried out as soon as possible, I believe Council cannot later form another opinion under Section 495 (2) (a) of the LGA that is patently inconsistent with it: namely, to single out a ratepayer or two from that class of

members of the public to pay for works that are to be performed for the benefit of every member of that class.

Comment 2. By virtue of the implied terms of the statutory trust, I believe Council is estopped from denying to the public the right that exists in members of its class of users of the car park and child care centre to have Council not act otherwise than in the interests of that class. As earlier mentioned, it is the Northbridge residential and business communities that would be adversely affected by any disavowal by Council of those rights. **As members of that class of the public who use Council's community car park, they are entitled to have the costs of these 'essential' works paid for by all the ratepayers of Willoughby and not one who is also a member of that class."**

N.B. End of quoted material

Apprehended Breach of Compliance with Statute

Section 674 of the LGA provides that any person may bring proceedings for an order to remedy or restrain a breach of that Act in the Land and Environment Court. As the High Court in the Bathurst Case earlier noted, (par 4) '[T]he expression "a breach of this Act" is defined in section 672 to mean a contravention of or a failure to comply with that statute and a threatened or apprehended contravention of or apprehended failure to comply with it.

I comment that if members of the Tribunal are of the view that the land transferred to Council in 1962 is subject to a statutory trust for public purposes, then such finding would predicate that Council should have first consulted with the community and the public before making this application; which, on its own admission, it has not. It follows that if the Council does hold the subject land or part thereof upon statutory trust, I do not believe that the Tribunal can be asked to place itself in the position where any decision it might make permitting Council to levy one of its ratepayers with a SVR would amount to evidence of an apprehended breach of Council's due administration of the statutory trust for public purposes under the LGA.

As I have commented in my January 27 letter, had Council retrieved, or had been able to retrieve the aforementioned legal advice from its records, I believe it would never have considered making the current application. Indeed, Council's 'strategic planner', [REDACTED], in a report to Council following a meeting on 27 July 2015 had declared that '[I]t is not legally possible for Council to force the Plaza owners or AMP to pay for the maintenance of the Council component of the car park.' Sadly, such advice was ignored.

MY BACKGROUND IN COMMUNITY INVOLVEMENT

As you may well appreciate, I am forming an opinion and drawing conclusions here from a legal background that goes beyond my personal knowledge and experience as a resident of the suburb for 39 years and of regularly visiting the Northbridge Plaza and its abutting public carpark, most recently, mainly on foot via its entrance in Sailors Bay Road. I believe I should outline that background and involvement to better understand why I have troubled to make this submission:

1. I attained my undergraduate degree in Law (Sydney) in 1959 and a Master's Degree in Law in 1979 (Sydney) majoring in trust law, taxes and duties. I was enrolled as a Solicitor of the Supreme Court of NSW in 1959 and practised for some 45 years in a Sydney city firm as a partner and then as a consultant.

2. In 1958 I co-edited, published and distributed a text on property law that remained 'the bible' on such matters at the University of Sydney Law School and elsewhere for thirteen years until eventually superseded by a CCH Loose Leaf publication on the same area of the law. The law relating to restrictive covenants was something that in my practice as a commercial lawyer I had constantly before me. Over many years I acted for subsidiaries of [REDACTED] in the subdivisional development and sale of lands in many parts of Sydney and Gosford where the imposition of restrictive covenants was required by Council as a condition of subdivision.

3. I am a member of the near 100 year old Northbridge Progress Association that I believe still boasts the Premier as a member, and with whom I am in regular contact, not only on local issues, but also in the area of the arts.

4. In my former role as Public Officer of the NPA for some 19 years I was involved in drawing up its amended constitution and supporting the many submissions of its executive to the Willoughby City Council on planning and traffic issues; and in particular on the many community issues that came to its attention, and where it was to play a representative community role in Council's earlier thwarted attempt to provide a Master Plan for the redevelopment of the Northbridge Plaza public car park.

5. I am a member of the Art Gallery Society of NSW and a regular attendee at the Art Gallery of NSW for over 24 years. During those years I have attended most of its major exhibitions as well as many hundreds of informative lectures on art, architecture, design, philosophy, comparative religion, civilisations, and fashion. In 1996 I attained a Diploma in Art from the AGNSW.

I believe that I have traversed all matters of relevance under your published Guidelines both here and in my earlier letter and attachments referred to in Council's application. I am happy to answer any queries that you might have.

Yours Faithfully,

M.J. Conder (Signed)

Michael Conder LLM (Sydney) Dip Art. (AGNSW)