

**BYRON COUNCIL**

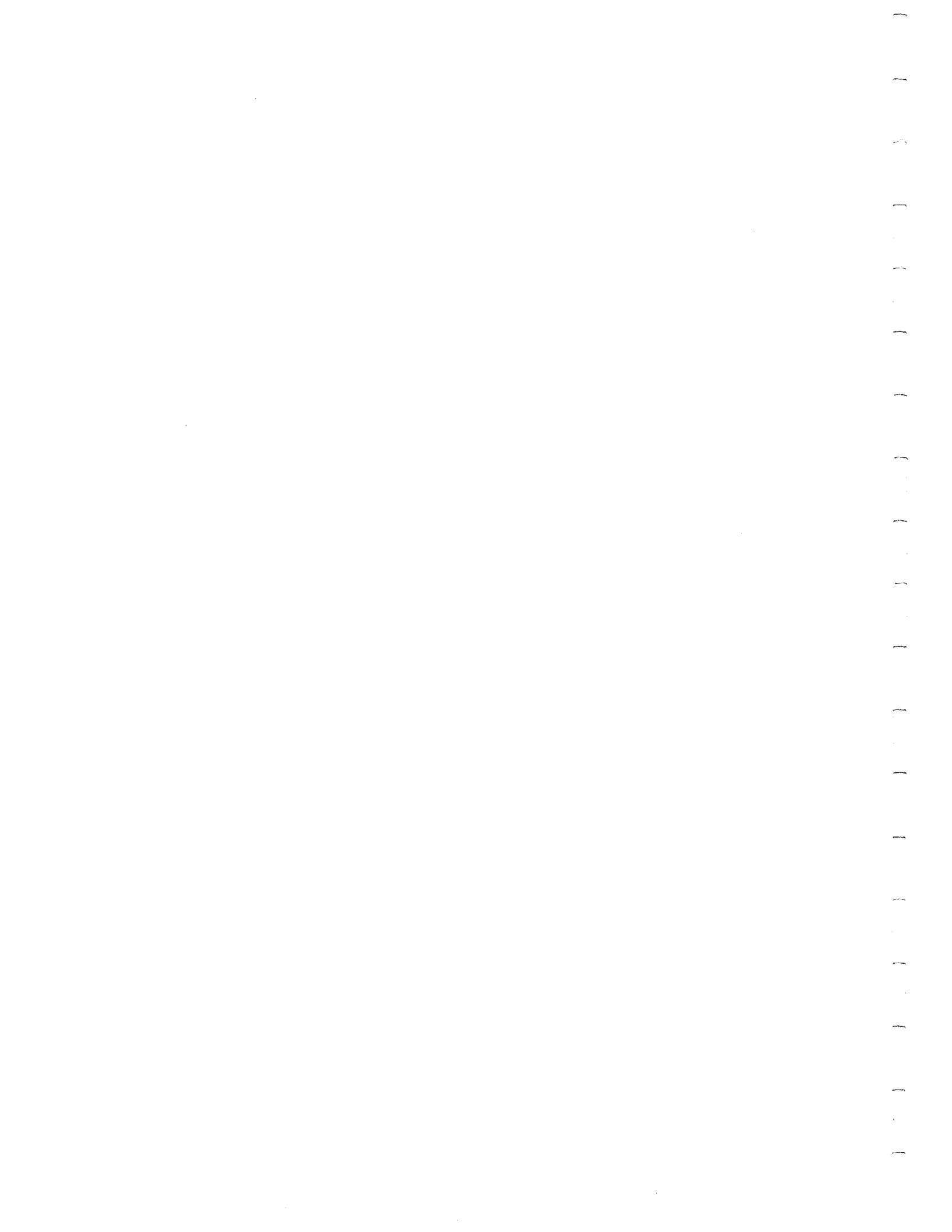
**SPECIAL INVESTIGATION REPORT**

April 1994

***Roundhouse***

Report Issued under Section 433 of the Local Government Act, 1993  
by Senior Investigations Officer M. Brophy

Report produced with the resources of the  
N.S.W. Department of Local Government & Co-operatives  
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**BYRON COUNCIL: S.430 INVESTIGATION  
ROUNDHOUSE**

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**BYRON COUNCIL: REPORT OF AN INVESTIGATION UNDER  
SECTION 430 OF THE LOCAL GOVERNMENT ACT, 1993 - ROUNDHOUSE**

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**1      EXECUTIVE SUMMARY**

- 1.1      This Report sets out the findings of my investigation of the Council, commenced under s.212 of the Local Government Act 1919 and completed under s.430 of the Local Government Act 1993, in respect of item 1(ii) of the Terms of Reference of the inspection, which required me to examine Council's conduct in its dealings with a property in Ocean Shores known as "the Roundhouse" and with the owners of that property. The investigation examined a broad range of relevant matters over a period of some 13 years, from 1980 to the present.
- 1.2      The investigation was undertaken as part of a more general investigation of the Council's performance of its planning functions. It arose from a complaint made by two of the former owners that Council had abused its planning powers and was engaged in a conspiracy to deceive the then Minister for Local Government and Planning by attempting to remove its obligation to acquire the property under the provisions of its Local Environmental Plan (LEP). Because of the complexity of the issues raised and the conflicts in evidence apparent at an early stage, evidence from the principal witnesses on this matter was taken under oath. It was dealt with independently of the other matters and made the subject of a separate report.
- 1.3      The report prepared for Council by Peter McClellan QC in February 1991, following his inquiry into some of these matters, was a very useful adjunct to this investigation. I have attempted not to re-examine those matters on which I agreed with him. Other matters which I believe he did not formally address or did not adequately deal with because of the nature and scope of his enquiry, are examined in this report, as are a number of issues which have arisen since his inquiry.
- 1.4      The central issue in this investigation was the Council's attempts, initially to obtain the Roundhouse site, preferably at no cost to itself, for the alleged purpose of providing a community facility on the site, and subsequently to avoid its acquisition obligation. Those attempts began during the preparation of a shire-wide LEP in the early 1980s when there was a strong community expectation that the Roundhouse would be dedicated to the Council, probably as an aboriginal art gallery, through the provisions of a Deed of Agreement entered into with the original developers of the Ocean Shores Estate. That expectation resulted in the site being zoned for community purposes, in spite of the strong objections of the then owners who had been attempting to have it zoned for medium density residential development. More importantly, from the Council's point of view, the zoning had attached to it an obligation on the Council to acquire the property on the request of the owners. Council's response to their request is what has led ultimately to this investigation.

- 1.5 Part of that response was to attempt to discredit the owners and to put them "in bad odour" with the community. It is my view that Council's conduct in promoting and reinforcing a negative community opinion of the owners was totally unwarranted and improper. I have addressed this issue in the report. My examination of the facts has led me to the conclusion that there is absolutely no justification for the view that the owners are somehow responsible for "forcing" Council to acquire their property, thus depriving the community of funds it should not have to expend. They were well aware of the restrictive zoning on the property when they purchased it and were given very clear indications from the Council and the then Department of Environment and Planning, prior to purchase, that there was no obligation on them to provide an aboriginal art gallery or any other community facility and that the development potential of the site could be realised. They made numerous approaches to have it rezoned but these were overtaken by considerations associated with the finalisation of the shire-wide LEP and problems with the bonding of works in Ocean Shores. It was not they who created the obligation on Council with a view to making a profit. On the contrary, the obligation which the Council has created for itself, and its conduct regarding that obligation, has led to severe financial and personal difficulties for the former owners.
- 1.6 The circumstances which gave rise to the community purposes zoning and the acquisition provision are examined in the report. I found that, because of the unusual conditions which applied at the time, and the fact that so many people were involved in the final product, it was not possible to hold a particular person or authority responsible. Nevertheless I have been critical of the conduct of several Council officers and elected members, as well as the Council elected in September 1987, who failed to take appropriate action which could have averted the situation which led to Council's obligation to acquire the property, and the consequent financial burden.
- 1.7 Of greater concern has been Council's conduct subsequently. Having imposed upon itself an obligation to acquire the site, through its own actions and those of a number of its senior officers, it almost immediately set about looking for ways, firstly to avoid the obligation and then, once the obligation was confirmed by the Court, to delay settling the owners' compensation claim. The "four strategies" developed to achieve this end were set out in a report from the then Shire Clerk/General Manager to Council in August 1990. They were: (i) delete the acquisition obligation from the LEP; (ii) rezone the site; (iii) study the history of the site in an attempt to find a dedication requirement; (iv) defend the Notice to Acquire in the Land and Environment Court. None has been successful.
- 1.8 In spite of the protestations of the then Shire Clerk/General Manager that he made a mistake in identifying (i) as a strategy, my assessment of the evidence supports the view that it was, and that, in pursuing this strategy, the Council attempted to mislead both the Department of Planning and the then Minister for Local Government and Planning. Given that a Notice to Acquire had already



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been served on the Council by the time the Amendment was due to be gazetted, this strategy could never have been successful, but that does not negate the Council's intent. The evidence of witnesses on this matter was contradictory, making the task of determining the truth extraordinarily difficult. My examination of all the relevant evidence led me to the conclusion that there was a clear intention, at least on the part of some Council officers, to use Council's concern about the potential obligation on it to acquire the Byron International Academy site as an avenue for eliminating its obligation to acquire the Roundhouse site.

- 1.9 Within months of having its shire-wide LEP gazetted, with the Roundhouse site zoned for community purposes, the Council decided that the zoning should be reviewed, as the site was no longer considered suitable for community purposes [strategy (ii)]. The zoning ultimately proposed was residential and the Council's initial understanding was that this would also remove its obligation. It was not until late August 1989 that it became clear that the obligation could only be removed if the then owners withdrew their Notice to Acquire. The difficulties they had already experienced with the Council made them sceptical about the Council's future response and deterred them from adopting this option.
- 1.10 When it became obvious that rezoning the site would increase its value, and hence possibly the compensation payable to the owners in the event that they did not withdraw their Notice, effective progress with that strategy was put on hold. I have been critical of the devious, dishonest and politically motivated way in which this was achieved through the "great surprise" report. In spite of this, the rezoning option was still being proposed as a negotiating tactic by Council even after court proceedings regarding compensation were commenced years later, and in spite of the fact that the owners had made it quite clear to the Council that they were no longer prepared to consider a rezoning, but simply wanted the Council to purchase the site, in accordance with its clear obligation.
- 1.11 Council had a real opportunity to bring this matter to a satisfactory conclusion as early as July 1989 when it received a valuation of the property from the Valuer-General of \$1.25 million. The claim submitted by the owners at that time was for \$2 million - close enough to provide a basis for negotiation. Instead, Council began stalling and delaying tactics. It sought valuations on different bases, the intent of which was to reduce the valuation figure. At the same time the amount being claimed by the owners was increasing, and instead of dealing with the issue in a direct and open way, Council embarked on a fruitless search of the records in an attempt to find another way out [strategy (iii)]. Finally, the owners took the matter to the Land and Environment Court.
- 1.12 Council's fourth strategy was its defence of this appeal, based on questioning the validity of the acquisition clause in its LEP and its application to the Roundhouse site. Again I have been critical of certain aspects of Council's conduct in connection with this appeal. The Court's decision was that Council was obliged
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to acquire the site and that it should immediately apply for resumption. Then began another phase of delaying tactics: engaging new solicitors, lodging an appeal against the Court's decision, carrying out further research, engaging a Queen's Counsel to undertake a formal inquiry and eventually withdrawing its appeal and initiating resumption proceedings.

- 1.13 Inevitably the antagonism between the two parties escalated during this "war of attrition" and the chances of reaching an amicable negotiated settlement rapidly diminished. The positions of each were further entrenched by Council's delaying tactics and other manoeuvres. In particular, it is my view that Council was being unnecessarily provocative in selecting as its expert Town Planner to provide input to the valuation process, a person whose previous involvement with the Roundhouse led to threats of defamation action from the then owners (the complainants). His assessment led to the value of the site being determined on the basis of its use as a private art gallery, with a valuation of \$468,000.
- 1.14 In addition, in an attempt to minimise the valuation placed on the site, Council introduced an argument which I believe on the evidence was unsupportable, namely that the development potential of the site was extremely limited because of allegedly severe problems with the Ocean Shores sewerage system. Although this issue was given some consideration by the Court in its determination of the amount of compensation payable, it had virtually no impact on the final decision regarding the amount to be awarded. The bases of the compensation determination were essentially those which the former owners had persistently argued were the only reasonable grounds for compensation, namely that the highest and best use of the site was medium density residential development and that the only issues which needed to be debated were the number of units and the price per unit. The real impact of the Council's value-minimising arguments was to extend the Court hearings excessively and to add further to the enormous cost of this exercise to the ratepayers of Byron. Ironically the total cost of the Council's handling of the matter is likely to be significantly more than double the amount of compensation ultimately paid to the former owners.
- 1.15 A number of Councillors had grave concerns, which they have openly expressed, about the way in which Council has approached this matter. The Council's conduct ought to have been determined by two major considerations in dealing with the Roundhouse which ought to be equally balanced. It should have been acting in the interests of ratepayers and not be engaging in costly, hypocritical and ultimately counter-productive stratagems in its attempts to reduce the amount of compensation it would pay to the owners. Equally importantly it had a duty to deal in a fair and reasonable way with the owners whose rights to the development of their property in accordance with its potential, it had effectively denied them.
- 1.16 The recent negotiations between the Council's Dispute Resolution Committee and the former owners have demonstrated, even if belatedly, that the Council is now

prepared to take a more conciliatory approach than it has exhibited in the past. While those negotiations did include an additional amount based essentially on estimated savings resulting from not proceeding with an appeal, it was my view that they should also have included consideration of some form of compensation to the former owners for the detriment caused to them by the Council's conduct in relation to the Roundhouse, as set out in this Report, conduct which, in my view, constituted an abuse of power. In particular, it was my view that Council should formally acknowledge that its delaying tactics, following the receipt of a valid Notice to Acquire, were responsible for the discounting which was applied by the Court to allow for the drop in the market (and hence the value of the site) which had occurred by the time of resumption. The Council has now signed a Deed of Release with the former owners, under which the parties agreed to a final settlement figure of just over \$1.4M. This figure was some \$170,000 above the amount which would have been required to be paid as a result of the court's decision, and, while not going as far as the former owners had hoped for, is a recognition on the part of Council that additional compensation was warranted. The agreement was based on an undertaking that pending legal action would be dropped and no further legal action in relation to the Roundhouse would be initiated.

- 1.17 The conduct of this investigation has been hampered by a number of legal difficulties. They related to the unwillingness of certain key witnesses to give evidence and to matters which arose because of the pending litigation on the former owners' compensation claim. These have been placed on record and the details will be examined by the Department of Local Government and Co-operatives to determine what implications they might have for future investigations.
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## **2. THE REPORT**

### **2.1 STRUCTURE OF THE REPORT**

- 2.1.1 The report is structured so as to deal with issues in an essentially chronological order. After the introductory sections (Sections 1 to 3.2) on the background to the investigation, an outline of the issues to be addressed and the investigation procedure, I have presented a summary of the facts relating to the matter under investigation (Section 3.4). This provides the broad context of the issues to be addressed in the report.
- 2.1.2 Then follows a more detailed listing of the issues of concern to the complainants and other issues of public interest (Section 3.5). This leads into the main section of the report - the findings. This section acknowledges the valuable contribution made to the investigation by the report of Peter McClellan QC. It makes several references to his findings and pursues issues not addressed or not, in my view, adequately addressed by him because of the nature and scope of his enquiry.
- 2.1.3 The conduct of the owners of the Roundhouse site, focusing on the period of the early 1980s, is addressed in some detail (Part 2, Section 4.2). Then follows an examination of the process by which the obligation on Council to acquire the site arose, identifying and assigning varying degrees of responsibility to those whom I have judged to be the principal players in this process (Section 4.3).
- 2.1.4 A central element of the report is the next section, which deals with the various strategies Council has adopted to attempt to remove its obligation to acquire the site (Part 3, Section 4.4.). This is followed by a section on some aspects of Council's conduct in dealing with the compensation claim (Part 4, Section 4.5). The last section in the Findings (Part 5, Section 4.6) addresses a number of legal issues raised during the conduct of the investigation.
- 2.1.5 The final sections of the report set out the conclusions (Part 5, Section 5) and recommendations (Section 6).

## **2.2 BACKGROUND TO THIS INVESTIGATION**

- 2.2 Over a period of some 12 months from late 1990, both the Minister for Local Government and Co-operatives and his Department received a significant number of complaints about the conduct of the Council, particularly in relation to planning matters. One of the major complaints was the way in which it was dealing with its acquisition of a property known as the "Roundhouse" in Ocean Shores. The substance of that complaint was that Council had acted improperly in attempting, by delays and other strategies, to avoid an obligation it had imposed on itself, to acquire the Roundhouse site and to pay the owners fair compensation, and that in the process Council had deliberately attempted to publicly denigrate the owners.
- 2.3 The complainants in this matter were two of the owners of the Roundhouse, Mr Jim Mangleson and Mr Mark Cochrane. In October 1990, they met with the then Minister for Local Government and Minister for Planning, the Hon David Hay MP, and presented him with a detailed complaint alleging the improper actions of the then Byron Shire Council, over a number of years, in attempting to avoid its obligation, pursuant to a provision in the Council's Local Environmental Plan (LEP) 1988, to acquire their property. This action followed a complaint to the then Minister on the same issue from one of the owners, Mr Jim Mangleson, in November of 1989.
- 2.4 The Minister agreed to the subsequent meeting to pursue the matter further, following the Council's resolution to appeal the decision of Cripps CJ in the Land and Environment Court, in July 1990, declaring that the Council was compelled to acquire the Roundhouse site under the 1988 Byron LEP.
- 2.5 A comprehensive submission detailing the owners' complaint was referred initially to the Department of Planning and later to the then Department of Local Government, which wrote to the Council asking a series of questions arising from the complaint. The Council referred the questions to Peter McClellan QC who, at that time, was undertaking detailed enquiries into a number of matters relating to the Roundhouse. He had been engaged by Council's solicitors, following its decision to appeal the Land and Environment Court decision, to determine whether a full enquiry or any other action was required.
- 2.6 The report of Mr McClellan's enquiry and a supplementary report in response to the Department of Local Government queries were provided to the Department in March 1991. A detailed assessment of both reports was undertaken by the Department. That assessment led to the conclusion that although some matters had been clarified by Mr McClellan's inquiry, a number of questions remained unanswered. In addition, there were concerns about Council's conduct at the time in dealing with this matter. An assessment of other complaints about Council's performance of its planning functions raised further issues of concerns. Consequently, a recommendation was made that a special investigation of the Council be undertaken.

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### **3 THE INVESTIGATION**

#### **3.1 TERMS OF REFERENCE**

3.1.1 On 29 November 1991, the Director-General of the Department of Local Government and Co-operatives approved an Inspection of Byron Council carrying the following Terms of Reference:

1. *To investigate:*

i) *the way in which Council carries out its planning functions, particularly in relation to development control, long-term/strategic planning and infrastructure provision; and*

ii) *Council's conduct in relation to the Roundhouse site.*

2. *To review Council's implementation of the recommendations of the management overview undertaken in 1990.*

#### **3.2 PROCEDURE ADOPTED FOR THE INVESTIGATION**

3.2.1 The investigation commenced in February 1992 and was conducted, pursuant to s.212 of the Local Government Act 1919, by Local Government Inspectors Mary Brophy and Allan Hartigan. The Inspectors were assisted by Mr Mike Conroy, Deputy Regional Manager, Parramatta Office, Department of Planning. Because of a number of other work commitments for the Department, field work for the investigation was staged over a six month period, and involved four site inspections, each of one week's duration.

3.2.2 It became clear during the preliminary stages of the investigation that evidence in relation to the Council's dealings over the Roundhouse was likely to be complex and conflicting. Accordingly, it was decided that, pursuant to s.214 of the Local Government Act 1919, the evidence of all principal witnesses should be given under oath and the proceedings recorded. Two witnesses who initially gave evidence informally were asked subsequently to place their evidence on a more formal footing. They refused to do so and summonses were issued. Both witness subsequently co-operated.

3.2.3 Difficulties were also experienced in gaining access from Council to documents prepared by its legal advisers. Initially this was restricted to documents prepared by Council's then current solicitors, Mallesons Stephen Jaques. However, following the taking of formal evidence, a need was identified to obtain information from Mr Warwick O'Rourke, of Messrs Sly and Weigall, Council's former solicitors. In response to requests of Council for co-operation in this matter, Council formally resolved to deny access to both the Mallesons'

- documents and to the evidence of Mr O'Rourke, invoking legal professional privilege. Access was eventually granted following the determination of the Land and Environment in the compensation claim made against the Council by the former owners of the Roundhouse. (See section 4.6).
- 3.2.4 Mr Hartigan resigned from the Department of Local Government and Co-operatives during the course of this investigation but remained a gazetted Local Government Inspector until early 1993 during which time he maintained some involvement with this investigation.
- 3.2.5 A provisional draft report of the investigation was prepared by Mr Hartigan and me as a confidential document. It was issued in this form as a means of ensuring that the principles of procedural fairness and natural justice are implemented in the investigation. Relevant excerpts were sent, in mid-November 1992, to a large number of persons who were the subject of critical comment in the report or who ought, for other reasons, be provided with an opportunity to respond to the provisional draft report.
- 3.2.6 Court proceedings in the Roundhouse compensation matter were imminent at that time, and the Council's solicitors served a subpoena on the Department for the production of all materials relating to both the Roundhouse and Ocean Shores. The former owners also served a subpoena on the Inspectors for the production of materials relating to the investigation and for a full copy of the provisional draft report. Subsequently Council's solicitors sought and obtained an interlocutory injunction restraining further distribution of the draft report. No further action was taken on the subpoena issued on behalf of Council but that issued on behalf of the former owners was the subject of a hearing on 2-3 December 1992 in the Land and Environment Court before Talbot J who ordered that they be restrained from inspecting the material. The injunction was not defended, but, on the advice of Counsel engaged by the Crown Solicitor, the Inspectors entered into an undertaking not to further publish or distribute the draft report until a decision in the compensation matter was handed down by the Land and Environment Court. This resulted in an hiatus in the investigation which lasted until early April 1993.
- 3.2.7 From 1 July 1993, with the commencement of the new Local Government Act 1993, the investigation proceeded under the provisions of that Act. The major change was that those carrying out the investigation were no longer independent statutory officers appointed by the Governor, but representatives of the Department of Local Government and Co-operatives. Following the resignation of Mr Hartigan from the Department, I was assisted in some aspects of the investigation by Ms Janette Ryan, Senior Investigations Officer with the Department's Investigations and Review Branch.
- 3.2.8 One of the matters outstanding following the Court's determination was our access to documents on which Council had claimed legal professional privilege, and to Council's former solicitors. With the re-commencement of the
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investigation, I requested the Council once again to allow that access. It was finally granted on condition that an advance copy of the draft report be provided to the Mayor to enable him to consult with Council's solicitors, as there were still concerns about a pending appeal on the compensation decision. This condition was agreed to and that draft report issued in October 1993. The release of the draft report to all Councillors was withheld until agreement had been reached between the Council and the former owners on additional compensation and withdrawal of appeals. It was issued on 22 December 1993. In the preparation of this final report I have taken into account further comments made by Council, individual Councillors and three of the persons who are the subject of adverse comment.

### **3.3 BACKGROUND FACTS**

#### **The Roundhouse site**

- 3.3.1 The Roundhouse site is a prominent parcel of land covering 1.388 hectares and with 360 degree views from a prominent hill-top which rolls gently to the north with steeper slopes to the western boundary. The eastern aspect affords magnificent seascapes from Cape Byron to the Tweed Coast and to the west and north, the lakes and fairways of the Ocean Shores Golf course can be seen, with Mount Chincogan and other mountains in the distance.
- 3.3.2 On the site is a large timber and glass circular building (hence "the Roundhouse") with car parking to the curtilage. The building contains a spacious central vestibule area surrounded by a number of cellular offices. It was originally built as temporary accommodation for an administration centre and sales office, for which building approval was granted in October 1968. It is currently in a relatively dilapidated condition.

#### **History**

##### The Roundhouse in context

- 3.3.3 The Ocean Shores Estate, of which the Roundhouse is a part, was the "brain-child" of a development company from the United States, Wendell West Company, which wanted to locate in Australia a large fully serviced residential project, close to the coast, with a mild climate and within easy reach of a major city. This attractive stretch of land just north of the Brunswick River had all the features they were looking for and development began in the late 1960s. The project was expected to be a major boost to the New South Wales North Coast and was heavily promoted by the company in which a number of high profile American personalities were involved, including Pat Boone.



### The Deed

- 3.3.4 The sort of grand scheme which was being proposed by Wendell West was totally outside the experience of the Council of that time and it was essential that some guidelines for controlling the development be put in place. Thus in 1969 Byron Shire Council (and other parties including the then State Planning Authority) entered into a Deed of Agreement with Wendell West Company Pty Ltd. The Deed was intended to govern the staged development of the land. The Deed contemplated the rezoning of the land to enable a residential subdivision by the developers in three stages, with the provision of open space and various community facilities to be provided by the development company progressively throughout the development, including, relevantly, an aboriginal art gallery, which was to be provided during the third and final stage of the 25 year, 8,000 lot development project.
- 3.3.5 The Deed operated by reference to a series of Development Area Plans. It was intended that, as changes to the concept of the development would inevitably occur, these changes would be reflected in amendments to the Plans. The original plan attached to the Deed designated the Roundhouse site as "Sales Office".

### The Changes to the development concept

- 3.3.6 Although apparently never reflected in a Development Area Plan, it was the developer's original intention, indicated in a letter to Mr Mangleson in November 1983 from the project architect, Dr Robert Sully, that once the temporary sales office was removed, the Roundhouse site would be developed for "multi-family uses" consisting of condominium-type town houses. However, shortly after the execution of the Deed, Wendell West sought permission to relocate the proposed Art Gallery from the site known as "Gallery Hill". The company put forward a proposal that town houses be developed on the site originally intended for the gallery and that the gallery be provided on the Roundhouse site. Accordingly, following approval of the change, as required by the Deed, by both the Council and the then State Planning Authority, the Development Area Plan was amended in August 1971. The zoning of the original gallery site became Residential 2(b), permitting a medium density residential development on that site. Such a development was subsequently approved and constructed.
- 3.3.7 The zoning of the Roundhouse site had been altered by amendment to Council's Interim Development Order (IDO) No.1 in April 1969 from 1(a) Non-Urban to 5(a) Special Uses (Community Buildings) - Sales Office. According to the relevant development control table, the site could have been developed at that time for any purpose with consent. Another interpretation, posed by Council's Planning Manager, is that this needs to be read in conjunction with the Development Area Plan and the Deed of Agreement which would restrict the use

of the land to the purpose shown on the map i.e. sales office. The concurrence of the State Planning Authority was, in any case, required prior to any development being approved on the land.

- 3.3.8 In August 1971, the State Planning Authority approved an amendment to the Development Area Plan to show this new 5(a) zoning and to indicate that the site originally identified as Sales Office had been changed to Special Uses - Art Gallery.
- 3.3.9 In March 1972, the IDO was further amended to incorporate some additional land purchased by the company and to reflect the changes noted above. It thus showed the Roundhouse site zoned 5(a) Special Uses (Community Buildings) - Art Gallery. At that time there were no acquisition or dedication requirements relating to the site. A later amendment to the IDO, in February 1979, limited the range of permissible uses to that specified in the "purpose reference" viz. art gallery. The site retained this zoning until the gazettal of the Byron Local Environmental Plan in April 1988, by which it became zoned 5(a) Special Uses - Community Purposes. That plan contained an acquisition provision relating to the site and specified that development for any purpose was permitted with consent.

#### The removal of the Roundhouse from the development

- 3.3.10 Ownership of the Ocean Shores Estate passed through a series of corporate hands in its two decade history of development. After the Estate was sold to Hastings Trading, the Roundhouse site was "excised" from the rest of the Ocean Shores development area, and put up for sale. Hastings Trading initially approached Council asking if it was interested in purchasing the site, perhaps for the construction of a new administration centre. Council declined and the property was subsequently purchased under a private business arrangement, by Ms A Gallagher, Mr Mangleson and Mr Cochrane, in March 1981 ("the owners").
- 3.3.11 Notwithstanding an early acknowledgment by the Council that the 1969 Deed of Agreement did not necessarily apply to the Roundhouse site and was not enforceable against the new owners (see paras 4.2.10 ff), over the years an expectation appears to have been built up in the Ocean Shores community (and in sections of the broader community of the Council area) that the Roundhouse would eventually become the Aboriginal Art Gallery referred to in the Deed of Agreement, (or at least a community facility) and that it would accordingly be dedicated to Council. This expectation may have been due in part to some of the promotional material published in the early days of the development of Ocean Shores, which indicated that the Roundhouse would become an Aboriginal art gallery. It should be noted that this issue was addressed quite thoroughly in the report to Council by Peter McClellan QC, issued in March 1991, which should serve to dispose of any current misconceptions on the matter (see paras 4.2.2 ff).

- 3.3.12 However, the community expectation of the time (which appears to have translated "Aboriginal art gallery" to "a community facility") found its way into a Local Environmental Study for Council's shire-wide LEP commenced in 1981. Planning Workshop, which undertook the study, referred to "the strongly perceived community needs", apparently judged to have been demonstrated by a particular interpretation of the community attitude study carried out as part of the study. In March 1982, one of the owners had proposed that the site be used for a medical centre and convalescent home. The other owners did not support this proposal and, in April 1983, indicated to the Council that they were proposing an alternative use of the site, namely, low profile medium density residential development. This proposal was submitted by Council to Planning Workshop, who, in a letter to Council dated 1 June 1983, suggested that the Roundhouse be preserved and Council require its dedication. The consultants did not, at that time, contemplate that the Council would pay to acquire the whole site, but saw it being acquired as a condition of consent to a medium density development proceeding on the balance of the land surrounding the Roundhouse building and curtilage for car-parking.
- 3.3.13 When the Planning Workshop draft study was published, the owners objected to its recommendation that the Roundhouse site and building be "used as a community building as originally proposed". They considered this reference to be misleading and damaging and threatened to have an injunction issued to prevent further release of the report in its current form. They also indicated to the Council that they would also be seeking damages. The owners wrote directly to Planning Workshop in September 1983 and again in November 1983, reiterating their concern about the misleading statement, and the appropriateness of the development they were proposing which, they suggested, could incorporate professional suites and a community meeting room. Planning Workshop subsequently deleted the words "as originally proposed" from the final report, and no legal action was taken.
- 3.3.14 The correspondence regarding the proposed use of the site, which passed between Mr Cochrane, on behalf of the owners, and Council, was accepted as a submission on the Environmental Study, and Planning Workshop recommended that the submission be noted and given consideration by Council. A report on the submissions, put to Council at its meeting on 6 August 1984 noted:

*"This site is currently zoned on the Development Area Plan special uses "art gallery." In view of the inadequacy of community use buildings in the Ocean Shores Estate, the existing special uses designation should be carried over to the draft L.E.P.*

**RECOMMENDATION:** *That the submission [from D.V. Cochrane & Co.] be acknowledged and the existing zoning retained in the draft L.E.P."*

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Council adopted the recommendation.

- 3.3.15 In spite of this resolution, the draft LEP, when it was exhibited in June 1986, showed the site zoned as Open Space 6(b) - Private Recreation. The owners objected again and, in a letter to Council on 8 August 1986, resubmitted their proposal for residential development.

The Council's obligations under its own planning instrument

- 3.3.16 In February 1986 Byron Shire Council's planning powers were removed and from that time until the end of March 1988 a Planning Administrator, Mr Jim Waugh, was responsible for the Council's planning functions. In 1986, the Planning Administrator approved a recommendation from Council's planning officers to rezone the Roundhouse site "Special Uses 5(a) - Community Purposes". The Council's submission was endorsed by Commissioner Simpson in a public enquiry on the Draft LEP in late 1986. The Commissioner also had before him the Roundhouse owners' submission that the site be zoned for medium density residential purposes. In spite of their earlier objections, the owners did not oppose the Council's submission, as they had by then resigned themselves to the fact that they were extremely unlikely to obtain approval for residential development on the site, and they had been given to understand that Council would now acquire the site under the standard acquisition clause which had been incorporated into the draft Byron LEP.
- 3.3.17 The owners had first attempted in December 1986 to have Council acquire the site under the then current planning instrument, IDO 1972, but were advised by Council that, on its legal advice, no such acquisition provisions existed or were implied in the instrument. This advice was confirmed by advice to the owners in a letter from the Department of Planning, dated 28 April 1987. It was, however, contrary to the owners' legal advice and, in their view, to the thrust of the determination of the High Court of Australia in the case of Liverpool City Council v Weir and others (1984) 51 L.G.R.A. Nevertheless, they did not attempt to challenge Council's decision at that time. The LEP was gazetted in April 1988 and, in accordance with Commissioner Simpson's determination, the Roundhouse site was zoned "Special Uses - Community Purposes".

The Notice to Acquire and Council's Response

- 3.3.18 Immediately after gazettal of the 1988 Byron Local Environmental Plan, two of the owners lodged with Council a formal Notice to Acquire the site and subsequently nominated a purchase price of \$1.5 million. This was considered by Council, on its legal advice, to be invalid, not being signed by all those with an interest in the land. A further notice, signed by all three owners, was lodged on 11 May 1989.

- 3.3.19 As early as September 1988, in the light of the results of a study of the Ocean Shores area preparatory to the formulation of a Development Control Plan (DCP) for the area, some elected members began to have reservations about the appropriateness of the site for community purposes. There was also some concern about the financial burden which acquisition would impose on it. The Shire Clerk/General Manager and the Planning Director had indicated at a meeting with Mr Cochrane on 26 August 1988, that Council may be prepared to review the zoning to allow for some other form of development on the site.
- 3.3.20 It should be noted that the provisions of the LEP relating to all land subject to the acquisition clause allowed development, with the consent of Council, for any purpose, pending acquisition of the property by the acquisition authority (clause 44 (1) of the LEP). Theoretically, therefore, the former owners could have lodged a development application for residential development at any time after the gazettal and expected that the Council would give it virtually the same consideration as would apply if the site were zoned for this purpose. However, there is no evidence that this option was discussed and, as far as the former owners were concerned, it was unlikely to have been acceptable to Council or the community, given the Council's insistence on retaining the 5(a) zoning for community purposes.
- 3.3.21 Consistent with the emerging view within the Council that community purposes may not be the most appropriate use of the Roundhouse site, a draft DCP prepared for the Ocean Shores area shortly thereafter, recommended quite different uses for the site, including private commercial activities and low rise, integrated cluster development. When the DCP was finally adopted by Council, on 27 March 1990, the Roundhouse site was deferred. The Council, in February 1989, and again in May 1989, resolved to prepare an amendment to the Byron LEP to rezone the site. The resolution of 30 May was carried through to the stage of a draft amending LEP presented to the Council on 8 August 1989 as part of its LEP Amendment No. 8, and included the zoning of the site as Residential 2(a).
- 3.3.22 Paralleling these moves was the Council's attempt to seek a further amendment to the LEP, known as Amendment No. 6, which purported to remove Council's obligation to acquire a site proposed for the Cape Byron International Academy, and a number of other Special Uses lands caught by the unfortunate drafting of the acquisition clause in the principal planning instrument, the Byron Shire LEP 1988.
- 3.3.23 Although the Council's resolution to seek the amendment referred specifically to the Cape Byron International Academy site only, the amendment as drafted by Council Officers, as well as rezoning another site at Tyagarah, would also have removed Council's obligation to acquire all land carrying a Special Uses 5(a) zoning, including the Roundhouse site.

- 3.3.24 Following Mr Mangleson's complaint to the Minister in November 1989 that the Council's application to amend the LEP was an attempt to deceive the Minister, and as a direct consequence of that complaint (see paras 4.4.17), the Minister approved the amendment, but with a modification to its drafting, the effect of which was to restrict its operation to the Cape Byron Academy site alone.
- 3.3.25 The Department of Planning (and hence the Minister) was never apprised of Council's resolution to rezone the Roundhouse site Residential 2(a), because the rezoning process was interrupted prior to Council's application for a s.65 certificate, for the draft plan to be publicly exhibited. The process came to an abrupt halt as a result of a report recommending a deferral of the rezoning, presented to Council on 12 September 1989. The report, which referred to the "recent" receipt from the owners of the Roundhouse of a valid Notice To Acquire (which had in fact occurred four months earlier and had been reported to Council's meeting of 30 May 1989), purported to be presented to Council from the Planning Manager. The report described the Notice as coming as a "great surprise", despite the clear knowledge that all Councillors and senior officers of the Council had of the situation at the time.

#### Court Action and Council Reaction

- 3.3.26 Following the break-down of any attempts at negotiation, the owners finally took the matter to the Land and Environment Court. The judgment of the Court, in July 1990, was that Council was bound to acquire the site and that it should proceed without delay to apply for resumption.
- 3.3.27 After the Council's loss in the Land and Environment Court, the General Manager/Shire Clerk presented a report to Council in August 1990, identifying four strategies which had been implemented in order to attempt to remove its obligations under the LEP. These included the decision, made at various times to rezone the site, and the proposal to amend the LEP to remove the Council's obligation to acquire certain land (Amendment No.6). While this proposal was originally purported to have been intended to apply to the Cape Byron International Academy site, it was described in the Shire Clerk/General Manager's report as an attempt to remove its obligations with respect to the Roundhouse, as the Council, in his words, "had no will to acquire the site".
- 3.3.28 When later challenged publicly by the owners on the identification of the LEP Amendment No.6 as one of the strategies in relation to the Roundhouse, the Shire Clerk/General Manager publicly retracted this part of his report, saying that there was never any intention to draft the amendment to achieve this purpose, and that he had simply made a mistake in writing the report in this way. He and certain other Council officers have continued to deny that Amendment No. 6 was ever intended to apply to the Roundhouse.

- 3.3.29 Council did not accept the advice of its solicitors Sly and Weigall, namely that it had virtually no grounds for appeal. It was dissatisfied with the way they had conducted the case (see para 4.4.161), and shortly thereafter terminated their services, engaging another law firm, Mallesons Stephen Jaques, who lodged an appeal on behalf of Council, in order to preserve the Council's position pending further investigations.
- 3.3.30 To prepare for the appeal, Council undertook an internal review of its files as well as those of the Department of Planning. The critical report of that review, prepared by Council's then Strategic Planner Mr David Kanaley and an external consultant, Mr Chris Murray, was presented to Council in November 1990. On the strength of the report from Mr Kanaley and Mr Murray, Council's solicitors engaged Peter McClellan QC to carry out an investigation of all matters pertaining to Council's involvement with the site. It was not until Mr McClellan's report was completed that the appeal was finally withdrawn in March 1991.
- 3.3.31 Mr McClellan's findings, in brief, were that, although proper consideration may not have been given (by Council and Council officers) to various matters, there was no evidence of corrupt or improper dealings, no grounds for Council to take legal action against any person with respect to the events investigated, and no need for further investigation or inquiry.

#### Acquisition Proceedings

- 3.3.32 The Council then proceeded with action to resume the property. Notice of the resumption was gazetted on 26 July 1991 (on which date Council became the owner of the site). The formal reason given for the resumption, following discussions with the Department of Local Government and Co-operatives, related to complying with provisions of the LEP (rather than, as Council would have preferred, and as initially suggested by its solicitors, "complying with the direction of the Court" or, as the Department would have preferred, "for [a particular] community purpose"). Council saw this as constraining its options in relation to the terms of compensation and the future development of the site.
- 3.3.33 A formal claim (for a total of \$6 million, including \$3.3 million for the land) was submitted to Council by the previous owners in September 1991. However, agreement was not able to be reached on the level of compensation to be paid. At its Special Meeting of 27 November 1991, Council resolved to base its valuation of the site on a report from Mr Neil Ingham of Planning Workshop, who was engaged for the purpose by Council's solicitors. The report considered that the only use, on the basis of its zoning history, to which the site could be put (apart from any existing use rights) was for "Private Art Gallery" purposes, and other community purposes. Based on Mr Ingham's view, Council's subsequent valuation of \$468,000 for the site was well short of the owners' formal claim, and

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the only feasible option from their point of view was to resort to court action. However, 90% of this amount (\$468,000) was eventually paid by Council to the owners in February 1992.

- 3.3.34 Subsequently, the processes associated with bringing the matter to Court continued. The owners maintained that they experienced considerable difficulty in obtaining a comprehensive set of documents under discovery and that Council caused delays in the process. Council complained that the owners delayed in lodging their final Notice of Claim and their expert reports, and argued that some of their requests for information were unreasonable.
- 3.3.35 The matter went before the Land and Environment Court on a number of occasions for call-over. In August, the owners lodged an amended claim for a total of \$2,971,500, supported by four expert reports. Council's expert reports were filed with the Court in September 1992 and the discovery process continued.
- 3.3.36 At the call-over on 16 September 1992, the Court directed, among other things, that an issues conference be held on 4 November and that the matter be listed for hearing from 7 to 18 December 1992 and from 1 to 5 February 1993. Council indicated its intention to attempt to settle the matter either by Court sponsored mediation or by negotiation before the court hearing, and determined the parameters for such a settlement. Council's intentions were conveyed to the solicitors for the former owners and they indicated their willingness to consider negotiation as long as the terms of the process were specified and there was a clear agenda. They had previously indicated a preference for negotiation via Council's Dispute Resolution Team, with legal representation, and that they would only agree to mediation or negotiation on condition that there was no issue as to the sewerage capacity of the site and that the highest and best use of the land was medium density residential development
- 3.3.37 Both parties made Offers of Compromise under Part 22 of the Supreme Court Rules, the applicants' offer being \$2.15M and Council's offer being \$819,000 (or \$1M with the associated costs). As neither party was prepared to accept the other's offer, the matter proceeded to the Court, and hearings commenced on 7 December 1992.
- 3.3.38 Following discussions in late December 1992 about a forum for negotiation, there was agreement that this could be the Council's Negotiation/Dispute Resolution Team, with legal advisers present. However the former owners indicated that their basis of settlement was that the site was suitable for medium density development, so that the matters to be negotiated would be limited to the density and the value per unit site applicable. These terms were unacceptable to the Council because they were too narrow, and it also wanted both its Counsel and its experts to participate in any negotiation.



- 3.3.39 On 29 January 1993, Council resolved to reject the former owners' new offer of settlement based on \$1.7M land value and to make a counter offer based on a land value of \$1.075M. The offer was not accepted and the matter returned to the Court on 1 February 1993. The former owners also made an informal offer to Council representatives of \$1.5M plus a share in any profits Council might make as a result of future development of the site. This offer was never put to the Council. A final offer of \$700,000 land value (and a total of \$1M) was offered by Council on 17 February in response to the applicants' offer of \$1.5M land value and interest plus \$250,000 costs. Again the offers were rejected and the matter was finally determined by Bannon J who, after a total of almost seven weeks of hearings, handed down his judgment on 1 April 1993.
- 3.3.40 The judgment supported valuation of the site on the basis of medium density development with a capacity of 50 units at \$33,000 per site "if the market was at its peak and there was a demand". However, Bannon J considered that there had been a down-turn in the market and the potential value should be reduced "on a three year deferral basis". This brought the total to \$1.1M which was further reduced by the estimated cost of clearing the site (\$20,000) and the amount of s.94 contributions which would apply, totalling \$143,880 which was also reduced by one third. The final figure was \$992,080. The matter of costs was dealt with in separate hearings and the judge's determination was that Council should pay one half the applicants' taxed costs.
- 3.3.41 The former owners appealed the compensation decision and Council filed a cross-appeal. However, negotiations, without legal representation, were initiated between the former owners and Council's Dispute Resolution Committee. Both parties expressed a strong desire to have the matter settled without further court proceedings and, after considerable negotiation, a resolution was finally reached in January 1994. Both parties agreed that the terms of the settlement be made public and they are attached to this report as Appendix 1.

#### Attempts at Intervention from the State Government

- 3.3.42 Following receipt of the complaints from the then owners in late 1990, the possibility of arranging some form of mediation to avoid any further legal costs was discussed informally with staff of the Department of Planning and a formal submission was made to the then Secretary of the Department of Local Government, Mr Fred Elliott, recommending that action be taken to arrange a round-table conference of all parties with a view to having an external, independent body (e.g. a Commissioner of Inquiry) resolve the issue of the best use of the land and how to achieve it. Although any agreement arising out of such a mediation process would have no binding force at law, the recommendation was made on the understanding that all parties would prefer to reach a mutually acceptable position without the additional financial burden associated with the courts.

- 3.3.43 The then Secretary did not support the recommendation, preferring to have the matter of the resumption run its natural course, with the ultimate resolution being the responsibility of the Land and Environment Court. It was suggested that the process may be subject to the proposed new provisions relating to resumptions under the Land Acquisition (Just Terms Compensation) Act 1991, but this was found to be not the case as this Act did not come into effect until 1 January 1992 and does not operate retrospectively.
- 3.3.44 In early September 1991, a Departmental visit to Byron Shire was undertaken by an officer of the then Special Investigations and Management Audit Branch of the Department of Local Government and Co-operatives, with a view to carrying out further enquiries into a number of issues, including this matter. In an attempt to resolve these issues, a meeting between Departmental officers and officers of the Department of Planning was held on 8 November 1991. The possibility of the Department of Planning being involved in mediation to resolve the Roundhouse site acquisition and its future development was discussed but rejected by that Department.

## **3.4 THE COMPLAINT**

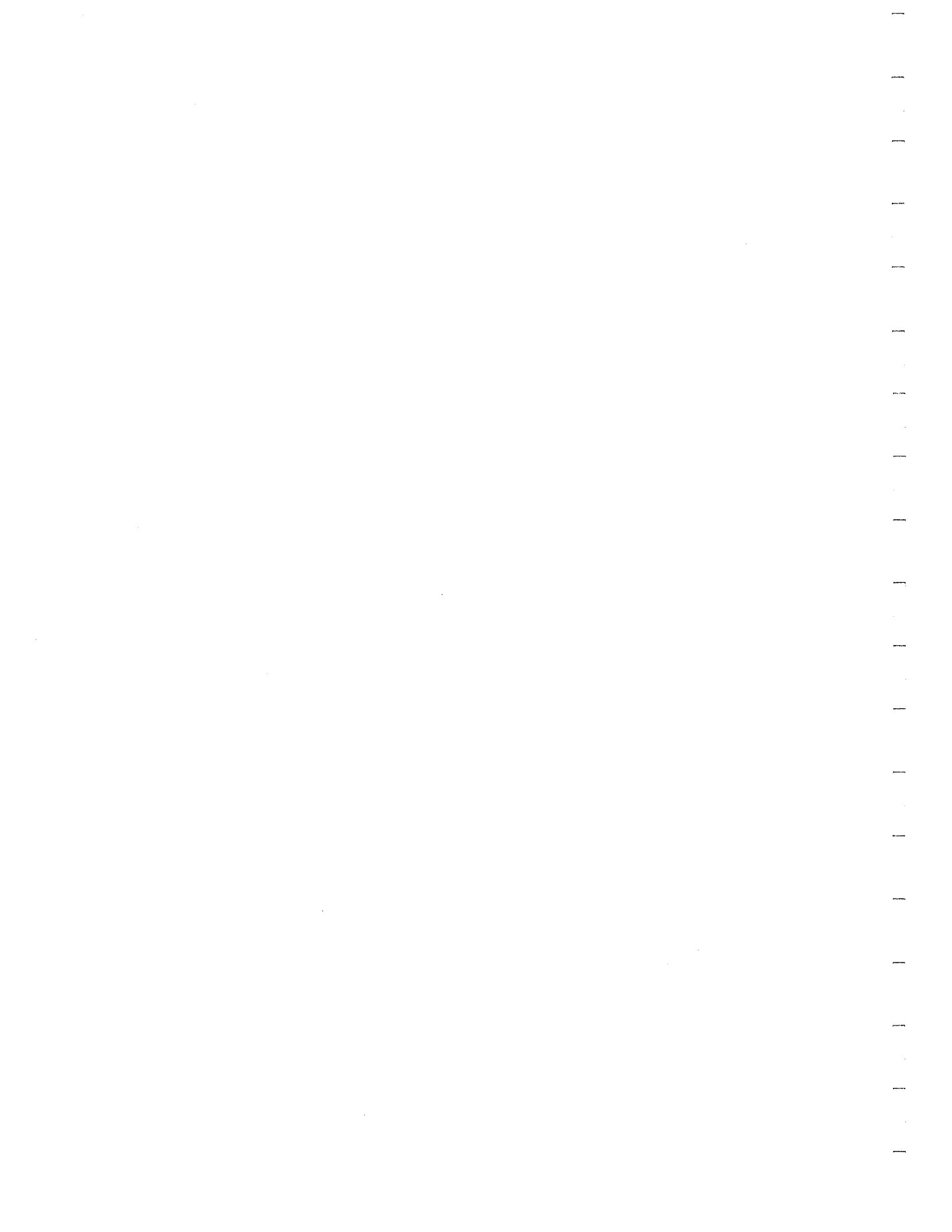
### **The Complainant's Issues**

- 3.4.1 The complaint submitted by Mr Mangleson and Mr Cochrane, contained, in essence, the following allegations:
1. Council had used its planning powers improperly in attempting to avoid the obligation to acquire the Roundhouse site under the 1988 Byron Local Environmental Plan.
  2. Council had employed delaying tactics throughout its dealings with them over the Roundhouse acquisition, and that the delays had forced them into a particularly difficult financial situation.
  3. Council had shown a consistent disregard for the reputation of the owners and had brought them into ill repute in the community. In particular they claimed that, Council, in resolving to publicly release its legal adviser's comments on the judgment of the Land and Environment Court (compelling it to resume the Roundhouse), where they were described as "opportunists" and "not innocent property owners whose rights needed protection", had defamed them. They also claimed that Council officers had wrongly instructed Mr Bingham, resulting in the Court being misled on a number of matters.
  4. The level of compensation offered to the owners following Council's

resumption of the Roundhouse site was unreasonably inadequate, and that the basis on which it was calculated was improperly determined.

### **Issues of Public Interest**

- 3.4.2 In recommending that an investigation be undertaken, the Department of Local Government and Co-operatives identified a number of issues relating to Council's dealings in connection with the Roundhouse which went beyond the concerns of the complainants. The matters requiring examination included:
1. the circumstances leading to the inclusion in the 1988 Byron LEP of an obligation on the part of the Council to acquire a property which it says it was forced to acquire, against its will;
  2. whether any persons responsible for the inclusion of the obligation acted improperly;
  3. whether the exercise of planning powers in this matter represented an attempt to achieve purposes not contemplated by the Environmental Planning and Assessment Act;
  4. whether the tactics employed by the Council in its dealings with the owners could be regarded as unreasonable conduct of a public authority in the circumstances;
  5. the integrity of Council Officers in preparing reports to Council and, in relation to the conduct of the Council's General Manager, making public statements which appear to be at odds with the facts; and
  6. the use of public funds to pursue an adversarial approach to the resolution of a problem which arguably could have been resolved much more quickly, at far less expense than it has been and in a much more conciliatory manner.
- 3.4.3 All these matters are examined in some way in this report and appropriate findings and conclusions have been made.



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## PART 2

### 4. FINDINGS

#### 4.1 INTRODUCTION

4.1.1 The report prepared by Peter McClellan QC was a very useful adjunct to this investigation and provided a focus for many aspects of my enquiries. I believe it is useful at this point to restate some of his findings and the conclusions he reached, and to make a few of my own observations.

#### 4.2 THE CONDUCT OF THE OWNERS

4.2.1. I am aware that there continues to be a number of misapprehensions within the community about the propriety of the conduct of two of the owners of the Roundhouse site, namely Mr Mangleson and Mr Cochrane, in relation to their purchase of the site, their request to Council for acquisition, their initiation of court proceedings and their compensation claim. Misapprehensions have also existed about the third owner, Ms A Gallagher, but these appear to relate in the main to difficulties experienced in the relationship between her father (and executor) and the other two owners. Despite the findings of both Mr McClellan and Council's own internal investigation undertaken by Mr Kanaley and Mr Murray, completely exonerating Messrs Mangleson and Cochrane, these misapprehensions continue to surface in the local press and have found their way into misguided comment from some Councillors over a number of years. Without in any way presenting an apology for the owners, I address these misapprehensions in order that they may, I trust, be put to rest once and for all.

4.2.2 I note the conclusions reached by Mr McClellan in this regard. He made it quite clear that dedication of the Roundhouse to Council was not now nor ever was required, since the Deed of Agreement only required an art gallery to be provided if and when stage 3 of the development was undertaken (see para 3.4.4), and this, even in 1981, was recognised as being unlikely to occur. Mr McClellan further observed:

*" ... by the time they [the owners] completed the purchase, negotiations had been entered into with the Council which reflected an intention that the art gallery should be located on land within stage 3 and not on the Roundhouse site."*

He concluded:

*"The purchasers have never been under any legal or moral obligation to dedicate the Roundhouse site to the Council".* (Emphasis added)

Mr McClellan says further:

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*"There is no evidence that the present owners of the land have acted contrary to any legal or moral obligation which may have been suggested as binding them."*

4.2.3 The evidence to support these conclusions is unchallengeable. In this regard, I note that Council had itself considered the purchase of the Roundhouse in July 1980 but declined the offer. On 22 July 1981 most of the elected members and senior staff met Messrs Cochrane and Mangleson to discuss the proposed transfer of the Roundhouse site from Hastings Trading to them. A record of the meeting was contained in the Council's Minutes of 28 July 1981. Mr McClellan's summary of those Minutes discloses that:

- \* it was accepted by everyone at that meeting that if there was an obligation to provide an art gallery it would arise only when stage 3 of the Ocean Shores Estate was undertaken;
- \* Hastings Trading offered to execute an amending deed by which it was intended to provide an art gallery site with the stage 3 lands of the development and release it from providing the gallery on the Roundhouse site;
- \* the intending purchasers wished to be assured at that time of the lawfulness of their use of the site for a real estate agency.

4.2.4 I note also that the purchase of the Roundhouse was completed without the Council attempting to secure the dedication of the Roundhouse or any other lands for the future construction of an Art Gallery. Furthermore, the amending Deed with the developer, which had been discussed at the meeting on 22 July 1981, was never executed. In his report, Mr McClellan observes:

*"It is obvious the Council should have obtained from the developer an amendment to the deed to ensure that either the Roundhouse was kept as the site for the future art gallery (if ever required), or provision was made for it on the stage 3 lands".*

4.2.5 The reference to "the developer" here is of course, not to Messrs Cochrane, Mangleson and Gallagher, but to the developers of the Ocean Shores Estate at the time, Hastings Trading. Mr McClellan was unable to ascertain any reason for the failure of the Council to secure itself against any default by the developers in providing the art gallery. However, he observes that the draft document prepared for signature by the purchasers would in any event, only have bound the owners to display some aboriginal artefacts in the Roundhouse building until a permanent Art Gallery was provided in stage 3. I believe that the futility of the Council proceeding with the "Supplemental Deed", as it was called, should have been obvious to Council's solicitors, who appear to have been extensively consulted at the relevant time. I note that the possibility of a Supplemental Deed being executed has not been raised in the case of a change in ownership of other

community facility sites required under the Deed and identified in the relevant Ocean Shores Development Area Plans (such as the marina and the beach club sites). In addition, as Mr McClellan observes, there was nothing to indicate that the owners, on purchasing the site, would have accepted even this obligation and there was no capacity in the Council to have legally required it, for it was never contemplated in the original Deed.

- 4.2.6 Nevertheless the new owners did voluntarily exhibit for some time a number of Aboriginal artefacts, owned by Dr Sully, the estate architect, and exhibited in the lobby of the Roundhouse at the request of the Director of the development company, Hastings Trading. I was advised that, because they were being damaged and there was no facility to ensure that they were adequately protected, they were subsequently placed in storage - again at the request of the Director of Hastings Trading. In 1983 Dr Sully wrote to the company from the United States requesting that they be removed from storage and sold. Mr Cochrane entered into a contract with him to act as his agent for the sale of the exhibits. Eventually the bulk of the collection was sold to various museums in Darwin, Canberra and Sydney, with a few minor items which could not be sold being returned to Dr Sully. I understand that all the documentation relating to the disposal of the artefacts is available but I did not pursue this matter during the investigation. This issue has been raised here in an attempt to set the record straight on one of the matters about which some concern has been expressed and in order to allay any suspicions that the Roundhouse owners had improperly disposed of the artefacts and deprived the community of a valuable cultural asset.
- 4.2.7 More importantly however, the Supplemental Deed had been drafted to include the developer's intention to provide the Aboriginal art gallery on a precinct of land in the northern sector of the estate, should this obligation have arisen in stage 3. **Had the Supplemental Deed been signed, therefore, the owners would have been very explicitly excused of any involvement, perceived or otherwise, in the provision of community facilities in the Estate, and this whole saga averted.**
- 4.2.8 Mr McClellan refers to the promotional material issued by Wendell West at the time the Estate was being marketed. It was clear that there was an intention displayed in that material that there should be an Aboriginal art gallery provided as part of that development. However, in this regard I note a letter to Council dated July 24 1981, from Christie Ternes, Solicitors acting for Hastings Trading, stating:

*"... our client has not at any time denied its obligations in this regard ... our client acknowledges its obligation to provide an Aboriginal Art Gallery ... at no time has our client ever indicated to any purchaser that it had any contractual rights to any of the facilities provided at Ocean Shores Estate and in fact our client's standard form of contract for the sale of real estate specifically provides that the legal contractual arrangements between the parties are as set out in the Contract and that there are no other warranties or representations made except as are expressly provided in such Contract ... These comments apply in respect to all people who maintain either that*

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*they have some interest in a proposed marina, in an Aboriginal Art Gallery, in the golf course, in the erection of a shopping centre or in respect of any other facilities."*

4.2.9 I note that there is no evidence that any of the owners, as has been alleged, were involved in the selling of the original estate or of making false representations about the use of the Roundhouse as an art gallery. They informed me - and it has been confirmed by Mr Jim Anning (Project Manager for Hastings Trading at the time) - that they were involved in re-selling and were the agents for the eventual transfer of the residue of the estate to the Bond Corporation subsidiary, but not in selling for Hastings Trading.

4.2.10 In any event, **as there was no action taken by any party to ensure that successors in title to the Roundhouse were bound to provide an art gallery, any obligation to do so could only have fallen to the developer, not to the purchasers and successors in title, Messrs Cochrane, Mangleson and Gallagher.** Even in this respect, Mr McClellan concludes:

*"... any legal obligation in the developer [i.e. Hastings Trading and, more recently, Bond Corporation] to provide the Roundhouse as an art gallery or for any other community purposes has not arisen and will almost certainly never arise".*

4.2.11 It is perhaps a bitter irony that it was Council's own (admittedly quite justifiable) actions in subsequently rezoning large sections of the estate prohibiting further residential development, because of various constraints on the land, which ensured that stage 3 would never proceed.

4.2.12 Despite the very firm conclusions of Mr McClellan and the very clear evidence on Council files that Council had been aware in 1981 that **the Deed did not bind anyone, least of all Messrs Mangleson, Cochrane and Gallagher, to provide an art gallery** until the unlikely eventuality of stage 3 being developed, I note that the Minute of the Shire President to the Council of 18 March 1991 makes no mention of Mr McClellan's comments in exoneration of the owners, and that all he was prepared to say, in relation to this issue, was that it is only now that it is clear the Deed required provision of an Aboriginal art gallery at stage 3.

4.2.13 In the provisional draft of this report, I commented that this glaring omission was a deliberate action on the part of the Shire President (Councillor Kingston) to refuel the suspicions within the community that the owners were indeed "the guilty party". It should have been clear to anyone objectively and comprehensively examining Council's own files that there was at all times, no tie between the requirement under the Deed to provide an Aboriginal art gallery on this or any other site, and there was nothing which restricted the transfer of the gallery site or required the dedication of the existing Roundhouse site.

4.2.14 In his response to the provisional draft report, Councillor Kingston commented that



the criticism of him in relation to this matter was contrary to the facts and that his Minute had the clear intention of bringing to the attention of the public that the Council

*"... had been guilty of 'a succession of mistakes, omissions and failures, which commenced as early as 1981.'... In reality, I made it very clear that the Council was the guilty party"*.

4.2.15 I acknowledge that the Minute did highlight the failings of the Council but it also failed to note Mr McClellan's comments that there was no evidence that the owners "have acted contrary to any legal or moral obligation which may have been suggested as binding them". Given that the Council held the view that the conduct of the owners had, in some way been improper, I believe the Shire President had a duty to report this finding by Mr McClellan. Council's position on this matter had been demonstrated in its amended points of defence at the hearing before the Court on 10 July 1990, and the points of defence prepared by Mallesons Stephen Jaques in the proposed appeal against Justice Cripps' decision, which included:

*"The respondent is not required to acquire the subject land ...*

(b) *By reason of the circumstances of*

(i) *the original approvals for development of the Ocean Shores Estate, including the deed of 16 April 1969 between Wendell West Company of Australia Pty Ltd, the State Planning Authority of NSW, Byron Shire Council and others;*

(ii) *the conduct of the developers and of James Harry Mangleson, one of the applicants, since that date, ...*  
(Emphasis added)

Although the reference to "the developers" is strange, in this context it clearly relates to Messrs Mangleson, Cochrane and Gallagher. When the opportunity was available to it through Mr McClellan's report, Council ought therefore to have publicly acknowledged that its negative view of the conduct of the then owners was not justified.

4.2.16 In relation to evidence which should have been available from Council's files, Councillor Kingston commented that no comprehensive review had ever been carried out until the one ordered by him following the decision of Cripps J. There also appears to be a consensus that, at least prior to 1987, Council's filing system was totally inadequate and difficult to access. The Planning Manager commented in his response to the provisional draft report:

*"I consider it to be unreasonable to expect that any individual Councillor would have been in a position prior to Kanaley and Murray's report to 'objectively and comprehensively' examine Council's files. It is quite clear*

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*that Council's filing system prior to 1987 is very difficult to find your way around."*

- 4.2.17 One of the popular "myths" about the owners is that they were wealthy developers who were "ripping the community off" in the sense that they were claiming compensation from the Council for a commercial decision which they made in the past which did not go their way. It is argued that they bought the site in the full knowledge that the land carried a restrictive zoning, and they therefore had no legitimate right to expect to develop the site for any other purpose. There is also a popular and sometimes quite maliciously expressed misconception that the owners have "forced" Council to purchase the site and would be making a windfall profit from the exercise. This "myth" has been reinforced by public comment from the Council such as the then Shire President's statement in Council's 1990 Annual Report, where he refers to "the forced acquisition of the 'Roundhouse'". He has since commented that he was referring to the Council being forced by the Court, rather than the owners, into the acquisition. His disclaimer ignores the basic reality that **it was the Council itself which created the situation**, and any notion of force being exerted, either by the former owners or by the court, is a misrepresentation of that reality.
- 4.2.18 The damaging publicity to which Council has contributed had detrimental impacts on the financial viability of the businesses operated by the owners, and on their personal lives. In addition, Council's conduct in attempting to avoid acquisition and the further delaying tactics it adopted in the settlement procedure, have resulted in financial hardship for the owners and has been particularly severe for both Mr Mangleson and Mr Cochrane.
- 4.2.19 I note that, prior to committing themselves to the purchase of the site, being well aware of the development restrictions imposed by its zoning at the time, Mr Mangleson and Mr Cochrane had detailed discussions with both Council Officers and elected members about possibilities for development. The assurances given to them in relation to the potential for the future development of the site were confirmed in later reports to Council. In spite of her research into the matter, and the fact that she had access to relevant documentation provided to herself and Mr Pullinger when Mr Cochrane met with them in August 1988, Dr Stanley indicated in her evidence that she found this surprising. She had not been aware of this background and had been under the impression that the transfer had occurred without Council's knowledge (a perception reinforced by the fact that Council had no record of having received the original notice of transfer and did not receive a copy until several years later - in 1987 - and until that time continued to send rate notices for the property to the development company). She said she also had the clear impression that Mr Alderson, then Council's Works and Services Director, held the same view. This situation of only having partial knowledge has led to most of the misconceptions in circulation about the Roundhouse, and Council staff must accept some responsibility for this, either because of their poor records system or perhaps because of their somewhat-less-than-objective approach to examining the history of the matter.

- 4.2.20 The relevant facts in relation to this matter are as follows. In a report to Council's Ordinary Meeting of 28 April 1981, in response to an application from Mr Cochrane for a change of use of the building shortly after exchange of contracts, but prior to transfer, the then Town Planner commented:

*"The purchaser of the Roundhouse is not bound in any way by the agreement between Princess Properties, [which purchased the estate from Wendell West and preceded Hastings Trading] Council and the DOEP [Department of Environment and Planning] and could be expected therefore that the DOEP would agree to a change in the 'zoning' of the site to a land usage which would not be incompatible with that permitted on adjoining land. Furthermore, since the present usage of the Roundhouse itself has not given rise to objection or complaint from adjoining landowners in the past, the purchaser could be expected to have a reasonable expectation that the DOEP and Council would agree to a continuation of this usage of the building." (Emphasis added)*

The Town Planner's report continues:

*"... it is considered that in view of the loose provisions of the original agreement relating to the development of an art gallery, and in view of Chincogan real estate not in any way being bound to this agreement, it would both be unrealistic and obstructive for this council to not consider endorsing an application to the [DOEP] for a change in zoning to permit the Roundhouse to be used for the purposes now proposed". (Emphasis added)*

- 4.2.21 On June 9, 1981, the Council advised Mr Cochrane that it had resolved to make application to the DOEP for its concurrence to allowing the Roundhouse to be used for real estate sales and offices for a period of five years and the present use to be continued until clarification and concurrence was received from the Department. The concurrence of the DOEP was required in accordance with the provisions of the Deed.
- 4.2.22 As Mr McClellan observes, the response from the Department was not received by Council until some eight months later. During that time the father of one of the owners, Mr Gallagher, had made representations to the Department about the use of the site for other purposes. Referring to those representations, the Department's letter in reply to the Council said, in part:

*"... leaving aside obligations under the agreement, the use of the building for a convalescent home and medical centre would not be inconsistent with any state or regional policies...should Council prepare a local environmental plan the Department would issue a section 65 certificate ..."*

And in reference to the obligations of the owners under the Deed:

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*"... the developer of the estate has an obligation to provide an Aboriginal Art Gallery. This need may not be related to the present building. Indeed, Council may feel that some more useful community building elsewhere should be negotiated.*

*In all the circumstances, there are many good reasons why a LEP for all the existing developed area should be prepared. The existing situation is less than satisfactory ... anomalies such as the Roundhouse could be resolved in any new plan." (Emphasis added)*

4.2.23 I note also that the Council recommended changes to the IDO to allow the site of the original art gallery to be rezoned for residential use, and there was no legitimate reason on planning grounds to prevent a rezoning proceeding in respect of the Roundhouse site. The Council and the State Planning Authority had previously approved amendments to the IDO, to reflect changes in the planned uses of the site by the developer, and would apparently have done so in this case, but for the fact that Council had abandoned the site-specific approach to rezoning of the land in June 1982, due to the progression of its Shire-wide LEP. Certainly the Supplemental Deed was drafted with the intention of binding the developer to provide the art gallery in the northern sector. This was the only attempt to tie this obligation to a specific area. It was indeed regrettable that the Supplemental Deed was not signed for this reason alone, as it would have signified the true position the Council of the day had taken with respect to the purchase of the Roundhouse site - it had no real objection, provided the developers of Ocean Shores were still bound to the original terms of the Deed to provide an art gallery on another site.

4.2.24 In my judgment, and from my reading of the Council's own files, any prudent investor would have formed a legitimate expectation of a rezoning of the Roundhouse site, even prior to purchase, given the attitude of the Council of the day and of the DOEP officers as contained both on the public record and in Council's own correspondence with the owners.

### 4.3 HOW DID THE OBLIGATION TO ACQUIRE THE ROUNDHOUSE SITE ARISE?

- 4.3.1 This is a highly complex issue and I am obliged to Mr McClellan for having relieved me of most of the work needed to understand it. I am, of course, aware that the 5(a) zoning on this site and the associated acquisition clause, were also applied to the site of the Cape Byron International Academy, and that Council's dealings in relation to this site, under other circumstances, might well have been similarly controversial and might equally have been the subject of investigation. The problems resulting from the error in zoning that site 5(a), with Council as the nominated acquisition authority, were dealt with in quite a different way, as noted in the discussion below on amendments to the LEP (Amendment No. 6).
- 4.3.2 Mr McClellan identified the following factors as contributing to the circumstances giving rise to the Council's current predicament in relation to the Roundhouse:
- \* The failure of the Council to insist on the execution of a Supplemental Deed at the time of transfer to the owners in 1981. Mr McClellan suggests that perhaps this was because of the excessive delay of the Department of Planning in responding to Council's request for legal advice on the issue.
  - \* The failure of Local Government Inspectors to thoroughly investigate the issue in 1984, despite the fact that the "Roundhouse" was one of the issues they referred to in their report. Mr McClellan suggests that, had the Inspectors carried out a fuller examination of the issue, it is possible the present difficulties may not have arisen.
  - \* The failure of the Chief Town Planner at the time to adequately reflect the advice of Planning Workshop in Council's submission to Commissioner Simpson at the public hearing into the draft LEP in 1986. The suggestion of Planning Workshop was that the Council should seek dedication of the Roundhouse building and an appropriate part of the site, if and when the remainder of the site was developed for medium density housing. Instead, the submission presented to Mr Simpson recommended rezoning of the whole of the site for Special Uses - Community Purposes 5(a). In their review of the submissions to be presented to Commissioner Simpson, Council's solicitors saw no reason to question whether the whole or only part of the site should be zoned 5(a).
  - \* The failure of the then Shire Clerk/General Manager to obtain a valuation of the land, as ultimately resolved by Council on 28 April, 1987. Had a valuation been carried out, Council may have realised the financial implications of the acquisition clause, and perhaps recommended an alternative zoning.
  - \* The failure of the Chief Town Planner and Planning Administrator to give adequate consideration to whether it was necessary to rezone the whole of

the land, or merely a part of it, for community purposes, at the time the Planning Administrator made his determination under s.68(3) of the Environmental Planning and Assessment Act. Both the Chief Town Planner and the Planning Administrator should have investigated more closely whether in fact the developer would ultimately be required to dedicate the land to Council. (I acknowledge, however, Mr Pickles' comment, in his response to the provisional draft report, that he believed that it was appropriate that the whole of the land be zoned for community purposes.)

- \* The failure of Councillors to appreciate the prospective difficulties in the acquisition of the Roundhouse site and the warnings of Councillor Boniface at the time, that Council would be liable to purchase the site at the request of the owners, following gazettal of the LEP in 1988.

Mr McClellan concludes:

*" ... the whole of the Roundhouse site has been zoned for community purposes without it having been adequately considered by the council officers, the Planning Administrator or the elected councillors".*  
(Emphasis added)

- 4.3.3 While Mr McClellan raised each of these issues, not all were, in my view, addressed adequately and several others were only brought to light during the course of this investigation. One of the aims of the investigation was to examine these matters which, for one reason or another were not dealt with by Mr McClellan, perhaps not least of all because Mr McClellan did not have available to him the powers conferred on Local Government Inspectors under the Local Government Act, such as the power to take evidence under oath.
- 4.3.4 I note in particular, the concerns expressed by some witnesses that we would not be prepared, in the investigation, to examine objectively the involvement of State Government authorities, and the level of responsibility attributable to them for the inclusion of the provision in the LEP which led to the obligation on the part of Council to acquire the Roundhouse. Even prior to these comments being received it had been the intention to deal with this issue in order to dispel such concerns. It was therefore decided to interview all persons who have played key roles in this issue.
- 4.3.5 The public authorities which, in my view, had significant involvement in the process which led to the obligation to acquire the Roundhouse being incorporated into the LEP, are:

- \* the elected Councils of the day (pre- and post-September 1987);

- \* Mr Jim Waugh                      Planning Administrator appointed to Byron Shire Council from 4 February 1986 to 18 March 1988

- \* Mr Ray Rawson Chief Officer/General Manager appointed to Byron Shire Council from June 1986 to January 1987
- \* Mr Ian Pickles Council's Chief Town Planner from May 1984 to July 1988, and subsequently part-time consultant Planner for the Council
- \* Mr Rob Doolan Council's Assistant Town Planner from April 1982 to 1984, Forward Planner from 1984 to July 1987, a Councillor from September 1987 to September 1991
- \* Commissioner Simpson Commissioner of Inquiry, conducted hearings on the Draft Byron Shire LEP in December 1986
- \* Mr Barry Pullinger Council's Shire Clerk/General Manager from January 1987 to 17 June 1993
- \* Mr Brian Boniface Councillor from September 1987 to September 1991
- \* Mr Oliver Dunne Councillor from September 1985 and Shire President from September 1987 to December 1989

### **Involvement of the Department of Planning**

- 4.3.6 The actions of the Department of Planning and its predecessors have been identified as contributing significantly to Council's obligation to acquire the Roundhouse site. The evidence does not support this view. The Department's initial involvement dates back to the preparation of the Deed of Agreement, which, in the view of Mr McClellan was *ultra vires* in that it fettered the Minister's power, and, on that basis, was always unenforceable. The Department, ironically, may thereby have contributed to the present circumstances in the sense of providing the foundation for the myths that have persisted about "the developers'" obligation to dedicate the Roundhouse site but it cannot be held responsible for these myths.
- 4.3.7 The then DOEP's excessive delay in providing advice to Council on the existing use rights applying to the Roundhouse, in response to an application from Mr Mangleson and Mr Cochrane, and on the matter of a Supplemental Deed, has been identified as a further contributing factor. Mr McClellan noted (and I agree with his view) that even if such an amending Deed had been executed, it would not have altered the fact that there was no obligation on the new owners to dedicate the Roundhouse site to Council as either an Aboriginal art gallery or a community facility. What it would have done though, was to make it quite clear that the Aboriginal art gallery, to be constructed by the developer of the estate in stage 3, would be on a different site altogether from the Roundhouse, and in the northern sector of the estate. This is quite contrary to the interpretation put on Mr McClellan's findings by the then Shire President, Councillor Kingston, in his Presidential Minute to Council on 18 March 1991. In that minute he states that

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execution of the Supplemental Deed:

*"... would have ensured that the 'Roundhouse' was kept as the site for the future art gallery. Part of the reason for this failure must lie with the Department of Planning, due to its 'excessive' delay in assisting Council with legal advice."*

The DOEP is also considered, in the view of some, to have been entirely responsible for the LEP, because it, in the person of Mr Waugh as Planning Administrator appointed by the Minister for Planning, had overall control of the whole process. The role of Mr Waugh is addressed in a separate section below.

- 4.3.8 Some persons may also be inclined to the view that the DOEP contributed to the present circumstances by approving the draft LEP for gazettal, with the acquisition clause applying to the Roundhouse site. What the DOEP did was entirely proper. In this regard, the comments of Mr McClellan are particularly telling and even damaging in terms of Council's moral position. As Mr McClellan observes:

*"... as the zoning had the effect of sterilising the land for development for any private purpose, the Council (irrespective of any legal obligation) should have accepted a moral obligation to acquire the land at the appropriate value if the owner wished to relinquish it. Furthermore, even if the Act did not require an acquisition clause, I would be surprised if the Minister would have allowed the LEP to be made without it ... The contrary position is both unjust and likely to diminish the community's willingness to accept the planning processes." (Emphasis added)*

- 4.3.9 I can only agree with this view and have considerable difficulty with the Council's attempts to remove the obligation it had itself so clearly written into the planning instrument.
- 4.3.10 In short, I can see no justification for sheeting home any of the responsibility for Council's present circumstances to the Department of Planning.

#### **Involvement of the Local Government Inspectors**

- 4.3.11 Mr McClellan identified the Inspector of Local Government Accounts who carried out an investigation of the Council in 1983 as having to accept some responsibility for Council's present circumstances in relation to the Roundhouse.
- 4.3.12 That investigation was undertaken over a 12 month period from June 1983 to May 1984 by an Inspector of Local Government Accounts, with technical assistance and advice on Town Planning matters being provided by two Planners (one being a Regional Manager from the then DOEP). Town Planning matters constituted only one component of this comprehensive investigation and the "Roundhouse" issue was one of several concerns about the Ocean Shores Estate which were brought to the Inspector's attention, amongst a range of other planning issues. The report of



the investigation makes it clear that the Inspector's understanding of the concern about the Roundhouse was in terms of its being an alleged illegal use of a relatively minor nature (real estate sales), especially by comparison with some of the other Town Planning issues they examined. In view of the major concerns about the Estate which were addressed in the Inspector's report this was regarded as a relatively trivial matter which did not warrant more than a cursory mention. The Inspector considered that it was a matter which simply needed to be brought to Council's attention. Consequently it was not specifically identified as a matter warranting a separate recommendation but was incorporated into a general recommendation regarding Ocean Shores which stated:

*"... the Council take action as quickly as possible to resolve problems concerning the Ocean Shores Estate."*

- 4.3.13 The Inspector's findings and recommendations were the subject of a Senior Officer's report to Council on 26 February 1985. That report focused on what was seen as the major concern about Council's handling of the development of Ocean Shores Estate, which was described as "the biggest single issue to have come before this Council and its past and present staff". In that context the Roundhouse was identified as one of a number of "unrelated issues raised by the Inspectors". The Council report, although not acknowledging that the Roundhouse was at that time no longer owned by the company developing the estate ("the developer"), i.e. the Bond Corporation subsidiary, Borata Pty Ltd, notes quite properly that:

*"The Deed of Agreement does not require the developer to provide an aboriginal art gallery at this point in time and the developer has not, therefore, failed to comply with the requirements of the Deed of Agreement in respect of the 'Roundhouse'".*

- 4.3.14 It therefore appears to have been quite clear to Council at that time that there was no "issue" with the Roundhouse in terms of either the use to which it was being put or obligations under the Deed of Agreement. Any confusion which existed about the status of the Roundhouse was not related to the facts but was the result of the same misinformation which has given rise to the myths about the Roundhouse which persist to this day. If the proper information had not previously been readily available within Council, it was supplied by Mr Cochrane in a detailed submission on the Inspector's report forwarded by him to Council's Chief Town Planner on 19 February 1985.
- 4.3.15 The Inspector cannot therefore be held responsible for not examining in detail an allegation which was minor by comparison with the other concerns about the Ocean Shores Estate and, moreover, was clearly unsupportable, given the facts as they were clearly known to Council at that time.

### **Outstanding Issues**

- 4.3.16 Relevant issues which, in my view, were not examined or not adequately examined

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by Mr McClellan include:

- \* the role of the Chief Officer/General Manager, Mr Rawson;
- \* the adequacy of reports to Council prior to the gazettal of the LEP;
- \* the apportionment of responsibility among the various public authorities involved.

### **The role of the Chief Officer/General Manager**

4.3.17 In June 1986, Mr Ray Rawson was appointed as Chief Officer/General Manager to manage the Council's operations, excluding planning matters which were the responsibility of the Planning Administrator. According to Mr Rawson, his brief was to sort out Council's finance and its structure, and to restore public confidence in the Council. Although never directly involved in any aspect of the preparation of the LEP, Mr Rawson's influence as the person responsible for the proper functioning of the Council, had an impact on the way in which the Roundhouse was dealt with in the Plan.

4.3.18 In relation to Ocean Shores generally, Mr Rawson had an overriding concern about the bonding of works in accordance with provisions of the Deed of Agreement and various development consents, and was dissatisfied with the way in which the then Shire Engineer was dealing with the development company's persistent attempts to have the level of bonding reduced. There was a real concern that the development company at that time, Bond Corporation, was not undertaking the engineering works required of it, and was not providing Council with adequate security in the form of bonds to cover those works in the event of the company's defaulting on the works. Mr Rawson commissioned Mr Frank Cranston to undertake a comprehensive technical and financial audit to clarify the company's obligations.

4.3.19 The emphasis placed by Mr Rawson on the bonding issue appears to have permeated other aspects of the Council's functioning and, in particular, work on the LEP. Mr Pickles, who at the time was Council's Chief Town Planner, indicated in his evidence that it was as a result of this pressure that a proposal initiated by Mr Mangleson and Mr Cochrane, in their submission on the Draft LEP, and initially supported by Mr Pickles, to rezone the Roundhouse to 2(a) or 2(t), was scrapped just prior to the Commission of Inquiry hearings in December 1986. According to Mr Pickles, it was argued that, if a concession in the form of a more favourable zoning was granted in respect of the Roundhouse, the development company would see this as an opportunity for it to press for concessions on bonding. Mr Pickles, in his comments to Mr McClellan's report, stated that the "game plan" was to get the LEP gazetted and to review the zoning of the Roundhouse, once that was achieved. This view is supported by the evidence of other witnesses including Councillor Boniface.

4.3.20 Mr Rawson commented that he did not examine the Deed of Agreement in any

detail but was aware that it bound the developer to provide various facilities at different stages of the development. It was his understanding however, that the Roundhouse site was in the ownership of the development company and was leased to Messrs Mangleson and Cochrane. His view was formed on his limited reading of the agreement and he did not seek any advice on the matter. It was one of the many misunderstandings extant in the community generally about the status of the Roundhouse site, and one which he had apparently absorbed. Even though he had not read the Deed (and there was, arguably, an onus on him to have done so), his discussions with Mr Cranston should have clarified the situation. It was clear to Mr Cranston, and, in his report, he expressed the view that:

*"It is unfortunate that the site has changed ownership without clarification of the future use of the premises". (p.11)*

- 4.3.21 Nevertheless, Mr Rawson commented that he was aware of the obligation on Council to acquire the site, as clearly noted by Mr Cranston, and was comfortable with that obligation because he felt that the Roundhouse site was both appropriate and necessary as a community facility.
- 4.3.22 During the time of his administration (which terminated with the appointment of Mr Pullinger in January 1987) the question of a valuation, pending approval of the recommended 5(a) zoning, was not considered and no attention was therefore given to what the financial implications of acquisition might be for Council. If this had been addressed, both Mr Rawson and Council might have realised that some of the emphasis being placed on the bonding issue (which involved works valued at some \$2.76 million for which Council expected bonds of approximately \$750,000) might more profitably have been directed towards "sorting out" the Roundhouse issue, the value of which, at that point (late 1986) could well have been of a similar order of magnitude to the amount involved in the bonding. However, it is acknowledged that it was not until near the end of Mr Rawson's term that the Simpson Inquiry was conducted and the report of that Inquiry was not published until several months after Mr Rawson left the Council.

#### **Adequacy of reports to Council prior to gazettal**

- 4.3.23 Despite the inadequacies noted by Mr McClellan, the evidence is clear that the Council, at least prior to the Local Government elections in September 1987, was apprised through Officers' reports, of its obligation to acquire the Roundhouse site once the LEP was gazetted, and of the owners' intention to take action in this regard.
- 4.3.24 Mr Mangleson and Mr Cochrane had received assurances from Mr Pickles that, having rejected their rezoning proposal and retained the special uses zoning, Council would respond promptly to a request for it to acquire the site. Consequently, on the first day of the Commission of Inquiry hearings in December 1986, they issued Council with a Notice to Acquire under the provisions of the IDO.

4.3.25 This was reported to Council's General Purposes Committee by Mr Pickles on 24 March 1987, following the receipt of verbal advice (later confirmed in writing) from Council's solicitors. The report noted that there was no obligation on Council to acquire under the IDO but that:

*"... should the recommended zoning of Special Uses - Community Purposes 5(a) under the proposed Shire Local Environmental Plan proceed to gazettal, then Council would be responsible for acquisition of the land upon request."*

4.3.26 The report specifically mentioned that this matter was brought to Council's attention because it would be responsible for the funding of the possible future acquisition.

4.3.27 The matter went to Council again on 14 April 1987 and Mr Pickles' report confirmed that Council was, at that time, under no obligation to acquire the site. However, the report again noted that the 5(a) zoning was to be recommended to the Planning Administrator. Although the consequent obligation to acquire was not commented upon in this report, Council's understanding of that obligation was implied in its resolution to obtain a valuation of the land.

4.3.28 An element of confusion may, however, have been introduced through the report on the Draft LEP (the S.63(3) Determination) which went to a special meeting of Council on 16 July 1987. That report does not mention the obligation to acquire if the recommended 5(a) zoning proceeded and comments that Planning Workshop had

*"... suggested that the Roundhouse building and appropriate part of the site on which it stands should be dedicated for the use of the community of Ocean Shores ..." (Emphasis added)*

4.3.29 This, as noted previously, was, in my view, a misrepresentation of Planning Workshop's proposal, although it should be noted that Mr Pickles disagrees that he misrepresented Planning Workshop's advice and considered that it was, in fact ambiguous. The suggestion put by Planning Workshop regarding dedication was on the understanding that the owners might be compensated for the additional land above the standard of 2.83 hectares per 1,000 population by allowing a greater density than would otherwise be permitted. I note, however, that the level of contribution thus proposed would be hugely in excess of what would be required for the extent of medium density residential development which could be carried out on the residual part of the site. It was little wonder that the then owners of the site rejected the proposal in submissions to the Council.

4.3.30 The 5(a) zoning recommended by Mr Pickles and supported by Commissioner Simpson was adopted by the Planning Administrator on behalf of Council.

4.3.31 There was no evidence that any further reports on matters relating to the

Roundhouse had been presented to Council before gazettal of the LEP in April 1988. In particular, there was no evidence that the "new" Council elected in September 1987 was formally briefed on the implications of the 5(a) zoning, despite an outstanding resolution for a valuation to be obtained for the site.

- 4.3.32 Nevertheless, there was some degree of knowledge amongst the Councillors. Members who had been re-elected should have been aware of the major issues, although I am aware from the evidence of Mr Pullinger that it was often difficult to achieve a quorum at Council meetings during the period of Mr Waugh's appointment. Former Councillor Doolan in particular, who had been Council's Forward Planner prior to his resignation in July 1987 and election to Council, had had some involvement with the preparation of the draft LEP, and had discussions with two of the former owners about the zoning of the Roundhouse site. Mr Doolan has insisted, however, that any involvement on his part finished well before the zoning of the site was finalised, and commented, in response to the provisional draft report:

*"Because I was involved in an earlier meeting does not mean I should therefore know the final outcome of this site when I was involved with some thousands of sites in the shire."*

In any case, Councillors should have been left in no doubt about the Council's obligation to acquire the site once the 5(a) zoning was fixed, following the representations made by the newly elected Councillor Boniface.

- 4.3.33 Mr Boniface gave evidence that he had raised his concerns about the proposed acquisition of the Roundhouse site with the Shire Clerk/General Manager, Mr Pullinger, and to various individual Councillors and Committees. He said he was not aware of what further action the Shire Clerk/General Manager had taken within the organisation but that he had put to him that:

*"... we were going in the wrong direction because we were looking at, in my view, an inappropriate acquisition that would be very expensive to the community."*

He added:

*"My concern at that time was at least to suggest that perhaps this item could be excluded from gazettal until Council had had a chance to look at it."*

- 4.3.34 When this matter was put, during the investigation, to Mr Dunne, who was Shire President at the relevant time, he acknowledged that Councillor Boniface had raised the issue with him. He gave evidence that, although he had the option of making political capital out of the issue, he chose to deal with it in such a way as would facilitate the process of "bridge-building" between Councillors. He suggested that it be brought by Councillor Boniface to a special meeting which he was arranging

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with Mr Waugh, which would provide an opportunity for all Councillors to discuss with him any concerns they had about the draft LEP. Mr Dunne commented that he did not recall whether Councillor Boniface did raise the matter with Mr Waugh but assumed that he did. Mr Boniface said that, as far as he could recall he was unable to attend the meeting and did not raise the matter with Mr Waugh at another time.

4.3.35 No consideration appears to have been given to seeking advice on the implications of identifying the Roundhouse site as a "deferred area" in the LEP, as had been suggested by Councillor Boniface.

4.3.36 Councillor Simmons also recalled that Councillor Boniface had identified a problem with the Roundhouse site and that the Shire President, Councillor Dunne, had indicated that amendments could be made after the LEP was gazetted.

#### **Apportionment of responsibility**

4.3.37 Notwithstanding the fact that for two years prior to the gazettal of the LEP the planning functions of the Council, including the oversight of the LEP's preparation, were the responsibility of the Planning Administrator, the Council, as a corporate body, must accept ultimate responsibility for the 5(a) zoning of the Roundhouse site and for the acquisition provision which applied to it. Through its Officers and through the various opportunities it had for comment on the proposals relating to the LEP, it clearly accepted both the zoning and the accompanying acquisition obligation. It cannot therefore sheet home the blame to Mr Waugh and the DOEP, nor is it entitled to say, as it has of recent times, that the acquisition was being forced upon it against its will; the Council must accept that it was the architect of its own misfortune in this respect.

4.3.38 Nevertheless, it is clear from the evidence that a number of individuals and authorities contributed to these circumstances. The "players" and decision-makers in this saga may be placed into three categories:

- i) those who apparently knew the true status of the Roundhouse and did not take appropriate action;
- (ii) those whose roles placed them in situations of depending on others for information and who, for various reasons, appear not to have been properly informed; and
- (iii) those who seem to have been blinkered by other agendas which distorted their perception of the issues relating to the Roundhouse.

4.3.39 I include in the first category of "players", Council officers, Mr Pickles and Mr Pullinger, and Mr Doolan (later Councillor Doolan); in the second, Mr Waugh, Mr Rawson and Commissioner Simpson, and in the third, ex-Councillor Dunne and perhaps some of the other Councillors, such as Councillor Wentworth.

4.3.40 All are in varying degrees responsible for the outcome. Initially it was my view that Council's solicitors at the time, assuming that they had some involvement in overseeing the drafting of the LEP, perhaps ought to have been included in this list. However, I understand from the evidence given by Mr Warwick O'Rourke, of Council's solicitors at the time, Sly and Russell (later Sly and Weigall), that their only involvement in the preparation of the LEP was to present Council's submissions to Commissioner Simpson. Although they did read all the public submissions and then presented the submissions prepared by Council Officers, they did not, he said, engage in any background research. Apart from the fact that this was not part of their brief, the notice given did not allow them sufficient time to carry out such research. In their limited role as spokespersons for the Council, they therefore had no real input into the content or format of the LEP.

#### **Those who knew**

##### Mr Pickles

4.3.41 Of all the people involved in this matter, Mr Pickles was perhaps the best informed and most aware of the true status of the Roundhouse - as a site carrying a zoning inconsistent with both its historical and current use, whose owners had been requesting and had justification for expecting a re-zoning which reflected the development potential of the land, and who now would have to be compensated by Council once the community purposes zoning was gazetted. Although he was not employed by Council at the time the property was transferred from Hastings Trading to Messrs Mangleson, Cochrane and Gallagher, he knew that they were the owners of the land and that there was no direct connection between them and the company which subsequently bought out Hastings Trading. He had no misconceptions about outstanding obligations arising from the Deed of Agreement including dedication of the site to Council. He had had conversations with the owners and had agreed with them that a zoning of 2(a) or 2(t) would be appropriate. When pressure was put on him (either directly or indirectly) prior to the Commission of Inquiry, to leave the Special Uses zoning on the site, he did not disabuse Mr Rawson of his perception that the development company was the owner and that there was no connection between the Roundhouse and the development company. Under that pressure, he effectively succumbed to the argument that any flexibility on the part of Council in relation to any part of Ocean Shores would result in pressure from the development company to seek concessions in respect of the areas affected by bonding.

4.3.42 Mr Pickles was well aware of the obligation that would accrue to Council once the LEP was gazetted with a 5(a) zoning on the site and had recommended in April 1987 (well before gazettal) that Council obtain a valuation. Although it was not necessarily his responsibility, (one would expect such a task to be the responsibility of the Shire Clerk/General Manager) he had made enquiries of Council's solicitors regarding acquisition procedures and was aware of the need to ensure that funds were allocated for the likely future acquisition. In a memorandum to both the

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Finance Manager and the Works and Services Director on 26 November 1987, he advised of the impending gazettal and requested that \$250,000 be set aside in the 1988 budget for this purpose. He also noted: "but a valuation should be sought." **In spite of Mr Pickles' request and his reminder regarding the need for a valuation, no valuation was sought and no funds were allocated in the budget for the following year.**

- 4.3.43 As the Planner responsible for most of the day-to-day work associated with the preparation and drafting of the LEP in consultation with Planning Workshop, Mr Pickles would have had some responsibility for having the site shown as a 6(b) zoning in the draft LEP which was exhibited in 1986. In the light of the zoning proposed in the EIS published in 1983, the justification for this zoning remains a mystery. Although such a zoning was originally proposed by Planning Workshop, it was rejected following the process of community consultation and was supposed to have been replaced with the community purposes zoning in the draft LEP.
- 4.3.44 Mr Pickles, in consultation with Mr Waugh, was responsible for the drafting of the acquisition table in clause 43 of the Draft LEP, which showed Council as the acquisition authority for all land zoned 5(a) Special Uses (Other), as a short-hand way of referring to all 5(a) land not otherwise specified. Although subsequently it has been argued that there is considerable ambiguity in this clause, it was perfectly clear to most people concerned with the matter that it was intended to cover the Roundhouse. If any blame is to be assigned for such possible ambiguity, Mr Pickles ought not in any way be held accountable, as the clause (and the associated table) was approved in that form by the DOEP, and it had presumably been found acceptable by Parliamentary Counsel before the LEP was gazetted.
- 4.3.45 Mr Kanaley, in his investigation of the matter following the determination of the Land and Environment Court, found that Mr Pickles was one of the few people who had taken appropriate action to deal with the Roundhouse issue and to alert Council to its obligations. I basically support his assessment, and would comment that, in fact, he did more than would have been required of him in bringing to Council's notice the need for a valuation. However, it is also my view that, if Mr Pickles had been more assertive in putting forward his point of view, a number of consequences may have been averted. Most significantly, a 2(a) or 2 (t) zoning on the site may have been recommended to Commissioner Simpson rather than 5(a), and, given that the approved zoning was 5(a), he could have put more effort into attempting to convince both the Shire Clerk/General Manager and the Council of the need to obtain a valuation and to set funds aside in the budget for the likely future acquisition.
- 4.3.46 In his response to the provisional draft report, Mr Pickles commented that, in the circumstances, the notion of "more assertiveness" was a "joke". He indicated that this totally misrepresented his position and status in the organisation, saying that he was outside the decision-making process and not permitted to attend Council meetings etc.



- 4.3.47 As well as pressure from within the organisation, there was also pressure from the community and not least of all from Councillor Wentworth, who has openly stated that she vigorously subscribed to the (misguided) view that the Roundhouse was and ought to remain a community facility. She was, I have been advised, present and giving "advice" to Mr Pickles and Mr Doolan at the Inquiry hearings. The potential for a strong negative reaction from the community to anything other than a 5(a) zoning was probably no less a deterrent than the assumed threat of repercussions on the bonding issue.
- 4.3.48 Given his status in the organisation, the sensitivity of relationships within Council at the time, and his perception that it would be neither appropriate nor productive to pursue a course of action which had the potential to involve him in considerable conflict, Mr Pickles' conduct is understandable. However, in theory at least, he could have taken a different approach and put forward to the decision-makers more forcefully, what he believed was appropriate from his professional point of view. He must therefore accept a modicum of responsibility for the final outcome.

Mr Pullinger

- 4.3.49 Mr Pullinger was appointed as Shire Clerk/General Manager just prior to Mr Rawson's departure from Council in January 1987. Like Mr Rawson, he had very little involvement with planning matters for the first 15 months of his appointment, i.e. during the remainder of Mr Waugh's term as Planning Administrator. One of his initial concerns was to follow up on the work commenced by Mr Rawson in commissioning the Cranston Report (see para 4.3.18) and he told me during the investigation that the issue of bonding of works overshadowed any concern that there might have been about the possibility of Council's having to acquire the Roundhouse. **Mr Pullinger was, nevertheless, aware of the pending obligation.**
- 4.3.50 As the person responsible for the general management and administration of Council, it should have fallen to Mr Pullinger to follow up on the resolution of Council on 14 April 1987 to obtain a valuation of the Roundhouse site. He had very early contact with Mr Mangleson in the latter's capacity as a Real Estate Agent and received a personal letter from him with relevant documents relating to the issue in late February 1987. That letter stated:

*"Dear Barry,*

*I have taken the liberty to supply the following material to [Councillor] John Bourne and I feel it fairly important that you are as acquainted as he with the same facts on the subject.*

*He was not aware of our previous communication with Council and in view of the potential costs involved he and in fact all councillors should have been advised as soon as our original registered letter was received by Ian [Pickles].*

*You may have been fully informed of our case to date in which case*

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*please disregard this enclosed information. I just did not want any councillor to be better informed than yourself on the matter." (Emphasis added)*

4.3.51 Mr Pullinger put it to me that, in his judgment, the possibility of an acquisition obligation accruing to Council as a result of a provision in the LEP was a planning matter and hence not his concern. He said he was particularly cautious about having any involvement with planning matters because of what he had perceived as a direction in those terms which he had received from the then Director of the DOEP, Mr Dick Smythe. This followed allegations raised in Parliament by Mr Knight MP (and later shown, by Local Government Inspectors, to be unsubstantiated) about certain matters relating to his previous role as Shire Clerk of Baulkham Hills Shire Council. He has stated that the message forcefully put to him by Mr Smythe was that he "had better keep his nose out of planning matters in Byron Shire since [his] reputation was already harmed".

4.3.52 Although he has subsequently accepted that it was his responsibility to obtain a valuation following Council's resolution of 14 April 1987, he offers this background by way of explanation of his perception of his role vis-a-vis Mr Waugh. He has also argued that, during the period January to September 1987 he often had difficulty obtaining a quorum at Council meetings, and that the information regarding the valuation of the Roundhouse site "would have been of little or no interest to the then Council". While this situation may be understandable I can see no valid reason for accepting it as a justification for Mr Pullinger's failure to implement this critical Council resolution. **Mr Pullinger must therefore be held responsible for not fully apprising Council (and perhaps also Mr Waugh) of the financial implications for Council of the proposed 5(a) zoning of the Roundhouse site.** Had Council been fully aware in April 1987 (or even as late as December 1987) of what was involved, it might have reconsidered the proposed zoning. From the evidence given by Mr Dunne, that early in its term the Council requested information on outstanding resolutions, it would appear that a second opportunity to report on the valuation to Council went begging. Mr Pullinger was clearly responsible for this failure to provide the Council with a critical piece of information, which may have avoided the problems it is still experiencing (more than six years later) in its dealings in relation to the Roundhouse site.

4.3.53 The potential financial impact on the Council of the acquisition obligation, which it was about to impose on itself, was also discussed with him by Councillor Boniface, providing him with yet another opportunity to bring the matter formally to the Council's attention. However, the financial implications were not presented to the Council, prior to gazettal, nor was any attempt made by Mr Pullinger to seek legal or other independent advice on the concerns raised by Councillor Boniface and the solution proposed by Councillor Dunne - namely that it could all be resolved post-gazettal. Mr Pullinger must, therefore, accept a large degree of responsibility for the fact that the acquisition obligation was not properly considered by the Council before it committed itself to the community purposes zoning and the consequences

of that zoning.

Mr Doolan

4.3.54 For most of the period during which the LEP was in preparation, Mr Doolan was Council's Forward Planner (initially as a contract employee) and in that capacity had a major input into the plan, which he said was applauded by the Minister for Planning and achieved a great deal for the community of Byron Shire. He worked closely with the consultants from Planning Workshop and more particularly Mr Pickles, to whom he was directly accountable, and was the contact person for some of the correspondence forwarded to Council in relation to the draft LEP and the Commission of Inquiry, including detailed submissions and correspondence about the Roundhouse site. He noted however, that he was not responsible for any outgoing correspondence. In his evidence, Mr Doolan stated that his work on the draft LEP tended to focus more on the southern and non-urban areas of the Shire. He also commented that, at one stage, while the work of Mr Cranston was underway, matters affecting the Roundhouse were taken even out of the hands of Mr Pickles.

4.3.55 At an earlier stage, however, when Mr Mangleson and Mr Cochrane presented him with a large amount of documentation to support their rezoning proposal, he said he felt that, because there was strong support for retaining a 5(a) zoning, a good way of achieving a resolution was to allow both to happen. He said it was his idea to allow some development and a community facility and that this was discussed with the then owners at a meeting with himself and Mr Pickles. This is confirmed in a letter from Mr Cochrane to Council (directed to the attention of Mr Doolan) dated 8 August 1986, which states:

*"As discussed, a more suitable zoning would appear to be one which allowed development of high quality apartments to supplement accommodation within the tourist market. And, in accordance with your recommendations, an appropriate public use facility such as a library room could be included within any approval for development of the site.*

*Such a facility ... should be suitably dedicated to ensure public enjoyment."*

4.3.56 In his review of the history of the Roundhouse, Mr Kanaley commented that

*"This suggestion could have provided a basis for a negotiated settlement of the use of the land which retained some community use component."*

4.3.57 Mr Doolan thus argued that his only involvement with the Roundhouse was in fact positive. He also commented that there were grounds for the view within the community, that the Roundhouse would be a community facility, based on information contained in videos and other promotional material which was circulating during the early stages of the development of the estate. He maintained that it was not a "black and white situation" and that the matter was very complex.

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He did not agree that "the Mangleson view" of the Roundhouse issue (which he considered was reflected in the provisional draft report), was the only way or the right way of seeing the situation.

4.3.58 Although not directly responsible for presenting Council's submissions to the Commission of Inquiry, Mr Doolan was involved in the preparation of documentation relating to the submissions and attended the hearings with Mr Pickles. He indicated that he had no particular recollection of the Roundhouse matter being raised before the Commissioner.

4.3.59 During the investigation, I questioned Mr Doolan regarding the concerns expressed by Councillor Boniface in late 1987 after they had both been elected to the Council. Mr Doolan commented by way of introduction that, after his election, he was particularly conscious of his role and when he came to the Council he was there as an elected representative and not as a staff member or a Town Planner. (As a matter of interest, I note, nevertheless, that a local press article published in July 1991, he is described as being accepted by many as "the most effective Councillor in the field of planning, in which he is pre-eminent" and "his thorough knowledge and calm assessment will be sorely missed in the future".) He indicated that he had no recollection of Councillor Boniface expressing concern at an Ordinary Council meeting about the financial implications of the 5(a) zoning on the Roundhouse site, and questioned why, if he had been so concerned, he had not put it forward as a Notice of Motion. He suggested that, because it was a finance matter it may have been raised at a Finance Committee meeting which he did not attend. Having, he said, sat next to Councillor Boniface and worked with him on several committees, Councillor Boniface had numerous opportunities to raise his concerns with him and, if this had occurred, he would have advised him to put up a Notice of Motion.

4.3.60 In the provisional draft report, I commented that Mr Doolan appeared not to have taken any initiative to provide some enlightenment to other Councillors on the issue (i.e. the acquisition obligation arising from the 5(a) zoning) once he was elected to Council in September 1987 and when Councillor Boniface voiced his concerns. In his subsequent evidence, Mr Doolan took issue with this statement, arguing that there was no onus on him to perform that function - even if he had been aware of Councillor Boniface's concerns - as this was the responsibility of paid staff. He said it was not his role, nor did he want to be seen to be providing planning advice to Council. Later in his evidence, he stated:

*"I was sitting there after September '87, I didn't know what was proposed for the Roundhouse; I didn't know what the story was; I didn't know what Boniface was going on about..."*

4.3.61 He expressed concern that he should be considered to have had any involvement in the matter at all, other than his positive contribution. He strongly challenged my categorisation of him as one who apparently knew the true status of the Roundhouse, and stressed that he had no involvement in the matter after August

1986 - a statement which, at least in a formal sense, is supported by the evidence on file. He commented that, as a junior officer, there were a lot of things within Council that he was not aware of.

- 4.3.62 Mr Doolan also challenged my comment that his failure to take some initiative in this regard was perhaps an indication that he was not prepared to challenge the status quo - in particular, the pressure being exerted by the then Shire President, Councillor Dunne (who, like Councillor Doolan had gone to the September 1987 election on the United Shires Group ticket) to avoid any actions which could lead to delays in having the LEP gazetted and Council's planning powers re-instated. He regarded this as a flimsy case against him which could not stand up to scrutiny. He argued that it was an attempt to weave him into the issue and I might just as well have attempted to weave the Engineer (or anyone else) into it. He said that if my concern was to follow through the history of how the 5(a) zoning (with the acquisition obligation) got into the LEP, then he did not "come into the game" - in the sense that he had no influence on the decision-making. Nevertheless, he did acknowledge that there was pressure to get the LEP gazetted.
- 4.3.63 In his evidence, Councillor Simmons said that, having received assurances from the Shire President that the concerns of Councillor Boniface about the Roundhouse could be addressed through amendments to the LEP after gazettal, he was concerned about what might happen if the site was not rezoned. He stated that at one stage, after the LEP was gazetted, he spoke with Councillor Dunne in the presence of Councillor Doolan and asked if it was true that Council would have to acquire the Roundhouse site. He gave evidence that Councillor Doolan had said that Council would not have to acquire the site. He said that the matter was not discussed in any detail but he was certainly left with the strong impression that there was no obligation on the Council regarding acquisition. Although he did not understand the situation he implied that he accepted the advice coming from Councillor Doolan because of his experience as a Planner.
- 4.3.64 This evidence may provide a clue to Councillor Doolan's failure to contribute constructively to the aborted debate initiated by Councillor Boniface, assuming that he was aware of the concerns expressed by Councillor Boniface - which he denies. If it was indeed his view that Council would not have to acquire the site, then the concerns of Councillor Boniface would have been, as far as he was concerned, simply hot air.
- 4.3.65 I have difficulty in reaching a concluded view on where Mr Doolan should be placed in the spectrum of those contributing to the zoning and associated acquisition obligation being incorporated into the LEP. As a former employee with some direct involvement in the Roundhouse issue, and with access to background information and Planning experience not available to other elected members post-September 1987, and in spite of his protests that he did not know what was going on, it is my opinion that he was in a position to be able to influence the direction of decision-making in relation to the matter. As a qualified Planner, he should have known that the zoning attached to the Roundhouse, together with the

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mandatory acquisition provision, imposed certain obligations on the Council.

4.3.66 I have difficulty accepting that, in his position as a Councillor, Mr Doolan was totally unaware of the issues raised by Councillor Boniface, even if they were raised only informally. They were well known to other Councillors and to the then Shire Clerk/General Manager. While I respect and (indeed applaud) his position that, as a Councillor, he was concerned not to interfere in the work of Council's Planning staff, I believe, nevertheless, that he had opportunities to clarify the situation, which he failed to take advantage of. As I have noted (in para. 4.3.63) this may well have been because he had a particular view that any acquisition obligation, if it were to be created through gazettal of the LEP, could somehow be avoided. I can only conclude that, in spite of his Planning experience and his involvement with the preparation of the LEP (which, I note was specifically mentioned by Mr Ingham of Planning Workshop, in his evidence before Bannon J in the recent hearings on the compensation case in the Land and Environment Court) Mr Doolan did not really appreciate the significance of this matter.

(NOTE: Mr Doolan objected vigorously to many of the statements relating to him as they appeared in an amended version of the provisional draft report. In his response to that draft, he requested that, if I chose not to make amendments indicated in his submission, his response be appended to the report, in the interests of natural justice and balanced reporting. Since I have not acceded in any significant degree to Mr Doolan's requests regarding amendments, I have appended his submission to this report - Appendix 2.)

#### **Those dependent on others for information**

##### Mr Waugh

4.3.67 As "the Council" in respect of all matters relating to Council's responsibilities under the EPA Act, Mr Waugh played a major role in overseeing the process of preparing the Shire-wide LEP. His was very much a part-time position however; he was in attendance on an average of 2 days each fortnight and estimated that his job as Byron Shire Council's Planning Administrator constituted about 10% of his total work-load. He relied heavily therefore on the information provided to him by Planning staff and in particular, Mr Pickles. All planning reports, planning agendas and planning business papers were provided to Council members for information and comment. Mr Waugh reported that Council made no representations or comment to him on the matter of the Roundhouse. In relation to the LEP he saw his role as being essentially one of review and deliberately chose not to become involved in the details of its preparation.

4.3.68 In his evidence, Mr Waugh stated that his understanding of the situation with the Roundhouse was that it was, in effect, a community facility and was either being used for community purposes or zoned for such purposes. He considered that what the LEP was doing in applying a 5(a) zoning to the site was formalising an undertaking that was contained in the Deed of Agreement. When asked about his

understanding as to whether the Roundhouse would be acquired through dedication or purchase he said he did not think it would come to that because of the uncertainty about whether the Ocean Shores Estate would ever reach stage 3. He supported the inclusion of an acquisition clause, in accordance with the provisions of s.27 of the EPA Act, which would apply to the Roundhouse but had the impression that acquisition would be a long-term matter and the question of financial liability would not be immediate. He also had the impression that it was essentially the Roundhouse building at issue and not an area of some 3.5 acres of prime real estate. Nevertheless he had visited the site with Mr Pickles and Mr Pickles' report to the Special Meeting of Council on 16 July 1987 did note that the site was 1.38 hectares and that the owners had requested a rezoning to Residential 2(a). He agreed that, in hindsight, he probably should have asked whether the same community benefit would not have been achieved on another site which was less valuable than the Roundhouse site.

4.3.69 Clearly Mr Waugh's misconceptions regarding the Roundhouse resulted in his decision to adopt the recommended 5(a) zoning. In fact he had no hesitation in doing so because the situation appeared to him to be straight-forward: he was simply carrying over existing provisions into the new LEP. Because he appears not to have been adequately briefed by Council's Planning staff on the complexities of the history of the Roundhouse site, the decision on its zoning was, for him, not an issue. As far as he was concerned the financial implications were a matter for the Council, which he understood was obtaining a valuation. They were also not an issue because of his view that any acquisition would not be likely to occur for some time.

4.3.70 In spite of being the primary decision-maker on matters relating to the LEP, Mr Waugh was not in a position to ask the sorts of questions which may have led him to doubt the appropriateness of the 5(a) zoning placed on this site. He had not been exposed to any of the local controversy about the site and had no opportunity or particular incentive to become familiar with the information on Council files about its history (which, in any case, on the basis of other comments about the inadequacy of Council's files, may have been of only limited value). Although as the decision-maker he must accept some responsibility for the outcome, it was, in my view, the duty of Council Officers to provide him with more comprehensive advice than he was given. However, it must also be acknowledged that, while this would have brought further dimensions to the decision-making, it may have made no difference to the final outcome.

#### Mr Rawson

4.3.71 Mr Rawson's involvement in matters concerning the Roundhouse were marginal but contributed nonetheless to the outcome. He was not aware of the true status of the Roundhouse vis-a-vis the Bond Corporation, and the links he made between the Roundhouse and the bonding issue appear to me to have been completely misguided. His position on this issue and the forcefulness with which, as perceived by Mr Pickles, he insisted on Council doing nothing which might hinder

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the negotiations on bonding, resulted in Mr Pickles backing down on recommending anything other than a 5(a) zoning on the Roundhouse site.

4.3.72 Although clearly not having any direct involvement in the circumstances which gave rise to the acquisition obligation being written into the LEP, as a key decision-maker in Council at the time, Mr Rawson did have some indirect influence on the process. Had he been properly advised on this issue, he might have been in a better position to assess the potential it had to have similar detrimental impacts on the organisation to that of the bonding issue (see para 4.3.22). Nevertheless, it must be acknowledged that Mr Rawson's term with the Council was quite short and had a particular focus. The possible future acquisition of the Roundhouse was an issue which was marginal to his primary concerns. The major responsibilities regarding future acquisition arose subsequently, following the report of the Simpson Inquiry.

#### Commissioner Simpson

4.3.73 Commissioner Simpson was appointed to undertake a public inquiry, under the provisions of s.68 of the EPA Act, into submissions on the Draft LEP. Like Mr Waugh, Commissioner Simpson's decision on the zoning of the Roundhouse site, following the Inquiry hearings in December 1986, was very much determined by the information with which he was provided by Council's Planning staff. He did not have access to documentation which might have enabled him to appreciate the complex history of the site. In fact, quite the contrary. His comment that:

*"... [h]aving regard to the long time use and zoning of the site as 'Special Use' ..."*

appears to indicate that the information available to him led him to the mistaken belief that the Roundhouse had a history of community use. Commissioner Simpson advised that he could not recall the context of his statement but commented that, as a matter of common practice, commissioners do not seek to elaborate on or interpret statements made in their reports once they have been issued. He added that the term "long time use" might just as well have referred to the use of the site for "commercial" uses as for "community" uses. Indeed his recommendation on the zoning is not unequivocal; it simply suggests that the "Special Use" zoning be retained but does not include any reference to "community purposes". Nevertheless a "community purposes" zoning is clearly implied from the context of the statement and in the light of Council's submission to the hearing.

4.3.74 As with Mr Waugh, it would be unreasonable to expect Commissioner Simpson to be fully aware of the detailed history of every site dealt with in the Inquiry. He likewise must rely on the information supplied to him. The "hidden agendas" of the "game plan" to review the Roundhouse zoning once the LEP was gazetted (see para 4.3.19), and the pressures arising from the negotiations with the Bond Corporation regarding the bonding of works in Ocean Shores generally, although



now known to have had a strong influence on the Council's submission, were clearly not matters to which the Commissioner was privy. Moreover, it was the evidence of Messrs Mangleson and Cochrane that, in their oral submission to the Commissioner, they stated that they would not object to the 5(a) zoning if that was what Council insisted on, provided that the property was acquired immediately. They have said that Commissioner Simpson accepted both Council's submission that it would acquire the property forthwith and their concurrence with that undertaking. Commissioner Simpson was unable to recall whether such assurances had been given before him, but it is not denied by Mr Pickles.

- 4.3.75 Through his recommendation to the Council on the zoning for the Roundhouse site and the status appropriately accorded that recommendation, there is no doubt that Commissioner Simpson contributed significantly to the ultimate inclusion of a 5(a) zoning on the site in the LEP. There is, of course, no suggestion that the Commissioner acted in any way other than with the utmost integrity in this matter. On the basis of the information supplied to him, a 5(a) zoning was, in his professional opinion, appropriate for the site and apparently acceptable to the owners, with the proviso that acquisition would proceed without delay. The Commissioner's contribution however is just one link, albeit an important one, in the causative chain of events which have led to Council's current situation.

### **Those who were blinkered**

#### Former Councillor Dunne and other Councillors

- 4.3.76 There was no evidence that Mr Dunne (then Councillor Dunne) had any involvement in this matter before September 1987 but, having been elected Shire President, was a key player subsequently. He reported that his priorities when elected to Council were to work towards ensuring that proper financial planning was being implemented and getting Council's planning powers restored so that it could operate with greater autonomy. Central to this goal was the gazettal of the LEP, any action which might delay gazettal was to be avoided. He said that this was not only his personal priority but was backed by a resolution of Council. He was concerned that the momentum of the process initiated by Mr Rawson not be allowed to stall. From his point of view the issue of the Roundhouse was a minor distraction by comparison with the other issues which were facing the Council - including the issue of bonding at Ocean Shores.
- 4.3.77 The impression which other Councillors got about possible problems or anomalies or "mistakes" which were identified with the draft LEP, both from staff and Councillor Dunne, was that they could be "fixed" after the LEP was gazetted, that it did not have to be perfect at first cut, but could be amended at a later date (as, indeed, it was). Most of the Councillors had also had little experience with making decisions on planning matters and were not really in a position to make judgments on such matters without the benefit of professional advice and guidance. Indeed, at this point, not having Planning powers, they were unable to make Planning decisions. However, the financial implications of this particular issue should have

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been of concern to them and ought to have been the subject of proper legal advice. No attempt was made either by the then Shire President (or the then Shire Clerk/General Manager) to obtain such advice.

- 4.3.78 Mr Dunne gave evidence that he was aware of the concerns of some of the Councillors, including those expressed by Councillor Boniface (see paras 4.3.33 - 4.3.34), and that he took a positive step to allay those concerns by arranging a meeting with Mr Waugh at which all Councillors could discuss issues relating to the LEP. However, he was particular that Councillors' contact with Mr Waugh was such that they were not seen to be influencing the planning process. At the same time, he admitted that he was concerned that if the Roundhouse was "re-opened" then the whole of the LEP would be re-opened. He said there were clear signs that the then government would lose the next election (which, it was suspected, was not far off) and elements of the Opposition had already been critical of some of the provisions in the LEP - which they considered to be "too green". In his mind there was therefore a risk that if the LEP was not finalised quickly it would be subject to radical re-vamping with a change in Government. Mr Dunne said that he was so concerned about this that he rang the then Minister for Environment and Planning, and asked him to "sign the bloody thing". It was, in fact, signed by the Minister the day before the 1987 State election which did, as predicted, result in a change of Government.
- 4.3.79 One of the other major issues to which Councillor Dunne was directing his attention and energy at the time was following up on the bonding of works in Ocean Shores; he negotiated an agreement with representatives of Bond Corporation to ensure that bond monies due from the company were paid, and flood studies undertaken. The Roundhouse had no relevance to these matters, as far as he was concerned, at that time.
- 4.3.80 One explanation, then, as to why Councillor Boniface's expressions of concern did not lead the Councillors generally to request a reconsideration of the LEP provisions relating to the Roundhouse, was that they had the clear message that the finalisation of the LEP could not be held up and, in any case, if changes were needed, they could be made after gazettal. There is a touch of both the naive conformist and the *mañana* syndrome in this attitude of the Councillors.
- 4.3.81 A further explanation was the perceived relationship between Councillor Boniface and Mr Mangleson. Both were involved with the Ocean Shores Progress Association, and Mr Mangleson acted as Councillor Boniface's "campaign manager" in his campaign to be elected to Council as a representative for Ocean Shores. Mr Mangleson was nominated to this role by representatives of three local Progress Associations who supported Mr Boniface's offer to stand as a Council candidate for Ocean Shores. It was therefore possible to conclude, given the problems Mr Mangleson had experienced in his relationships with Council on matters quite apart from the Roundhouse, that Councillor Boniface was simply being used by Mr Mangleson to promote his cause. I would hasten to add, however, that there is no evidence to suggest that such a conclusion was in any

way justified. Yet another influence which I believe was operating to blinker the decision-making of some at least of the Councillors, was the myths about the Roundhouse which were prevalent in the community, and, in particular, the myth that it would be dedicated to Council as a community facility.

- 4.3.82 The prejudices of the Councillors, both in relation to the Roundhouse owners and their own beliefs about the community's legitimate expectations in relation to the site, together with the assurances they had been given, blinded them, I believe, to the reality of the potential burden which Council was about to lay upon itself.
- 4.3.83 Although there is no evidence that Mr Dunne (or any of the Councillors) deliberately sought at that stage to disadvantage the former owners of the Roundhouse site by preventing consideration of amendments to the draft LEP, as the leader of the Council with strong support from a group of Councillors, he was in a powerful position to influence the Council's decisions. His preoccupation with getting the LEP gazetted without delay resulted in his failure to respond constructively to the representations of Councillor Boniface. It was, I believe, incumbent on him to obtain advice on the options available to the Council, and, in particular, on whether the compromise of a deferral of the zoning on the Roundhouse site was practicable. It is my understanding that a deferral would not have resulted in any significant delay in the gazettal of the plan, and could have been achieved. The fact that it was not seriously considered, creates a perception that there may have been other motivations for retaining the zoning - in spite of the consequences.
- 4.3.84 The approach taken, the "game plan" as it was described by Mr Pickles, to leave the zoning and associated acquisition provision in the LEP until after gazettal and "fix it up" subsequently, was a risky option to take without legal advice, and without any clear idea about what "fixing it up" might mean. The two obvious options were problematic. The option of rezoning did not fit with Councillor Dunne's firm view that "spot rezonings", especially in Ocean Shores, were unacceptable. The option of an amendment to the acquisition clause required consideration as to how this might be achieved. Moreover, no consideration was given to the possibility that, under the provisions of s.34(4) of the EPA Act, the right of the then owners to require acquisition might accrue at the time of gazettal rather than at the time of lodgment of a Notice to Acquire. The concerns expressed by Councillor Boniface opened the way for the then Shire President to seek expert advice on these matters and he failed to take advantage of that opportunity. To that extent, he must share responsibility for the zoning and the acquisition provision being included in the LEP.

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