PART 3

4.4 COUNCIL ATTEMPTS TO REMOVE ITS OBLIGATION TO ACQUIRE THE SITE

4.4.1 Despite the evidence from Mr Cochrane and Mr Mangleson that assurances were given during the Simpson Inquiry hearings that Council would move speedily to acquire the Roundhouse site (see para 4.3.24) - evidence which Mr Pickles does not refute - Council, for a number of reasons to be explored in this report, embarked on a series of strategies aimed at avoiding, by whatever means it considered might be available to it, having to pay to acquire this site. These strategies, which were apparently conceived in an ad hoc fashion, were set out in the Shire Clerk/General Manager's report to Council's meeting of 14 August 1990, following the decision of Cripps CJ in the Land and Environment Court. They were identified as:

1. to remove Council's obligation to acquire the site by an amending LEP (Amendment No. 6);

2. to rezone the site as proposed in another amendment to the LEP - Amendment No. 8;

3. to investigate the history of the matter to find evidence of a dedication requirement under the Deed of Agreement; and

4. to defend the appeal in the Land and Environment Court with the defence being based primarily on the validity of the acquisition clause in the LEP.

The Shire Clerk/General Manager noted that, "despite early knowledge that the Council was obliged to acquire the site following receipt of a valid notice to acquire", these strategies were pursued by Council on the recommendation of himself and other officers

> *"... to relieve the Council of the obligation to acquire and these strategies were pursued because **there was no will to acquire the site.**"* (Emphasis added)

Each of these strategies is dealt with in some detail in the following sections.

Amendment No. 6

4.4.2 A major focus of this investigation was to determine whether Council improperly used its planning powers in an attempt to relieve itself of the obligation to acquire the Roundhouse site. This was alleged by Mr Mangleson in his letter to the Minister in November 1989. Essentially the allegation was that the true intent of a draft plan purporting to address deficiencies in the drafting of the LEP in

relation to the Cape Byron Academy site was in fact a vehicle which, while achieving this stated purpose, would also achieve an ulterior purpose i.e. the removal of any obligation to acquire the Roundhouse site. Despite Mr Pullinger's having described the purpose of Amendment No. 6 as achieving this result in his report to Council referred to above, this has been vehemently denied by him in public statements and, on oath, in evidence to this investigation.

4.4.3 The allegation that Council, through its drafting of Amendment No. 6, attempted to deceive the Minister for Planning was one of several allegations on which the Department of Local Government sought comments from the Council and which it referred to Peter McClellan Q.C. Mr McClellan's report on the matter to Council in March 1991 noted:

> *"In so far as it is suggested that the Council may have attempted to deceive the Minister for Local Government and Minister for Planning, my enquiries do not reveal anything which would support such an allegation."*

4.4.4 The processing of Amendment No. 6 had previously been reviewed by Messrs Kanaley and Murray and the documentation arising from that review was referred by Council to Mr McClellan. They had concluded that

> *"... in reading the more complete documentation of the draft plan, serious concerns arose concerning the method of processing the plan. ...*
>
> *A close reading of the attached chronology and documentation must raise some serious questions."*

The Shire President subsequently obtained comments from both Mr Pullinger and Mr Ryan regarding this matter. Mr Pullinger stated that his comment about Amendment No. 6 in his report to Council of 14 August was "incorrectly worded" and Mr Ryan argued that the report prepared by Messrs Kanaley and Murray contained "several major errors of fact, errors of law and errors of interpretation" which he purported to address in a memo to the Shire Clerk/General Manager dated 11 December 1990. All this documentation was provided in response to the Department's request for the Council's comment on the allegations about Amendment No. 6. and was the basis on which Mr McClellan made his finding.

4.4.5 I was not convinced by the arguments presented by Mr Ryan to support his contention that the concerns expressed by Messrs Kanaley and Murray were totally unwarranted, and, in spite of Mr McClellan's finding, it was my view that the evidence did indeed raise a number of questions which demanded further investigation. The evidence relating to this matter is discussed in some detail in this section of the report.

Relevant Facts

Background

4.4.6 As earlier mentioned, the original impetus for this draft plan was born of a concern that the Council, under the drafting of Clause 43 of the LEP, could be required to acquire land on which the Cape Byron International Academy was to be built and which was zoned 5(a) Special Uses - Education. The developer was experiencing financial difficulties and the Council was concerned that a Notice to Acquire would be served on it, pursuant to the provisions of Clause 43. That clause provided as follows:

> *"(1) This clause applies to **land within Zone No. 5(a)**, 6(a) or 9(a).*
>
> *(2) **The Owner of any land to which this clause applies** within a zone reserved for a use specified in Column 1 of the Table to this subclause **may**, by notice in writing, **require the public authority** specified in Column 2 of the Table opposite that use **to acquire that land.***

Column 1	*Column 2*
Open Space	*Council*
Special Uses (Schools)	*Department of Education*
Special Uses (Other)	***Council***
Arterial Roads	*Commissioner for Main Roads*
Local Road Widening	*Council*
Land zoned 7(f1) listed in Schedule 9	*Department of Environment and Planning*

> *(3) Upon receipt of a notice referred to in subclause (2), the public authority concerned shall, subject to subclauses (4) and (5), acquire that land.*
>
> *(4) The council shall not be required to acquire land, the subject of a notice referred to in subclause (2), where the land is required to be dedicated to council as a condition of development consent or subdivision approval.*
>
> *(5) ...."* (Emphasis added)

The category "Special Uses (Other)" is taken to mean all special uses not otherwise specified. The table implies that Council is the acquisition authority for all reserved special uses zoned land, other than that explicitly identified as

"Special Uses (Schools)". The category catches both the Roundhouse and the Academy site as well as some other land, and was the category which the Council attempted to delete from the LEP.

Preparation and Exhibition of the Draft Plan

4.4.7 On 15 November 1988, the Planning Director submitted a report to the Council covering various aspects of the development of the Academy site. One of the recommendations of that report, adopted by the Council, was that the Council resolve to prepare a plan to:

> *"... remove any obligation on Council to acquire land zoned 5(a) special uses other than those lands reserved for a public use."* (Emphasis added)

4.4.8 The draft plan was forwarded to the Department of Planning (DOP) on 24 January 1989. While stating as one of its aims and objectives the removal of the obligation on Council to acquire certain land zoned for Special Purposes [Clause 2(c)], it also indicated that the plan applied to all land covered by the Byron Shire LEP 1988 [Clause 3], and would amend the LEP:

> *"by omitting from the Table to Clause 43(2) the words "Special Uses (Other)" in Column 1 and the word 'Council' where it appears opposite in Column 2."* [Clause 5(b)]

4.4.9 In Council's letter to the DOP accompanying the draft plan, 5(a) land owned by other public authorities and the Academy site were listed in some particularity, but the Roundhouse site was not mentioned, nor, for that matter, was another parcel of 5(a) land known as "Roger Buck's drain". The letter notes:

> *"... the amendment to Clause 43 consists of deleting a reference to Council acquiring Special Uses Land....*
>
> *The inconsistency with Clause 83 [of the North Coast Regional Environmental Plan] occurs with the amendment of Clause 43 which effectively removes the requirement of Council to be obliged to acquire land zoned Special Uses and in particular land zoned Special Uses Education at Broken Head. This has proved necessary as it is quite clear that this clause is ambiguous and that Council had no intention originally to be the acquisition authority for land either currently owned by Council, land owned by other public authorities such as the State Rail Authority, Public Works Department or privately owned educational establishments such as the Cape Byron International Academy. Therefore this Table has been amended to delete the reference to Council being the acquisition authority for Special uses (Other)."* (Emphasis added)

Maps accompanying the draft plan showed affected land as the Academy site and another site at Tyagarah (both of which involved changes to zone boundaries), but

not the Roundhouse or any other 5(a) land.

4.4.10 The plan, as drafted by Mr Ryan, was placed on public exhibition. Mr Mangleson became aware that the draft plan was on exhibition when it was advertised in the local press on or about 22 March 1989. The advertisement in the North Coast Advocate on 22 March advised that Draft LEP Amendment No. 6 applied to certain land at Broken Head and at Tyagarah and that it would have the effect of rezoning those parcels of land and amending "the provisions of Clause 43(2)" of the 1988 LEP, but not specifying what the provisions were nor in what way the Council was proposing to change them. Mr Mangleson was concerned that it might have implications for the Roundhouse site and told me that he sought advice from counter staff of Council who informed him that the Roundhouse would not be affected by the plan. Consequently neither he nor the other owners lodged submissions objecting to the plan at that time.

Council Action Subsequent to Receipt of the Notice to Acquire

4.4.11 A Notice to Acquire, signed by all three owners was submitted to Council on 12 May 1989. Following receipt of this valid notice, Mr Pullinger wrote to Sly and Weigall on 23 May 1989, enclosing a copy of the notice, advising of the Council's intention to re-zone the site, and seeking advice on the effect of the Council's proposed LEP Amendment No. 6. The concluding paragraph states:

> *"Council's Planning Director is of the view that if this amendment is gazetted, it may also remove Council's obligation to acquire the Roundhouse site. Could you please advise me on this particular matter."*

4.4.12 By letter dated 7 June 1989, and received by Council on 19 June, Sly and Weigall replied, in part:

> *"Since the right of the owners of the site to require Council to acquire it accrued and Council's obligation to do so was incurred under the Byron Local Environmental Plan before the proposed amendment comes into effect* ***the amendment will not affect that right or obligation."*** (Emphasis added)

4.4.13 Pursuant to s.68 of the EPA Act, the Draft LEP was sent by Council to the DOP for approval on 26 June 1989, stating that there were no inconsistencies with the North Coast REP and no exclusions.

4.4.14 On 14 August 1989 Parliamentary Counsel (PC) wrote to the DOP advising:

> *"**If the only land within Zone No.5 (a)** under Byron Local Environmental Plan 1988 **is land which is specified for "Schools", the amendment proposed by clause 5 (b) of the draft plan may stand, but otherwise it should be omitted.** If any land in the Shire of Byron is currently reserved for public purposes other than "schools" (and it is presumed there is such land), then (in accordance with section 27 of the Act) the plan ought to*

contain provision for the acquisition of that land by a public authority." (Emphasis added)

4.4.15 On receipt of this advice, the DOP wrote to Council on 18 August 1989, regarding a number of technical concerns and asking Council to address the issue raised in the PC's letter. The Council's Planning Manager, Mr Ryan, responded on 14 September noting that it was **important to Council that Clause 5(b) be retained, otherwise,** he re-iterated, **it would be responsible not only for the acquisition of the Academy site but for SRA land and various other 5(a) land owned by other Government Departments.** His letter stated that there was also some privately owned 5(a) land (Roger Buck's drain) but that this was proposed to be zoned residential through Amendment No. 8. Mr Ryan went on to say that this (i.e. the deletion of the acquisition provision) was a matter of concern to Council and if it could not be rectified as proposed by Amendment No. 6 then "an alternative solution should be proposed". He also noted:

"There is no other land within the Shire area that Council ***wishes*** *to acquire that is currently zoned 5(a) ..."* (Emphasis added)

4.4.16 A file note on the DOP's file, LEP 1988 - Amendment No. 6, from Mr Chris King to the DOP's Legal Officer, for the information of Parliamentary Counsel, and dated 20 September 1989, includes the statement:

"It is the Grafton Offices understanding that all other land zoned 5(a) is council owned or is proposed for rezoning."

According to Mr King, this file note was written following a telephone conversation with Mr Ryan.

The Department of Planning Alerted

4.4.17 Mr Mangleson subsequently became aware of the possibility that the amendment could affect the Roundhouse site and wrote, on 23 November 1989, to the Minister for Planning, suggesting that if the plan were to be made in its present form it would be *ultra vires.* This letter was received at the DOP by fax on 23 November 1989. On 29 November 1989, the Acting Manager, Northern Region wrote a memo to the Director of the Department saying, in reference to the Council's drafting of Clause 43(b):

"Parliamentary Counsel has amended the draft plan by deleting this matter as some sites zoned 5 (a) remain in private ownership which may be required to be purchased by Council ... ***Should the plan have proceeded in its original form Mr. Mangleson would not be able to require Council to acquire his land*** *... Mr. Mangleson's concerns are valid and have already been raised by both the Grafton Office and Parliamentary Counsel with council in relation to Byron L.E.P. 1988 (Amendment No.6). Council has been advised that it is unlikely the Minister can make a plan which removes*

a requirement to purchase 5 (a) zoned land on demand unless Council can indicate all such zoned land is in public ownership." (Emphasis added)

The Minister subsequently approved the plan, limiting its effect to the Cape Byron Academy site. It was gazetted on 20 April 1990.

Aftermath

4.4.18 Mr Mangleson, in May 1991, made a formal request under the Freedom of Information (FOI) Act seeking from the Council the Minister's advice on the reasons for altering the plan. The Council replied that the Minister gave it no advice regarding the reasons for his decision. However, on 11 April 1990 the Secretary of the DOP had advised the Council in the following terms:

> *"The Minister decided to alter the plan as it is evident there are a number of sites in the Shire zoned Special Uses 5 (a) which would be affected by the proposed amendment. The Parliamentary Counsel advised that section 27 of the Act requires a plan to contain provisions dealing with the acquisition of that land by a public authority, and has approved an amendment of Clause 5 (b) so that it only relates to Special Uses 5 (a) Private Education zones."*

4.4.19 Consideration was given during the investigation to referring this matter to the New South Wales Ombudsman, pursuant to s.52 of the Freedom of Information Act, but in view of the fact that it occurred in 1990, I decided there would be little utility in such a referral.

Findings

The Drafting and Exhibition of the Plan

4.4.20 The Council's Planning Manager, Mr Ryan, said in evidence that the recommendation adopted by the Council at its meeting on 15 November 1988, was drafted specifically to exclude the effect of the proposed amendment on public use land, including the Roundhouse, i.e. it was intended to address the problem of the Academy site alone. The position he took was that this amendment never had anything to do with the Roundhouse and it was for this reason that the Roundhouse is not mentioned in any of the documentation relating to it.

4.4.21 It is obvious from Mr Ryan's evidence and from an objective reading of the resolution itself, that the drafting of several of the clauses in the draft LEP, and in particular Clause 5(b) (see para 4.4.8), goes far beyond what was contemplated in Council's resolution. The effect was to remove the obligation to acquire all land zoned Special Uses (Other) for which Council was the nominated acquisition authority in the LEP, whereas it had been Council's original intention to limit it to the Academy site only. Despite the circumscription in Council's original

resolution, the intention expressed in the Council's letter (prepared by Mr Ryan) to the DOP to remove Council's obligation with respect to other public use lands appears to have arisen later. There is no evidence of any resolutions from Council authorising this action - certainly no resolution authorising the drafting of the Table to delete Council's obligations to acquire all Special Uses land, whether reserved for a public purpose or not. It should also be noted that, at the time of the notification to the DOP (24 January 1989), there was no rezoning proposal for the Roundhouse site on the books and there was no Notice to Acquire which the Council accepted as valid. There is no doubt, therefore that the amendment would have caught the Roundhouse.

4.4.22 Mr Ryan has since argued, in his response to the provisional draft report, that

> *"The plan was* ***my interpretation*** *of Council's resolution to carry out to the letter the requirements of the Council. I have made this quite clear in subsequent correspondence to the Department [of Planning] and I believe the plan was gazetted in accordance with Council's wishes."* (Emphasis added)

The evidence is clear that the plan was gazetted in accordance with Council's resolution of 15 November 1988, in spite of the way it was originally drafted - but only following intervention by Parliamentary Counsel and the representations made by Mr Mangleson. The draft, however, was patently not in accordance with the Council resolution but was the result of Mr Ryan's actions, for which he had no proper authorisation from the Council.

4.4.23 The advertisement of the Draft LEP was, in my view, quite misleading in that it gave no indication of the import of the amendment to Clause 43(2), and therefore provided no signal to persons who may have an interest in its effect. They were thus effectively denied their right to object to the proposed provisions. While it is acknowledged that the EPA Act does not specify what information must be included in such public notices, in combination with the other circumstances of this matter, there are clearly grounds for suspecting that this might have been deliberately framed to disguise any possible reference to the Roundhouse.

4.4.24 The maps accompanying the draft plan were likewise misleading; in my view it would have been reasonable (although I am aware there is no statutory requirement for it) for the exhibition of the draft LEP to have included a map of the whole shire, showing all the land zoned 5(a) so that the actual import of the draft plan could be assessed, and, in particular so that it would be clear both to the public and to the DOP exactly what land would be covered by the deletion of the acquisition clause. It was argued by Mr Ryan that these other lands were not included because they were not intended to be covered by the amendment. If there was no intention to mislead then, at the very least, the drafting was incompetent. If there was genuinely no intention to have this amendment cover the Roundhouse site, then it is difficult to understand how the wording of the draft plan could have been derived. If the drafting were indeed innocent, it appears to

have been a gross oversight on the part of both Mr Ryan and Dr Stanley not to have taken the trouble to examine the zoning map, to identify all the 5(a) land and thus properly assess the impact of the proposed amendment.

4.4.25 In relation to the Planning Manager's comments about the possibility that Council may be required to acquire land owned by public authorities, it should be noted that s.27 of the EPA Act specifically provides that acquisition provisions are to be incorporated into LEPs:

> *"... unless the land is owned by a public authority and is held by that public authority for that purpose."*

His stated concern about State Rail Authority and Public Works land thus appears to be misguided, and perhaps even mischievous. If this were indeed a genuine concern, it would have been appropriate for him or the Planning Director to have sought legal advice on the interpretation of this provision or, if necessary, on how the LEP might be amended to overcome the perceived difficulty.

Information Withheld from the Department of Planning

4.4.26 I understand that Mr Ryan was made aware of the advice from Sly and Weigall, received on 19 June 1989, and, at that point it should have been clear that the amendment, as drafted, would not remove the obligation on Council to acquire the Roundhouse. However, Mr Ryan argues that it was never intended to cover the Roundhouse and this advice was, in effect, an "all clear" signal to proceed with the amendment as he was, with the assurance that the Roundhouse was otherwise covered and therefore quarantined from the effects of Amendment No. 6. On the other hand, there were those in Council who were not convinced that the obligation had arisen (see below, paras 4.4.30 - 4.4.31) and the resistance of the Council to acquiring the site persisted until well after the determination by Justice Cripps in July 1990.

4.4.27 In any case, the amendment did proceed without reference to the actual circumstances relating to the Roundhouse or to the fact that a proposal to re-zone the site was also "on the books" at least as far as Council was concerned; it had resolved to rezone in February 1989 and again in May 1989, its second resolution being at the same meeting as its resolution to obtain a valuation of the site, as a first step in the acquisition process.

4.4.28 Mr Ryan's statement, in his letter to the DOP of 26 June 1989 regarding inconsistencies with the North Coast REP, was clearly incorrect as the plan was inconsistent with clause 83(g) of the REP, relating to mandatory acquisition provisions. I understand that a drainage reserve (Roger Buck's drain) was also affected by a direction pursuant to s.117 of the EPA Act and this was not alluded to. This advice to the Department was also contrary to previous advice, given in Mr Ryan's letter of 24 January 1989 to the Department regarding inconsistencies with the North Coast REP.

4.4.29 Given the situation with the Roundhouse, the statement in Mr Ryan's letter to the DOP on 14 September 1989 that there was no other land which the Council **wished** to acquire, was an accurate statement and a disingenuous way of expressing the Council's intentions in relation to the Roundhouse site - it certainly did not wish to acquire the site. However the fact is that it was zoned 5(a), Council was the acquisition authority and it had received from the owners a valid Notice to Acquire. The statement is, in my view, an exercise in verbal gymnastics and was clearly intended to deceive. Specific mention is made of Roger Buck's land zoned 5(a) which was being rezoned by draft Amendment No. 8, the same instrument which contained the proposal to rezone the Roundhouse to 2(a) but which was overturned by Council's decision of just two days previously - in response to the "great surprise" report (see below, para. 4.4.92).

4.4.30 Mr Ryan's comment in this regard, on the provisional draft report, is intriguing. He stated:

> *"This is a statement of truth. Council was in receipt of a notice to acquire for the Roundhouse site, therefore Council was acquiring it. ... the statement is a clear statement of truth and cannot be interpreted any other way."* (Emphasis added)

While this would have been the situation in ideal circumstances, the reality was not so simple. It was by no means certain at that time that the Council was acquiring the site. There was an extreme reluctance to accept that a valid Notice to Acquire automatically triggered the acquisition process. Mr Pullinger has acknowledged that it was not until he was preparing his report to Council's meeting of 22 August 1989 that it registered with him that rezoning the site would not automatically relieve Council of the obligation. A further indication of the unwillingness of Council's senior staff to acknowledge that the Council in fact had an obligation to acquire and their attempts to find ways of avoiding acquisition, is found in Dr Stanley's hand-written letter to Mr O'Rourke, of 28 August 1989, in which he seeks his advice on a series of questions. She asks:

> *"5. If a local environmental plan is made which confers an obligation to acquire land in error, what steps must Council take to avert any obligation to acquire?"*

4.4.31 Again, only two days prior to Mr Ryan's letter to the DOP on 14 September 1989, Council had endorsed the action of the Planning Director, set out in the "great surprise report", to instruct its solicitors to obtain an opinion as to **whether** Council was liable to purchase the site. These incidents are clear evidence of the reluctance of Council's senior staff and Council itself to concede that it did indeed have an obligation to acquire. The clarity with which Mr Ryan, at says he perceived the situation was by no means shared by other decision-makers within the Council at the time. In the face of this confusion about the Council's understanding of its obligations and its intentions in relation to the Roundhouse, there is no justification, in my view, for withholding from the DOP any

information regarding the status of the site.

4.4.32 For the record, there is no evidence on either Council's or its solicitors' files, and Mr O'Rourke had no recollection, that the advice referred to in the "great surprise report" was sought. However, Mr O'Rourke stated that he had repeatedly advised that Council was indeed liable to purchase the site and that any expectation of relief through the Deed of Agreement was ill-founded as, in his view, the Deed was unenforceable.

The Effect of Intervention

4.4.33 In defence of Council and of his own actions, Mr Ryan commented, in his response to the provisional draft report, that the advice from Parliamentary Counsel (PC) was contrary to that received by Council from its solicitors, Sly and Weigall, and Council was not aware of the contrary view. The advice from the PC suggested that, if the plan had proceeded in its original form, Mr Mangleson would not have been able to require Council to acquire his land, The advice from Sly and Weigall was that, regardless of the content of Amendment No. 6, the obligation had arisen and Council was required to acquire the site. It was Mr Ryan's opinion that Council acted appropriately, in accordance with the legal advice given to it and which it had no reason to believe was incorrect. In fact it may well be that the PC's advice was given in ignorance of the fact that a valid Notice to Acquire had been served; there is no indication in the documents that either the Department of Planning or the PC was aware that a valid Notice to Acquire had been served. Without such a notice, there would certainly be grave doubts about the legality of the proposed amendment and the concerns of the PC would have been warranted.

4.4.34 If the PC did give his advice not knowing that a Notice to Acquire had been served, this must be seen as a further indictment of the Council and, in particular of Mr Ryan. If the Council's intentions regarding the Roundhouse had been honourable there is no reason that it would not have been open with DOP officers about those intentions instead of playing a "cat and mouse" game with the DOP and perpetuating the myth that Amendment No. 6 never had any implications for the Roundhouse.

A Deception Intended to Mislead or an Unintentional Misdrafting?

4.4.35 As earlier mentioned, both Mr Pullinger and Mr Ryan have vehemently denied the suggestion that Amendment No. 6 was drafted with any intention to relieve the Council of its obligation to acquire the Roundhouse. Mr Pullinger's case is not assisted by his report to Council, on 14 August 1990, on the four strategies pursued by the Council on recommendations from himself and other officers to relieve the Council of its obligation to acquire the Roundhouse. The first strategy is described in his report in these terms:

"To remove Council's obligation to acquire by an amending Local

Environmental Plan No.6 which sought to vary clause 43 of the LEP. This LEP was not given consent and further, it would not have had the desired effect since the Notice to Acquire had been validly served. This LEP was also aimed at removing [the] obligation to acquire other defined Special Use lands such as the proposed academy site."

4.4.36 The drafting of this report is extraordinary. Not only does it implicate the Council in endorsing this strategy, but it reveals by its terms that the LEP had only a secondary aim in relation to "other defined Special Use lands such as the proposed academy site". It was also incorrect in stating that the amendment was not given consent.

4.4.37 In view of Mr Pullinger's strident and public rebuttal of this allegation, which was made prior to this investigation, evidence was taken on oath to determine the truth of this matter.

4.4.38 The evidence of all witnesses is consistent, with one very significant exception:

"I don't think it was ever attempted. No one would have ever attempted that while I was President.... Barry got his strategies mixed up"
(Oliver Dunne, former Shire President)

"You could read it that way, but it wasn't intended."
(Malcolm Ryan, Planning Manager)

"There was never any attempt. The Roundhouse was not in the minds of the senior staff... The letter to Sly and Weigall months later proves it had nothing to do with the Roundhouse."
(Mr Barry Pullinger, Shire Clerk/General Manager)

"Barry didn't have a conscious strategy of any kind"
(Greg Alderson, Executive Manager, Works and Services)

"I thought the intention was to correct it for both sites. ... it was the intention there to catch the Roundhouse. ... Everything would have been looked at by CMT because the whole business paper goes to the CMT before it goes to Council. ... It would have been discussed. This was a possible tactic and we needed to know if this was the right thing to do: was it being too sneaky? was it being provocative? ... and it was decided at that stage that that was the way to go ...

Q. It's clear it would have applied to the Roundhouse and it was drafted to achieve that purpose?

A. Right."
(Dr Jane Stanley, Planning Director)

"In my opinion, it is important to understand that the amendment of Clause 43 could never have affected any prospective obligation to acquire the Roundhouse site. This is made quite clear by the advice from Sly & Weigall of 7 June 1989 with which I agree. Accordingly, as I understand the allegation of an attempt to deceive the Minister which apparently relates to this proposed amendment, it is an allegation without substance."
(Letter to the Department of Local Government from P D McClellan QC dated 14 March 1991)

Summary of the Evidence on the Drafting of Amendment No. 6

The Evidence of Mr Pullinger

4.4.39 Mr Pullinger has asserted that there was no attempt to deceive, and cites as proof the letter he wrote to Sly and Weigall dated 23 May 1989 in which he advised of Council's receipt of an effective Notice to Acquire, the concluding paragraph of which referred to Council's plan to amend the LEP in respect of the Academy site:

"Council's Planning Director is of the view that if this amendment is gazetted, it may also remove Council's obligation to acquire the Roundhouse site."

4.4.40 Mr Pullinger stated that it was only shortly before this letter was written that he became aware of the possibility canvassed by the Planning Director, Dr Stanley. He said he was "appalled" by suggestions contained in the report on Amendment No. 6, prepared by Messrs Kanaley and Murray and presented to the Shire President in November 1990. The report suggested that there may have been an attempt to draft the amendment with another purpose in mind and that Mr Ryan had been involved as a knowing participant in the attempt. Mr Pullinger said he had not seen Mr Ryan's letter of 14 September 1989 to the DOP, and expressed the view that "to draw Malcolm into it was a nonsense". He did not know "why [Malcolm] would write the letter like that". Mr Pullinger subsequently acknowledged that he had seen the letter because it was an attachment to Mr Ryan's memo to him on this matter in December 1990. Having re-read the letter he said he could find no problem with it and did not put the construction on it that I had.

4.4.41 He explained that, in writing his "four strategies report", he had done so in a hurry on the afternoon of the Special Meeting of Council at which it was considered, and, in the rush, he had simply made a mistake. He did say, however, that he had rung Mr Ryan to check with him about the relevant LEP amendments and their impact on the Roundhouse site.

The Evidence of Dr Stanley

4.4.42 Dr Stanley said that she did not recall that the resolution of 15 November 1988

was specifically framed to exclude the Roundhouse. It was her recollection that it was the intention to correct Clause 43 of the LEP for both sites (i.e. the Academy and the Roundhouse). She recalled that they were concerned not to alert the owners of the Academy site to the fact that they may be able to require the Council to acquire their site under the current wording of Clause 43 - a further indication of the tendency within Council to control situations by withholding information to which persons affected have a legitimate right, where it is considered that such information has the potential to disadvantage the Council.

4.4.43 When the discrepancy between the wording of the Council's resolution and the wording of the draft LEP was pointed out to her, Dr Stanley's spontaneous comment was:

> *"Yes. It was the intention there to catch the Roundhouse".*

4.4.44 It was her view that the amendment was drafted from the beginning to include the Roundhouse in its effect. She said that was done with the knowledge and approval of the CMT (Corporate Management Team), at least in the sense that the draft LEP would have gone to the CMT for endorsement as part of the business paper when it was presented to Council on 2 May 1989, and that she would have briefed them. She also said that Mr Dunne (then Shire President) was aware of the strategy "as he was not someone you would keep out of strategies".

4.4.45 She said she did not remember the drafting of Mr Ryan's letter of 14 September 1989 to the DOP, but agreed it was "creative", and it surprised her to read it as she did not recall it. When asked why she thought the letter might have been framed in such a way as to exclude mention of the Roundhouse, she suggested that this might have been on the solicitor's advice. If judged to be misleading, she accepts that she must bear the ultimate responsibility for it. She said that she had no intention of misleading the DOP and was of the view that they would have had no objection to the drafting of the amendment in those terms, since they believed the acquisition clause in the LEP was a mistake as well. However, she could not identify any particular person in the Department to whom she had spoken in forming this view.

4.4.46 Subsequently, in her response to this section of the provisional draft report, Dr Stanley stated:

> *"My conclusion from the documentation disagrees with yours, in that I concluded that the drafting of the acquisition clause had been in error, and it would have been irresponsible not to seek to correct it. However, it was never anticipated that this LEP would have the result of removing Council's obligation to acquire the Roundhouse, as it was known that the owners intended to serve a notice to acquire (if they had not already done so by then), and the obligation would not be removed retrospectively."*

She also notes, however, that my statements of her recollections at the time of the

interview with her are correct.

The Evidence of Mr Ryan

4.4.47 Mr Ryan's evidence essentially re-iterated the position he had set out in his memo to the Shire Clerk/General Manager of 11 December 1990, arguing errors of fact, law and interpretation in the report of Messrs Kanaley and Murray. He said the November 1988 resolution was drafted so that it did not include the Roundhouse. He had no explanation for the way the amendment was subsequently drafted, except to say he "always had difficulty in framing the objectives". He agreed that the drafting of the amendment to include the Roundhouse "could be read that way, but it wasn't intended". He did not know at what point in time Dr Stanley became aware of the possibility the drafting could have that effect. He insisted that there was no intention to mislead the DOP because it was clear to him that Amendment No. 6 applied to the Academy site and not to the Roundhouse.

4.4.48 Mr Ryan has also pointed out that, in his letter of 14 September 1989 to the DOP, he had placed the onus back on it. He had invited the Department, if it was not satisfied with the drafting of clause 5(b) of the amendment, to propose an alternative mechanism for dealing with the problems arising from the wording of clause 43 and the accompanying table, or, as a last resort, to defer this matter from the LEP. This should demonstrate quite clearly, he argued, that the Council had no intention of attempting to mislead the Department in relation to the impact of the amended clause on the Roundhouse site.

4.4.49 When asked whether he recalled being rung by Mr Pullinger about the LEP amendments relating to the Roundhouse, which were mentioned in the report to Council on the four strategies, he said he had no recollection of such a call. However, in his comments on the provisional draft report, Mr Ryan noted:

> *"I remember pointing out to Mr Pullinger on the night of the Council meeting that his report was in error, however, I did not see the report before it went to Council."*

The Evidence of Mr Dunne

4.4.50 Mr Dunne said he did not think that any attempt was made to have the amendment cover the Roundhouse site. He stated that no one would have done such a thing while he was President. He commented that he never heard anyone say: "We'll use this to get the Roundhouse off the books". The only action in relation to the Roundhouse (apart from the acquisition notice being lodged) which he was aware of was a proposed rezoning.

4.4.51 As to the four strategies report he said that Mr Pullinger should be given the benefit of the doubt and that "Barry got his strategies mixed up". He added: "Barry can write up history any way he likes but resolutions of Council are the only indication of how people were thinking."

The Evidence of Mr King

4.4.52 Mr Chris King was Senior Planner at the DOP's Grafton Office and was involved in the processing of Amendment No. 6. When questioned about what action he took on receiving Mr Ryan's letter of 14 September 1989, he said he believed he would have rung Mr Ryan to clarify what he meant. This is supported by comments in his hand-written file note dated 20 September 1989 (see para 4.4.16).

4.4.53 He said that initially he did not understand that there was other 5(a) land that would be "pulled in" by the acquisition clause. He indicated that the planning process at Council was "a bit all over the place" and it was very difficult to keep track of what was going on. DOP officers were not in a position to be able check out all the details of draft plans and had to "take Council's word on the situation". He said that, in the context of Amendment No. 6:

> *"Yes, we did talk about the Roundhouse site and it was made clear to me that the only intention of this plan was to overcome the Academy situation."*

He also commented that he

> *"would have taken the view that if the site was going to be re-zoned then the acquisition clause didn't apply to it anyway."*

4.4.54 On the issue of the supposed rezoning proposal, he said that

> *"...at the time of making the LEP we would have to have the opinion that they were going to seek that rezoning..."*

It was on the basis of the understanding from Mr Ryan that the Roundhouse was to be rezoned that the DOP proceeded with making the plan, because that was considered to be "a satisfactory solution to the problem". He agreed that Mr Ryan ought to have informed the DOP when he became aware that the rezoning was not proceeding.

Analysis of the Evidence - Conclusions

4.4.55 The original evidence of Dr Stanley is clearly at odds with the testimony of all other witnesses. Her subsequent comments however are somewhat equivocal: while agreeing that the statements attributed to her were consistent with her recollections, she denies that it was the intent of the LEP to remove Council's obligation to acquire the Roundhouse site. It is obvious that an irreconcilable conflict in evidence has arisen, both amongst the witnesses and within the evidence submitted by Dr Stanley. Given the unreliability of the verbal evidence I have had to depend primarily on the documentary evidence and my reading of the facts in my assessment of this issue. That assessment has led me to the conclusion that Amendment No. 6 was, at least at some stage, being used as a mechanism to remove the Council's obligation to acquire the Roundhouse site.

The evidence on which I base this conclusion is given below.

4.4.56 Mr Pullinger claimed that he simply made a mistake in the drafting of his report of the 14 August 1990. I find this evidence difficult to accept. It seems remarkable that, despite Mr Pullinger's report being considered by the whole Council, not one Councillor at the time pointed out what was later regarded as a gross error of fact. What was contained in it was clearly Mr Pullinger's understanding of the position as he knew it and as confirmed in the discussion he said he had with Mr Ryan. Much of the report was quoted in at least two local papers, featuring as the leading front page article in one of them (The Northern Advocate of 22 August 1990), and no retraction or correction from Mr Pullinger appeared. It was also accepted without question by the Council. Mr Ryan has stated that he pointed out the "error" to Mr Pullinger. It should be noted, however, that this statement was not made in his original evidence, but in his response to the provisional draft report. Given the importance we placed on the "four strategies" report during our investigation, the opportunity was clearly available to Mr Ryan to have explained the circumstances at that time. The fact that he did not is difficult to understand. If indeed he did express this view at the time the report went to Council, then it clearly had no effect. It was either not accepted by Mr Pullinger or the matter was not considered significant enough to be corrected or even discussed with elected members. It therefore stood as a statement of what the Council had intended to achieve through Amendment No. 6.

4.4.57 Mr Pullinger has stated categorically, and I accept his statement, that the CMT had no involvement in the preparation or review of the report. However, given the importance of this matter, I believe it was one which ought to have been addressed by the CMT. The fact that it was not, is an indication of the confidence Mr Pullinger had in the statements he had made in it.

4.4.58 As far as the elected members are concerned, Mr Pullinger has stated (and I accept) that they did not debate the "four strategies" section of his report as their concern was with his recommendations. The fact that no-one questioned the strategies as outlined by Mr Pullinger, must be read as an endorsement of them. In any case, it matters little whether they consciously endorsed them or turned "a Nelsonian blind eye"; they must still accept responsibility for the substance of the report. The whole Council is thereby judged to have had the same understanding. In hindsight, and given the course of events subsequently, Mr Pullinger's statement about Amendment No. 6 might have seemed like a mistake. (One might well ask however: was Mr Pullinger's "mistake" in blowing the Council's cover on the issue or was it that he had totally misrepresented the intent of the amendment and simply "got his strategies mixed up" as suggested by Mr Dunne?) Nevertheless, I believe, that, at the time it was written and presented to the Council, it was an expression of his understanding of the import of Amendment No. 6; it was what was in his mind about what the Council (or at least some its senior staff) had attempted and wanted to achieve by this means.

4.4.59 I found the evidence of Mr Ryan on the issue of the drafting of the Amendment

and at a number of points elsewhere in his evidence on this issue to be disingenuous and unconvincing. He could offer no explanation for the drafting of the LEP Amendment No. 6 in terms which were so far removed from the November 1988 resolution that it could not be regarded as being authorised by the Council. As far as the Council was concerned at that point, the aim of the amendment was to deal with the problem of the Academy site. The stated concerns of both himself and Dr Stanley that the wording of Clause 43 of the LEP left open the possibility of Council being placed in the position of having to acquire land owned by State authorities seems hardly a genuine concern, given the provisions of s.27 of the EPA Act and the fact that no evidence exists that legal advice was sought on this particular issue. Moreover, if it were a legitimate concern, and the only concern apart from the Academy site, then there would clearly have been more appropriate ways of amending Clause 43.

4.4.60 At the time of the preparation of the draft Amendment and the first notification to the Department of Planning in January 1989, the valid Notice to Acquire had not been received by Council, nor had it resolved to rezone the site. Its status therefore was as a parcel of 5(a) land, with a controversial history, identified for acquisition by Council at some time in the future, on the request of the owners. There was therefore absolutely no excuse for not including a reference to the site in that letter to the Department of Planning. It clearly was covered by the terms of the drafting of the plan which would have deleted reference to the Council as the acquisition authority for all land zoned 5(a). The fact that Mr Ryan was able to offer no explanation as to why the Roundhouse was not mentioned, places in serious doubt the credibility of the argument that the amendment was not drafted in such a way as to cover the Roundhouse. The advertising of the draft amendment so as to avoid mention of the effect of the proposed change to Clause 43(2) adds further support to the view that there was probably a deliberate intention to mislead. There is also no validity in the argument that, at that time, there was a proposal to rezone the site, since, although there was indeed, by that time, a resolution of Council to that effect (dated 14 February 1989) the proposed rezoning was deferred indefinitely at the direction of Dr Stanley (see below, paras 4.4.73 - 4.4.74). At the time of advertising the exhibition of the draft plan, the site was clearly 5(a) land in private ownership, with Council nominated as the acquisition authority for it and with no realistic prospect of the acquisition obligation being lifted.

4.4.61 I find Mr Ryan's explanation for his failure to include the Roundhouse in his reply to the DOP of 14 September 1989, equally unsatisfactory. Clearly the existence of such a site (i.e. 5(a) land in private ownership) would have been the prime concern of the advice of Parliamentary Counsel (PC), which he was requested by the Department to address. By that time, the proposed rezoning had been eliminated as an option, as a result of the "great surprise" report (see below, para 4.4.92ff) and, although the valid Notice to Acquire has been served there was certainly no acknowledgment on the part of Council that it had an indisputable obligation to acquire the site. Mr Ryan had led Mr King into believing that the Roundhouse was to be re-zoned, when he would have been aware that a week

earlier, the "great surprise" report had secured Council's agreement to what amounted to an indefinite deferral of that rezoning. Dr Stanley's supposition that the drafting of this letter may have been the result of legal advice is not supported by the evidence of Mr O'Rourke. Apart from the advice in his letter of 7 June 1989, Mr O'Rourke said he had no specific recollection and no record of having discussed LEP No. 6. He did comment, however, that he had many telephone conversations with various senior staff of the Council about the Roundhouse and they were all about either putting off "the evil day" or removing it altogether.

4.4.62 Mr Ryan's argument that there was no need to mention the Roundhouse because it was effectively in Council ownership, is equally unsatisfactory. While this would certainly be the case if there was absolutely no doubt in the mind of Council about either the legality of the Notice or about the LEP provisions which led to its submission, it is patently obvious that the Council (or at least some its senior staff) did not accept that the Notice imposed an undeniable obligation on the Council. As long as this uncertainty on their part existed, there was no guarantee that acquisition would proceed and therefore that the site was effectively owned by the Council. There is no evidence that this situation was ever explained to the DOP, even on an informal basis. As far as the DOP was aware, the mechanism Council had in mind for dealing with the Roundhouse was to re-zone the site.

4.4.63 In his defence Mr Ryan, responding to my draft report, has noted that, as far as he was concerned at that stage the Roundhouse was a very minor matter in his daily activities and his main concern was the rezoning of the site at Tyagarah which was the subject of a refusal of development consent and an appeal to the Land and Environment Court. It was this concern which prompted his invitation to the DOP, if it was not satisfied with the drafting of the amendments relating the acquisition provisions, to defer this matter and deal only with the Tyagarah rezoning. He comments

> *"Surely this demonstrates my anxiety that the amendment be gazetted for the land at Tyagarah as I had little concern about the amendments to the acquisition clause. At that time I had no idea that anyone would ever interpret Amendment 6 as effecting* (sic) *the Roundhouse."*

I am not satisfied that this claim provides a convincing explanation for all the anomalies in the process which have been discussed in this section.

4.4.64 The strategy to remove the acquisition obligation by means of Amendment No. 6, appears to have proceeded notwithstanding the legal advice dated 7 June 1989 from Sly and Weigall indicating that it would not have succeeded. I do not believe that that fact should be allowed to enter into the argument as to whether or not there was an intention to mislead both at the drafting stage and subsequently. There was, in my view, a further attempt at deception by Mr Ryan in his reply of 14 September 1989 to the queries raised by the PC. Dr Stanley suggests that the drafting of Mr Ryan's reply, which I believe was an example of misrepresentation by omission, may have been made on the basis of legal advice received on the

matter. There is no support for this theory in the evidence obtained from Mr O'Rourke. It is possible that the PC's advice had driven the Council into a corner from which its officers refused to resile, or that they had decided to embark on a bluff with the owners, following gazettal of the amendment with the desired drafting. It should be noted that the terms of the PC's note still left it open to retain the drafting proposed by Council if he could be assured there were no other land so affected; no other land was put forward by Council. I do not know the answer to this question. It will continue to lie in the minds of those who were responsible for the decisions taken at that time.

4.4.65 In spite of the protestations of Council officers, I am led to one of two conclusions: either that the management and administration of Council's planning functions were in a state of disarray and beyond the control of its senior managers, or that the actions of those involved in this matter are only explicable in the light of their conscious decision to draft the terms of this amendment with an ulterior purpose, namely to remove any obligation on the Council to acquire the Roundhouse site, and the pursuit of this strategy involved the deliberate withholding of information and providing misleading information to the DOP and ultimately attempting to deceive the Minister for Planning. I am inclined to the latter conclusion, not least of all because of the intent expressed in the "four strategies" report. On the evidence, the elected body of Council effectively endorsed the strategy, even if it did not do so by a formal resolution. I will not speculate as to the possible motives of those involved but note that this question has been put to me. Whether or not the actions of Council and its officers were driven by a desire to "do the right thing" by the ratepayers is irrelevant; those actions amounted to an improper use by Council of its planning powers.

Council's proposals to rezone the site

Rezoning: On the Agenda

Relevant Facts

Initial Reaction to the First Notice to Acquire

4.4.66 On 26 April 1988, immediately following gazettal of the 1988 LEP, solicitors for Messrs Mangleson and Cochrane again requested the Council to acquire the site. In response, the Council asked them to submit a price for the land agreed upon by all three owners. Council also sought and obtained advice from its solicitors, Sly and Russell, which indicated that the Notice to Acquire was not valid, since it was not given on behalf of all three owners of the land. It appears that this was due in part to a dispute between Mr Gallagher (Ms Gallagher's father and executor) and the other two partners - a dispute which was subsequently resolved, at least temporarily, shortly before the valid Notice to Acquire was lodged in May 1989.

4.4.67 Solicitors acting for Mr Mangleson and Mr Cochrane advised the Council on 11

May 1988 that their agreed price was $1.5 million - substantially in excess of the $250,000 suggested by Mr Pickles in his memo of 26 November 1987.

4.4.68 In August 1988, the Planning Director, Dr Stanley, and the Shire Clerk/General Manager, Mr Pullinger, met Mr Cochrane to discuss the notice and to set a course for negotiation. Mr Cochrane gave Mr Pullinger copies of his files on the history of the site, including copies of Council minutes referred to in Section 4.2 of this report. Although Mr Pullinger describes his efforts as working towards a negotiated settlement of the issue by suggesting that the owners withdraw their notice following a rezoning of the property, both Mr Mangleson and Mr Cochrane say those negotiations did not occur, and that the August 1988 meeting was the only time serious discussions were ever held between them.

4.4.69 Nevertheless, the Council indicated that it was prepared to rezone the site and the first sign of a change in attitude by Council came on 13 September 1988 when the Council considered a report from Dr Jane Stanley, advising of an interim report on the "appropriateness" of the current zoning. She recommended that the Council advise the owners that it would review the zoning of the site pending reports from Council's planning consultants, and the owners were advised of this resolution.

4.4.70 At about the same time a Draft DCP was prepared by consultant Planner, Mr Peter Cuming. It stated:

> *"This site has been assessed, and confirmed by the resident input as not being the most ideal location for a publicly funded facility.*
> *However the site has a recognised public amenity value. This should be duly considered by Council in the rezoning process.*
>
> *13.1.1 Recommended uses for the site include private commercial activities based on:*
>
> * *serving the public cultural amenity such as restaurant, art gallery etc. as originally proposed in the Ocean Shores development Area Plan (1972).*
>
> * *the development of private consultation rooms, studio space etc.*
>
> *13.1.2 The unique scenic position and size of the site suits an integrated* ***cluster development of a low rise, high quality architectural form*** *which maintains a large area of open space available for public use."* (Emphasis added)

The First Rezoning Resolution

4.4.71 Against the background of these recommendations, on 14 February 1989 a report on the 5(a) Community Purposes zoning for the site was presented to the Council

by the Planning Director, but under the title of the Shire Clerk/General Manager. It advised that, "in light of recent appraisals of community facilities and their siting, it is believed that this zoning cannot be supported". The report mentioned the exposed nature of the site, the difficulties of access by aged persons and the prime nature of the real estate involved, as factors militating against the appropriateness of the site as a community centre. The Council has maintained that the "appraisals of community facilities" referred to in the Shire Clerk/General Manager's report to the Council were never the subject of report as a report was never prepared. This is despite references several times to a report, prepared by Mr Ken Redwood, Council's Community Planner at the time. Mr Redwood has confirmed that, in collaboration with Mr Cuming, he did in fact prepare a report on the matter. It would appear the report has been mislaid in Council's files.

4.4.72 Following its consideration of the report to its meeting of 14 February, Council resolved, pursuant to s.54 of the EPA Act, to prepare an LEP for the rezoning of the site (not being specific as to what level and order of use), in conjunction with other rezonings in the Ocean Shores area.

4.4.73 On 16 March 1989, the Planning Manager, Mr Ryan notified the DOP of Council's intention to prepare two amendments to the shire-wide LEP - one relating to the Roundhouse and another to sandmining - but indicated that the Roundhouse plan would be deferred, stating that it was

> *" ... likely that this amendment to the Roundhouse site will be included in a forthcoming amendment to the zoning in general in Ocean Shores, for which the Department will receive notification in due time."*

4.4.74 The Council appears not to have adopted a resolution in these terms. Mr Ryan told us that the Planning Director, Dr Stanley, had issued a direction to that effect. There is no evidence to suggest that the deferral was supported by either the CMT or by Council.

The Second Rezoning Resolution

4.4.75 Following receipt, on 12 May 1989, of an effective Notice to Acquire (signed by all three owners), Mr Pullinger directed Mr Kanaley (Dr Stanley and Mr Ryan were both on leave at the time) to prepare a report making what was in fact an unnecessary recommendation to rezone the site, given that the previous resolution was still "on the books". Mr Pullinger said he had forgotten about the February resolution because no action had occurred in relation to it, and he was unaware of Dr Stanley's instruction to defer action on the resolution. Despite the Council's endorsement of the further zoning proposal, the Department of Planning's files do not reveal any correspondence from the Council on the rezoning, other than a mention in the Planning Manager's letter of 16 March 1989 that the proposed rezoning was to be deferred.

4.4.76 Council resolved, in response to two separate reports presented to it on 30 May

1989, both to obtain a valuation (with a view to acquisition) and to proceed with rezoning the site. Although the resolution did not specify what zoning should be applied to the site, the report suggested that any rezoning should take into account the recommendations contained in the Draft DCP. It also recommended that a Local Environmental Study be undertaken. There appears nevertheless to have been an understanding that the zoning would be Residential 2(a) and this was incorporated (on the evidence of Mr Ryan, as suggested by Dr Stanley) into the map prepared by Mr Ryan, for an amendment to the LEP identified as Amendment No. 8.

4.4.77 Council's solicitors had been advised of the Council's apparent intention both to proceed with acquisition and to re-zone the site, through the letter of the Shire Clerk/General Manager to them on 23 May 1989, which states:

> *"It is my understanding from your previous advice that Council must now proceed to acquire the property.*
>
> ***It remains Council's intention to suitably rezone the property thereby removing Council's obligation.*** *...*
>
> *I intend to recommend to Council that a meeting be held between the owners and Council's executive to discuss a mutually suitable rezoning and agree on a time frame."* (Emphasis added)

The letter also contained the reference to the Planning Director's view on the effect of Amendment No. 6 in respect of the Roundhouse, as discussed previously (see para 4.4.11).

4.4.78 On 19 June 1989, Mr Ryan advised the DOP that the Council intended to prepare a series of amendments to the Byron LEP, which were to be incorporated into a single amending LEP (Amendment No. 8). No mention was made of the Council's resolution concerning the Roundhouse site. However, on 9 August 1989, the Shire Clerk/General Manager faxed a copy of the draft LEP No. 8 to solicitors acting for the owners. The draft LEP contained as one of its objectives, the rezoning of the Roundhouse site to 2(a).

4.4.79 On 9 August 1989 the Shire Clerk/General Manager wrote to Council's solicitors again seeking advice on, among other things, the effect of the proposed rezoning (without specifying what that proposed rezoning was) on Council's obligation to acquire the site. Although they had responded to his letter of 23 May on 7 June, their response had dealt solely with the effect of Amendment No. 6. The Shire Clerk/General Manager also requested that, if Council was still required to acquire, the solicitors speak with the owners' solicitor

> *"... to determine his clients real intentions and if they are prepared to withdraw their requirement on Council to acquire the site if the property is rezoned. The question should also be put as to whether the owners would*

be prepared to accept a delay in the acquisition proceedings pending the outcome of the rezoning process now formally commenced."

4.4.80 The Shire Clerk/General Manager's report to Council's meeting of 22 August 1989 notes that preliminary verbal advice received was that rezoning would not remove the obligation. That report also refers specifically to a 2(a) zoning. It states:

> *"Council at its meeting of 8 August, 1989 noted a Draft Local Environmental Plan Amendment No. 8 which included a rezoning of the Round House site from 5(a) Special Uses and Community Purposes to zone 2(a) Residential Zone. This Local Environmental Plan has been forwarded to the Director of the Department of Planning with a request for a section 65 certificate to be placed on exhibition."*

4.4.81 An examination of the files of the Department of Planning undertaken during the investigation, revealed however, that no copy of this particular version of the draft plan, which included the 2(a) zoning on the Roundhouse site, was received by the Department.

Comments and Assessment

Questionable Commitment to Rezoning?

4.4.82 The Council's moves to rezone the Roundhouse site so soon after gazettal of the shire-wide LEP seems totally out of step with its insistence, prior to gazettal, on retaining the 5(a) zoning. This apparent about-face lends support to the view that there were other factors operating to determine the Council's position put to Commissioner Simpson (as suggested by Mr Pickles). It also suggests that the merits of the rezoning proposals submitted by the owners were never given due consideration in the lead-up to gazettal. On the other hand, the Council's actions might equally be seen as part of the alleged conspiracy to deceive the owners into believing that the Council was seriously attempting to "do it right" for them. The public resolution of the Council on 14 February promised a rezoning but the private letter to the DOP deferred it indefinitely.

4.4.83 Mr Pullinger has indicated that, as far as he was concerned, he was serious about working towards a rezoning of the site because he saw this as the only feasible way out for Council and he believed that it would be acceptable to the owners. He said that he was, in fact, negotiating with the owners towards this end. As far as the owners were concerned any such "negotiation" by Mr Pullinger was more in his mind than in fact.

4.4.84 In his response to the provisional draft report, Mr Pullinger commented that this claim was not supported

> *"... by the numerous correspondence and reports on Council's files relating*

to this whole matter. These letters commenced on a 'without prejudice' basis and then went to an 'open' basis and cover a period from August 1988 to September 1989."

4.4.85 Although there were indeed numerous reports and letters on the files, including during the period mentioned, I found nothing in them which could be seriously described as attempts at "negotiation".

Cognitive Dissonance?

4.4.86 The two resolutions of Council concerning the Roundhouse, on 30 May 1989, appear to be quite contradictory, and raise the question of Council's true intention. There was no point in proceeding with a rezoning once a valid Notice to Acquire had been served. On the other hand, had the Council intended to re-zone, then there was no purpose in obtaining a valuation. The resolution to obtain a valuation implies Council was accepting that the obligation to acquire had accrued and must be acted on, while the resolution to re-zone implies that it had no such intention and would avoid it by replacing the 5(a) zoning.

4.4.87 In resolving on the rezoning, Council, in effect, endorsed the pursuit of two separate strategies in tandem (namely amending Clause 43 of the LEP and rezoning the site), in the hope that at least one of them would have met the ultimate objective set for it - removal of the acquisition obligation and hence of a very significant liability affecting Council's financial position. Mr Pullinger has argued that this was certainly not his intention, and in his comments on the provisional draft report, stated:

"If this section is referring to Local Environmental Plan Nos. 6 and 8 as it implies, then it is ascribing an intent to myself which did not exist. My sole intent was to inform the Council of the receipt of the valid acquisition notice and to put the due process for acquisition in place; secondly, the sole purpose of the report written by Mr. Kanaley and presented to Council on 30 May was to achieve the intent of the rezoning of the property as agreed with the owners and by the due and proper process."

4.4.88 I have great difficulty reconciling these alleged intentions regarding "due and proper process" on the one hand towards acquisition and on the other towards rezoning. In his evidence under oath, Mr Pullinger indicated that it was his understanding at that point (and by implication, that of the Council, relying as it did on his advice), that a rezoning would automatically remove the obligation to acquire; he was not aware that it would have no effect unless the owners withdrew their Notice to Acquire. The fact that rezoning would not relieve Council of the obligation to acquire was reported to the Council by Mr Pullinger for the first time on 22 August 1989.

4.4.89 Council's expectation therefore was that its unilateral action to effect a change in the zoning was a way of avoiding any acquisition obligation it might have as a

result of the Notice to Acquire, just as the proposed amendment to clause 43 of the LEP would have done. However, it was clear from the Sly and Weigall advice, reported to Council on 22 August 1989, that none of the strategies proposed by the Shire President or Council's senior management would have worked, as the Notice to Acquire had been served - it would appear quite fortuitously - before gazettal of Amendment No. 6 had occurred, or the proposed rezoning had proceeded.

DOP in the Dark

4.4.90 It is my view that Council's failure to notify the DOP of its resolution of 30 May to re-zone the Roundhouse site was a deliberate withholding of information which might raise questions by that Department. Mr Ryan has argued that it was unnecessary to advise the DOP because it had already been advised of this intention in Dr Stanley's letter of 16 March. However, that letter also indicated that the proposed rezoning was to be deferred.

4.4.91 In fact, I note with some scepticism that, despite the resolution of May 30 and the statements made to both Council and its solicitors, at no stage on the files of the Department of Planning is there any indication that Council had advised the Department of any progress made towards the rezoning of the Roundhouse site. A file was commenced and the only document on it was a copy of the letter from Council of 16 March 1989. There is no reference to the Roundhouse in any of the documents on the Department's file on Amendment No. 8.

Rezoning: Off the Agenda

Relevant Facts

The "Great Surprise" Report

4.4.92 The rezoning process came to a halt on 12 September 1989 with the Council's consideration of a report deferring the rezoning until the zoning of the Bond Corporation land at Ocean Shores was considered. The report was purported to have been submitted by Council's Planning Manager, Mr Ryan. Because of its importance to this investigation, this report is reproduced below in its entirety.

> *"3. Roundhouse Site - Ocean Shores*
>
> *Council recently received a request to purchase the Roundhouse by the current owners for the sum of $2 Million. This request has come as a great surprise to me in that I was under the firm opinion that the Roundhouse was to be dedicated and constructed as an Aboriginal Art Gallery for public use. In fact the Deed of Agreement signed by the original developers of Ocean Shires has clauses in it which require the construction to occur.*

I have instructed Council's legal advisers, Sly & Weigall to obtain an opinion whether Council is liable to purchase the Roundhouse. I am also having a valuation done of the property to verify its worth.

It would seem inappropriate at this stage to proceed with rezoning of this land previously requested by the owners, but rather retain any further consideration to rezone until the Bond Corporation land is considered. The plan is still in the preparation stages, and there is adequate justification for leaving the site at its current zoning.

It could be possible if Council is to purchase this land, that a local rate may be levied on all allotments within Ocean Shores to fund the purchase.

Directors' Recommendation:

1. *That the action of obtaining legal opinion be endorsed.*

2. *That the rezoning of the Roundhouse site be deferred for consideration with the remaining Bond Corporation land.*

3. *That the applicants for the purchase be advised accordingly."* (Emphasis added)

4.4.93 Mr Ryan has denied authorship of the report, both to the Council's internal investigators, Messrs Kanaley and Murray, and to Mr McClellan. Mr McClellan was unable to determine who wrote it, concluding the position was "obviously unsatisfactory". He continues:

" However, negotiations were in my view never likely to have been successful and accordingly the report does not have any major significance in the history of the matter."

Comment

4.4.94 I agree that the potential for negotiation was slight but disagree with Mr McClellan's view on the significance of the report. The report is central to an understanding of the politics of this issue and affords a revealing insight into the integrity of those involved.

4.4.95 It is extraordinary for a number of reasons:

* The expression of "great surprise" is inconsistent with the fact that the (valid) Notice to Acquire had been received some four months earlier, and was the third notice submitted by at least two of the then owners - the first

being under the IDO (December 1986), and the second immediately after the gazettal of the LEP (April 1988). It had been responded to without any ceremony by Council at an earlier meeting on 30 May that year. It was also inconsistent with the knowledge which the officers and Councillors had of the situation by the time it was written. Both the Shire Clerk/General Manager and the Planning Director (and others) were already aware, from advice received from Council's solicitors, that there was a legal obligation to acquire. In addition, they had met Mr Cochrane about it and had received a detailed briefing from him about the history of the Roundhouse which was clearly at odds with the facts contained in that report.

* The report refers to previous requests by the owners for the rezoning of the land although there is no record of any such request having been made since their submission to Commissioner Simpson in 1986. It makes no reference to Council's own decisions, initiated by the Council, to re-zone the site.

* The report is identified as being the report of the Planning Manager, Mr Ryan. Mr Ryan told Mr McClellan that he did not write the report and had no knowledge of it. Mr McClellan interviewed all persons likely to have been responsible for it, and all have denied authorship.

* It refers to the obtaining of a valuation in the present tense when a valuation had been sought and received from the Valuer General in July.

* The report contains a Directors' recommendation which would appear to represent the expression of a corporate opinion rather than that of one individual within the Council.

* The report was submitted to an ordinary meeting of the Council, rather than, as is usual with reports of this nature, referred confidentially to the Committee of the Whole.

4.4.96 From the above, two conclusions logically follow:

(1) The report was clearly intended for the "public gallery", since staff and Councillors would have had an understanding of the facts far different from those being canvassed in the report; and

(2) The report had a political focus in that it was being suggested that the purchase should be funded by levies on allotments in Ocean Shores alone, and an adverse reaction not only to the purchase, but to the owners of the Roundhouse could have been expected.

4.4.97 I experienced the same stumbling blocks as Mr McClellan in determining who wrote this report. All persons who denied authorship of the report to Mr McClellan repeated their denials, under oath, to the investigation.

The Evidence of Mr Pullinger

4.4.98 Mr Pullinger said, in his evidence, that at this point (just prior to this report being prepared) he felt that he had lost control of the running of the Roundhouse issue, that he did not have the support of the officers or of the Shire President and that he could not do what he set out to do without that support. He said he had been keen to press ahead with rezoning and felt that he had made some progress in negotiating with the owners in these terms. He said the President was running the argument that Clause 11 of the Deed (relating to indemnity) gave Council "the out", and was strident in his view that this property should be dedicated if there was no relief under the Deed. It was the President, he stated, who had "pulled the plug" on the rezoning, but he did not know why. He said that the report's statement of surprise was "total nonsense".

4.4.99 He could recall Councillor Dunne having discussions, just prior to this incident, with himself, Dr Stanley and Mr Alderson concerning the rezoning of the property. He said that Councillor Dunne "still held the view that the property had to be re-zoned" and that he also proffered a second view which was that, even if the Council did end up having to acquire the property, it would be through a rezoning process of North Ocean Shores which would generate sufficient s.94 contributions to pay for the acquisition. He commented that this was "a perfectly logical argument", however, the plan, in hindsight, was "a nonsense - the amount to be generated in the immediate term was zero". He added that it was then that he realised why, earlier, directions had been given to defer the rezoning of the Roundhouse site. He commented that he did not know whether Dr Stanley had made the decision regarding the deferral of her own accord or whether it had been on the Shire President's instruction.

4.4.100 Mr Pullinger said he believed that "the motivation behind (the report) was to prevent something happening, that is, the acquisition or the rezoning of the land, from a genuine belief that somehow the Council was being diddled" - and, he added "I don't believe they were motivated by anything else." He noted that the President was under incredible pressure from various people in the community who were running the line (and still are) that "these people (i.e. the owners of the Roundhouse) were crooks" and "that somehow we'd been defrauded".

4.4.101 According to Mr Pullinger, the other two officers were extremely enthusiastic about this new approach but he considered that it was an ill-founded strategy and was aimed at putting pressure on Messrs Mangleson and Cochrane (but to what end he did not know): the correct approach (from the point of view of both Council and the owners) was the one he had been taking - to rezone the site with a view to negotiating a withdrawal of the owners' Notice to Acquire. He did, nevertheless, concede that initially it was his understanding that a rezoning would automatically relieve the Council of the obligation to acquire the property, and he had put this position to Council, in closed meetings on a number of occasions. He indicated that it was not until later that he learned that the only way the acquisition process could be aborted was if the owners withdrew their Notice to

Acquire.

4.4.102 When questioned on the authorship of the report, Mr Pullinger said that he did not write it, and that he did not know who physically wrote it. His understanding, however, was that it was generated in a discussion, in Mr Alderson's office, between Mr Alderson and Dr Stanley. He said he had come in half-way through the discussion, and was "horrified" that the concept of a local rate was being discussed. He stated that this had been raised by Mr Alderson with him previously and he had dismissed it. He said he also recalled Mr Alderson using the words: "this will up the stakes", meaning that it was calculated to achieve some reaction in the Ocean Shores community, and "it had the effect all right". When asked what he considered might have been the political reason for suggesting a local rate, he said that was a matter on which Mr Alderson would be able to comment but he said that at that time he believed Mr Alderson still had doubts about whether the Council was obliged to acquire the property but, if it was, then it was possible to levy such a rate. His own view, from his experience in local government is that it was "a nonsense".

4.4.103 Mr Pullinger said that, in theory, every report carries a Directors' Recommendation, which would normally indicate that the report had been through the CMT and the recommendation endorsed, but this report "did not go through that process". Although he could not actually recall whether the report was in the business papers prior to their issue to Councillors on the Friday before the Council meeting, or whether it was submitted as a late item, he acknowledged that, in any case, he had the option of pulling it out, but had decided on the previous day that, since he did not have control over the process, this would achieve nothing.

4.4.104 When asked about the Council's response to the report, Mr Pullinger stated that it was "ho hum" and he believed that it was not even debated. He commented that this was not surprising because the majority of the Councillors held the view that Council did not have to "buy this thing", despite their being told and despite their decision of some months previously to re-zone it (as a way of avoiding the acquisition obligation).

The Evidence of Dr Stanley

4.4.105 Dr Stanley said she had a clear recollection of the report going to the CMT and remembers seeing the report in the business paper. When she saw the report "under someone else's name" she asked "why are we doing this?" When she asked Mr Alderson about it, he said that "it was necessary to provoke a bit of a reaction in the community". She said the Shire President, Councillor Dunne, was involved, since she could recall him earlier "poring through files" on the matter. In her view, he was outraged by the prospect of acquisition and believed it to have been immoral. She said the tone of the report was one of moral outrage as adopted by Councillor Dunne at the time. She said Councillor Dunne could have written it, and Mr Alderson could have channelled the report through for him.

4.4.106 Dr Stanley said it was "a total misrepresentation" to suggest that Mr Pullinger could have been "horrified" by the report as he never raised any objection to these actions. She said she was instructed to make a file note outlining the reasons for the report and that it was the decision of the CMT that she do so.

4.4.107 In response to the section of the McClellan report where Mr Alderson had suggested that the letter she had written to Sly and Weigall had been dictated at the same time as the report was dictated, she said that could not be true as she did not dictate work.

The Evidence of Mr Dunne

4.4.108 Mr Dunne said he could recall going to the Council in the mid afternoon of the Council Meeting. He said he did not write the report, as the Minutes he wrote came out on his own computer. He said he had never met Mr Mangleson or Mr Cochrane, but that, at the request of Mr Gallagher, he had met him with Mr Alderson on 12 July 1988, at the home of a friend in Ocean Shores. (It should be noted that Mr Gallagher denies that this meeting took place at his invitation; the invitation was issued to him by the friend and he assumed it had been in consultation with the Shire President, Councillor Dunne). At the meeting, Mr Gallagher indicated that he was in dispute with the other two owners, that he had always wanted a nursing home on the site, and that at this stage he had no intention of signing the Notice to Acquire, but that he would advise Councillor Dunne if circumstances changed. That was the only involvement Councillor Dunne had, he said, with the Roundhouse owners. He said he was surprised that Mr Gallagher had put his name to a Notice to Acquire. He had put the issue "on the back burner", as Mr Gallagher had assured him that he was not going to sign an acquisition notice.

4.4.109 Mr Dunne commented that by mid-August, it was apparent to him that the "whole effort to rezone this land was a shambles".

4.4.110 In relation to the statement by Dr Stanley that the report had been through the CMT, Mr Dunne commented that for her, everything that was discussed with Mr Pullinger, even if in passing, was regarded as having been endorsed by the CMT. He also suggested that by then, the matter was getting out of hand and no-one was prepared to accept responsibility, so it was convenient to blame the CMT: "Things have gone wrong, and suddenly it's a joint decision".

4.4.111 When asked why, in his opinion, the matter was being brought to the Council at this point, Mr Dunne stated that he thought it probably had a lot to do with the comments he was making through the previous month about the planning process being "stuffed", and this applied particularly to the way Ocean Shores was being dealt with. He was also annoyed about Dr Stanley's approach to the Bond Corporation asking them, in effect, to buy the property. He said he never had any doubt that Council had an obligation to acquire the site and his concern was with where the money was going to come from, so that it would not be a burden on the

ratepayers.

4.4.112 Mr Dunne agreed that the report was specifically intended for "public consumption" and stressed that the matter had to be brought formally to the attention of the community by the Council. As far as he could recall, matters relating to the acquisition of the Roundhouse had, until that time, been dealt with at closed meetings. However, he commented that he did not agree with the terms in which it was written, and would not have written it that way. He said that it was not his understanding that "the Roundhouse was to be dedicated and constructed as an Aboriginal Art Gallery for public use", but that this was a common misunderstanding in the community, that this was "a sentence you would have seen many, many times throughout the '80s", and it did not surprise him that some-one could write that. He agreed that the comments about the rezoning were a reflection of his view.

4.4.113 When questioned as to whether he might have suggested the local rate as a method of funding the acquisition, Mr Dunne said that if he had made any suggestion along those lines it would have been in combination with s.94 contributions and checking whether the developer (i.e. the Bond Corporation) was liable for any contribution which may have been due under the Deed. He said that he was concerned that he was not giving any "freebies to Mr Mangleson, the Bond Corporation or anybody else".

4.4.114 Commenting on Mr Alderson's recollection that Councillor Dunne had been "excited" about what was going on, Mr Dunne suggested that his "excitement" was probably to do with the fact that here was yet another thing looming up as a "stuff-up", and he was getting sick of being made "the bunny". He said he was concerned that no-one was doing anything about the financial side of it and that he had discussed this with Mr Alderson. It was his view that if the Ocean Shores rezoning could be done by November they could have "the whole thing as a package with the Bond Corporation".

4.4.115 Mr Dunne said he had never written a report that he did not acknowledge authorship of, but did not deny that some of his ideas were in this report. He indicated that it was his view that Dr Stanley had written it, and he could not understand why she would deny it.

The Evidence of Mr Alderson

4.4.116 Mr Alderson asserted that he did not write the report, and the first time he saw it was in the business papers on the Friday morning. Nevertheless, he acknowledged that there could well have been a meeting in his office at which this issue was discussed, and the report may have arisen out of those discussions, which would have included Councillor Dunne. He said that the report was probably written late on the Thursday afternoon or on Thursday night and that this would fit in with the way Councillor Dunne often used to work: he liked to see the draft business paper so that he could discuss reports with senior staff to put his political concerns, and

if he felt matters needed to be addressed in more detail, the relevant report could be "pulled out".

4.4.117 During this period, he recalled, Councillor Dunne "was excited about which way it was going", and that both he and Mr Pullinger were concerned at the financial impact if rezoning had proceeded, as that would have pushed the price up. He said that there was a general view that the rezoning should therefore not proceed. His own view was that this might not necessarily have been the case and that they should have been talking to Mangleson, Cochrane and Gallagher explaining that it looked as though Council did not want the land, and asking questions like: how many units can we fit on the site? what else can be done? and taking a pro-active approach. He added: "If I had a view at the time is was: why aren't we looking at that?" According to him, by this time the "penny had dropped" that acquisition was a real prospect and Dr Stanley had written the report to say this. His explanation of the "great surprise" was that Dr Stanley had been convinced up to this point, partly as a result of frequent discussions with representatives of BEACON, that Council would not have to pay for the acquisition of the site - she was "under the belief", he said, that the Council would not be "out of pocket" in acquiring it. In his opinion, she was supported in her position on this issue by the views of Councillor Dunne about relief through the Deed.

4.4.118 When asked about the various views regarding the Roundhouse which had currency at the time, Mr Alderson stated that Councillor Dunne's view was that there was a provision in the Deed which "protected Council from having to acquire, and if they had to acquire, then there were other clauses that said that they could pass on to any heirs and successors any costs involved". He said that Mr Pullinger "probably didn't know which way to go" and that, at one time, he was running the argument that pressure should be put on the Bond Corporation to provide for the acquisition through s.94 contributions or dedication, and was, as a consequence, "jumped on" by Mr Dick Smythe, then Director of the Department of Planning. His own concern, he said, was to see the broader picture and to consider what was to be done with the site once it was acquired.

4.4.119 Mr Alderson said that the proposal to strike a special rate to fund the purchase "might have been something that came from Oliver [Dunne]", as the view was that the whole Shire should not have to pay, and this was in the context of a "campaign" in the press about the Roundhouse situation being a bit of a "debacle". This was "thrown in" as a way of getting some support from the public. He agreed that the report itself and the idea of the special rate were politically motivated and suggested that it was intended to place some pressure on Mangleson and Cochrane "to come and talk about it" and to reduce the price. He indicated that acquisition through s.94 contributions may have been feasible as the development of the northern precincts of the Ocean Shores estate was considered to be viable at that time.

4.4.120 Mr Alderson said that he had told Mr McClellan that, in an attempt to discover the identity of the report's author, he had approached the secretaries and it

appeared after looking through their work books, that it was one of three reports written by Dr Stanley which she had dictated to the typist. He subsequently explained that the documents prepared by Dr Stanley and submitted to the typist, Mrs Margot Coggan, had to be either hand-written or on a dictaphone because Mrs Coggan did not do shorthand. When he checked the work book it appeared to Mr Alderson to be quite clear that all the documents were prepared together, as a single word-processing document, apparently on the Friday morning.

The Evidence of Mr Ryan

4.4.121 Mr Ryan said he did not write the report and that it was only brought to his attention by Mr McClellan. He said he did not write reports in the first person. He believed it was written by Dr Stanley "to get the heat off her back because of the two LEPs that were being delayed". He had no idea why "they" couched the report in those terms - he thought it was ridiculous. He did not understand Dr Stanley's note to file in justification for the report and could not understand the basis for proposing a separate levy on Ocean Shores allotments.

The Evidence of Mrs Coggan

4.4.122 Mrs Coggan said that when she saw the report initially her reaction was that Jane Stanley was the author and she was surprised when she saw it was under the Planning Manager's Report. She said she had looked at her diary and could find no evidence of a further report typed at the same time as the letter to Sly and Weigall, as alleged by Mr Alderson. She said it was possible she had forgotten to enter it into her diary, but that it would be unusual for that to have happened. She concluded by suggesting that the report may not have been typed in the executive area at all, but in the typing pool on the ground floor. Subsequently, in commenting on an extract of the provisional draft of this report, Mrs Coggan stated that, following the interview in which she gave evidence on this matter, she had looked at the worksheet for that meeting and believed that the report was an extract from another document which may have contained correspondence and file notes, which she may have typed in draft form. She also re-stated her belief that the author of the report was Dr Stanley.

Analysis of the Evidence on the "Great Surprise" Report - Conclusions

4.4.123 The authorship of this report remains a mystery, and contradictions and inconsistencies in the evidence abound. Of those closely involved in the matter, only Mr Pullinger has attempted to distance himself completely from the process leading to the preparation of the report and from the sentiments expressed in it. Although he had the option of pulling the report out of the business paper, I believe he did not do so because he accepted the political reality that this, essentially, was what the President wanted and that Dr Stanley and Mr Alderson had had a significant involvement in achieving it. They had taken the reins and his own strategy was in tatters. The reason for the denials regarding authorship may not be difficult to ascertain. It is understandable that no one person is

prepared to accept responsibility for an action which was, at the time, the result of a joint effort aimed at satisfying a number of different agendas.

4.4.124 I believe the report was written with the intention, in part, of creating a mischief in the Ocean Shores community by provoking outrage that "the developers" were about to "diddle" Council to the tune of $2M. Newspaper reports of the day carried the headlines "ANGER OVER LEVY PLAN" - the report certainly achieved the political purpose set for it. It was also, to some extent, a reluctant admission of defeat on the part of Dr Stanley and Councillor Dunne, that their convictions about the Roundhouse and alternative mechanisms for acquisition at no cost to Council may not be supportable. The protestations about dedication and the suggestion about the Deed requiring construction of an Aboriginal Art Gallery must be regarded as nothing less than duplicitous, given the information available to the Council at the time and the actions it had taken in relation to the Roundhouse.

4.4.125 While some doubt remains as to whether the report was actually written by Dr Stanley, her stamp is clearly on it: she was responsible for the letter to Sly and Weigall, she wrote the contemporaneous file note, and she has acknowledged that she agrees with the sentiments. However, Mr Alderson's stamp is also visible in some of the language used and the personal tone, which were more characteristic of his reports than of those prepared by Dr Stanley. In addition, the ideas expressed in the report had been canvassed in meetings between Dr Stanley, Mr Alderson and Councillor Dunne. Therefore I do not believe it was either Dr Stanley's initiative or that she was solely responsible for its preparation but rather that it was the outcome of a joint decision, arising from those discussions.

4.4.126 The evidence points to the fact that the report was not formally endorsed by the CMT and, in fact the position regarding rezoning expressed in the report (and in the File Note prepared by Dr Stanley, on instruction, according to her, from the CMT) is contrary to that stated in the minutes of the CMT meeting held the previous week, on Thursday 7 September, namely "Let rezoning process (of the Roundhouse) proceed."

4.4.127 The way in which this report seems to have magically appeared on the Council business paper, with no-one held accountable and no-one prepared to accept responsibility for it, is an indication of the chaotic state of the Council's management at the time. Mr Pullinger insists that he was working on a particular strategy to address the Roundhouse problem; others were working on different strategies and there was no real communication. Mr Dunne commented that, as far as Mr Pullinger was concerned, seeking legal advice constituted action, and he suggested that this was about the extent on Mr Pullinger's action in relation to the Roundhouse. That he allowed such a crucial report to go to the Council with a Directors' recommendation not formally endorsed by the CMT and, on his evidence, contrary to his own views on several of the issues it covered, demonstrates, I believe, a lack of leadership on his part, and an abrogation of his responsibility to control and direct staff.

4.4.128 Having adopted the report without, apparently, questioning or debating the issues it raised, the whole Council must be judged as having endorsed the sentiments and ideas expressed in the report.

4.4.129 If, as stated in the file note written by Dr Stanley, the impetus for this public statement was the belief that a rezoning to a higher order of use would have pushed the price up, then it was in effect a deceit practised on the community of Byron Shire. Rather than presenting the facts honestly to the community, and admitting that the Council had itself created the circumstances which resulted in this potentially enormous liability to the ratepayers, it produced a deceitful document intended to put the owners "in bad odour" with the community.

Investigation of the history of the Roundhouse

Relevant Facts

4.4.130 Following the "great surprise" report, Dr Stanley embarked on a research exercise which was expected to clarify the situation regarding the Roundhouse once and for all. She said that she did not, however, research Council files believing that everything they could reveal was already known. Instead she undertook a review of the files relating to the Roundhouse and Ocean Shores held by the Department of Planning.

4.4.131 Her report to Council on 17 October 1989 outlines the findings of her research, and has appended a summary of relevant documents, including material from Council's own records (among them several reports and copies of correspondence from 1981). The report contains a number of the common misconceptions which were not dissipated through her research and reflects her particular concern - which was also a concern for many in the community - for the provision of an Aboriginal art gallery on the site. It was her belief that the Roundhouse

> *"... was used to house the collection of Aboriginal artworks until some time during the mid 1980's when the collection was apparently sold off. Given the developer's commitments and the basis for collecting the artworks from Aboriginal source areas, this dispersion of the works may be a matter of public concern."*

I have addressed these concerns in Section 4.2 of this report (see para 4.2.6).

4.4.132 Dr Stanley was operating on the assumption that the building which was functioning temporarily as a sales office (and in her mind there was some doubt about the legality of this use) but that it was the intention of the developers of Ocean Shores to dedicate the facility "within a few years" for public use. her report also noted:

> *"There is correspondence to indicate that if a S.314 certificate, or later equivalent ... for the site had been requested, Council would have given*

advice that referred to the obligations to provide an aboriginal art gallery, and the special uses zoning of the land."

4.4.133 In fact, the owners did obtain a s.149 certificate prior to purchase and that certificate did not give any indication of an obligation to provide such a facility. By contrast however, the s.149 certificate for the proposed marina site (also to be provided in stage 3) did refer to a reservation for the purpose of a marina. That site was sold at auction in January 1981 without any of the controversial repercussions which have accompanied the transfer of ownership of the Roundhouse site.

4.4.134 Although the aim of the research is not clear, the questions it raised for Dr Stanley, and of which she advised Council, related to whether or not the development company had breached its obligations and whether the existing use was authorised. She acknowledged that the answers to the questions

"... would not necessarily remove Council's obligations to purchase the Roundhouse under current planning provisions, but they could provide a basis for simultaneous legal action to recoup costs from other parties, or to require reinstatement of public assets."

4.4.135 A number of actions were suggested as means by which further information may be sought on the issues raised in the report. There is no evidence that any of these were followed up, apart from a letter to Bond Corporation seeking its assistance to clarify the situation and stating that:

"The purchase of the Roundhouse site by this Council is not practicable in financial terms and not supportable based on the history of the matter. ... The evidence available to Council suggests that your company does have [an obligation to provide the Roundhouse as a community facility] and that you should make provision for the purchase of the Roundhouse property, to be subsequently dedicated for public use."

4.4.136 One of the other actions proposed was to seek legal advice concerning the legality of the transfer of the site in 1981, and any liabilities arising. The report concludes:

"A further report will be put to Council when the legal advice is obtained and various options described above have been clarified."

4.4.137 There is no evidence either on the Council's files or those of Council's solicitors at the time, that legal advice was sought or obtained at this point. However, according to Mr O'Rourke, if he had been questioned about any matter arising from the Deed he would have been consistent in his response, namely that it was unenforceable.

4.4.138 In the meantime the owners were becoming increasingly sceptical that they would

be able to negotiate a settlement with Council and, in letters to Council from their solicitors on 25 October 1989, advised that their claim was now $2.7M, and warned that unless an offer to acquire or an unequivocal assurance regarding resumption was received within 21 days, legal proceedings would be initiated. Following the Council's acknowledgment of those letters, there is no evidence of any further formal communication between the Council and its own or the then owners' solicitors or the owners themselves, until March 1990 when the Council suggested, through its solicitors, a meeting to discuss a resolution in the form of a rezoning of the site to enable it to be developed. The owners were wary of proceeding in this way because of their experience with Council to date and the matter finally went to the Land and Environment Court in July 1990.

Defence of the Appeal

Relevant Facts

4.4.139 The bases on which Council was to defend the appeal by the owners in the Land and Environment Court were that the acquisition clause was *ultra vires* in that it purported to deal with land other than that identified in s.26(c) of the EPA Act, and that in any case the clause was open to interpretation. One of the implications of the position being taken by Council's solicitors was that s.116 of the EPA Act would not apply, as a consequence of which the land could be valued on the basis of the purpose for which it is currently zoned rather than in the more general terms of "highest and best use". The advice from Mr O'Rourke was that Council had a good chance of winning on the grounds he proposed.

4.4.140 Apart from the matters initially listed as the Council's Points of Defence, Mr Bingham of Sly and Weigall who represented Council before the court, because Mr O'Rourke was overseas, sought to include additional points of defence. He put it to Cripps CJ that there may be a condition of development consent requiring dedication of the Roundhouse, in which case acquisition by Council could not be required.

4.4.141 I note that the version of the LEP made available to Mr Bingham, for the purposes of the Council's defence, did not contain the Amendment No. 6, gazetted in April 1990, which had the effect of deleting the Cape Byron Academy site from the acquisition provisions of the Plan. As a result, Mr Bingham put it to the Court that, if Council was bound by the provisions of Clause 43 of the LEP, then it may also be required to acquire that site.

4.4.142 Mr Bingham sought and obtained the concurrence of Council officers to his proposal to put to the court that the matter had a long and complex history and that Council was not dealing with totally innocent parties.

4.4.143 The previous owners objected to these and other comments made by Mr Bingham about the site and about them. These were raised by Messrs Mangleson and

Cochrane with the Law Society and Mr Bingham's response to the Law Society indicated that **most of the allegedly misleading statements made by him to the court were based on his instructions from Council officers.** Those officers were Mr Pullinger, Dr Stanley and Mr Alderson.

4.4.144 A number of aspects of the Council's defence of the appeal were commented on by Cripps CJ in his judgment. Of particular relevance are the following:

> *"On 30 January 1990 the Registrar gave directions for the filing of points of claim and points of defence to be completed by 27 February. The matter was listed for 28 February ... The respondent [Council] had not filed points of defence or any affidavits disputing the applicants' claim."*
>
> *"[Mr Bingham] submitted ... that I should deal with the legal issues of construction of the LEP and the EP & A Act (being the only issues identified by the Council until 10 July 1988) and that if the Council were unsuccessful, it should thereafter be given an opportunity to raise the additional defences referred to above."*
>
> *" ... the Council has had every opportunity to investigate the matter fully and put before the Court such material as it deems necessary with respect to the claim of the applicants."*
>
> *"I do not think in these circumstances the Council is entitled to some sort of preferential treatment."*

Evidence on the Court Proceedings

4.4.145 When I questioned Mr O'Rourke on the Council's Points of Defence, he indicated that, as he had been instructed that the Council wished to defend the appeal, it was his duty to find reasonable grounds for the defence. He commented that he did not believe it was a specious argument that, as Special Uses (Other) is not a category within the 5(a) zonings shown on the Byron Shire LEP map, then the acquisition provisions of Clause 43 cannot be taken to apply to the Roundhouse site. The issues of the lack of definition within the LEP of "Community Purposes", and whether such purposes are encompassed within the provisions of s.27 of the EPA Act were similarly considered to be valid arguments.

4.4.146 In his evidence on the last-minute introduction of the possibility that there may be somewhere (perhaps in the Deed?) a condition of consent requiring dedication, **Mr Pullinger admitted**, in his evidence, **that raising that possibility was a mechanism for having the matter adjourned.** It was argued that Mr Bingham had only recently been brought in to this case and that there had been insufficient time to ensure that he was adequately briefed, and in particular, he had not had the opportunity to study the Deed. When he questioned the Council officers, on the morning of the hearing, whether they knew of any document which might require dedication as a condition of consent, according to Mr Pullinger, they

indicated that such a document may exist. Dr Stanley, in her evidence, denied that Mr Bingham was "instructed" that the Deed could contain a condition of consent requiring dedication. I note that Mr Bingham does not specifically mention the Deed; he simply refers to "the original development consent or subdivision approval for the residential development of the subject area" (which is, in effect, the Deed).

4.4.147 Mr Pullinger commented that the introduction of this additional point of defence had come as something of a surprise to him because he understood that Council's defence was to be on the grounds of the validity and application of the acquisition clause. It was the view of Mr Pullinger that Mr O'Rourke ought to have fully briefed Mr Bingham, and it was his view that if Mr O'Rourke had run the case these matters would not have arisen.

4.4.148 I have noted (at para. 4.4.141) that the version of the LEP made available to Mr Bingham, did not contain the very crucial Amendment No. 6, gazetted in April 1990. None of the officers made any attempt to correct this impression. Mr Pullinger said that because it was a technical planning matter it went over his head and Dr Stanley did not consider it was an issue because the argument was in the context of what was in the original Byron Shire LEP 1988 at the time of gazettal.

4.4.149 It should be noted, that in his response to the provisional draft report, Mr Alderson dissociates himself from much of the activity involved in the court proceedings. He has commented:

> *"My role was an assisting role ... at the last minute I was instructed to attend by Oliver Dunne* [or more likely Ian Kingston, who was Shire President at that time]. *I was very underprepared as I had not been anticipating attending the court at all.*
>
> *I clearly recollect sitting quietly at the briefing table saying almost nothing because the issues of discussions did not involve engineering matters. ...*
>
> *I know [of] no strategy to delay acquisition. I do not recall the matter being discussed at any point in time. ...*
>
> *My involvement at the briefing was in my opinion zero ... I clearly remember disagreeing with Barry Pullinger, Jane Stanley and Mr Bingham, concerning the 'innocent parties' comments. Barry Pullinger and Jane Stanley did say that they thought people would come forward."*

4.4.150 I note, however, that some of the correspondence between Council and its solicitors and solicitors for the owners, during the period prior to and after the hearings, is directed to Mr Alderson, and he is also referred to as a person with whom matters relating to the Roundhouse were discussed.

Assessment of the Evidence

4.4.151 It was and remains my view that the grounds on which the Council defended the appeal were difficult to support in the light of all the advice Mr O'Rourke had given previously that Council did have an obligation to acquire. In spite of Mr O'Rourke's comments, I am left with the strong impression that **the conduct of the case suggested that there was no real conviction that the arguments for the defence were solid.** The late introduction of additional points of defence tends to support my view.

4.4.152 There is, nevertheless, no doubt that the drafting of the acquisition provisions in the LEP was unsatisfactory and did not unequivocally represent the Council's intention. Justice Cripps acknowledged that there were deficiencies in the drafting, and suggested jocularly, in response to Mr Bingham's arguments in the Court, that they may have been written somewhere "between the manhattan and the martini!" What is not in doubt, however, was the intent of the provisions at the time of the preparation of the plan - Council wanted the site zoned for community purposes (albeit undefined) and would acquire it for those purposes. The arguments put in the defence of the appeal were, in effect, *post facto* attempts at negating this intention.

4.4.153 **Council's senior officers**, including Mr Alderson, **must accept much of the responsibility for the direction of the Council's defence.** Apart from giving Mr Bingham the false impression that there may still be some redress through the Deed of Agreement, Council officers did not properly brief him on the LEP and, in particular, the acquisition table.

4.4.154 Mr Bingham also sought and obtained the concurrence of Council officers to his proposal to put to the court that the matter had a long and complex history and that Council was not dealing with totally innocent parties. This might not have been such an issue if it had remained within the confines of the court, but, as discussed below, Council later sought to capitalise on it.

4.4.155 Although the statements made to the Court by Mr Bingham did not affect the outcome of the Court proceedings (the judgement was definitively in favour of the applicants), it is of concern that up and during the court hearings, in spite of all the evidence available to Council, its senior officers were still refusing to accept the situation Council had created and were continuing to look for ways of avoiding its obligation or, at the very worst, postponing it for as long as possible, and waging a "war of attrition" against the owners. **There was a clear strategy to delay and the "eleventh hour" introduction of the possibility of a condition of consent requiring dedication was just one more illustration of this.**

4.4.156 Council obtained some re-inforcement for its delaying strategy from its solicitors. The advice of Mr O'Rourke to Council as early as 6 April 1988 (i.e. even prior to gazettal of LEP 1988) gives some hint of this. In a letter summarising the various statutory provisions which would determine the procedures required of Council

should it receive a Notice to Acquire, he states:

> *"... the financial impact of the obligation to acquire can only be minimised by securing for Council the maximum possible time in which to accumulate the funds to meet the claim for compensation."*

He adds, however, that this advice should be seen in the context of all the preceding advice contained in his letter regarding the acquisition proceedings.

4.4.157 Nevertheless, again, in August 1989, in response to Dr Stanley's question:

> *"If a local environmental plan is made which confers an obligation to acquire land in error, what steps must Council take to avert any obligation to acquire?"*

the verbal advice in response, attributed to Mr O'Rourke, which he acknowledged was consistent with what he would probably have said, was:

> *"Rezone before notice served. If contested right to acquire - Land and Environment Court ... we seek declaration that we didn't have to acquire or sit back and wait for property owners to do it."*

4.4.158 Council officers have repeatedly argued that their prime concern was a financial one, that they were motivated by a desire to ensure that the rate-payers of the Shire were not burdened with the cost of an acquisition which the Council was either not legally bound to, or which was over-priced. They also operated on the "collective wisdom" of years of experience in local government that property resumptions are always protracted processes which can be expected to take years to resolve. Hence they have justified what I consider to have been a deliberate and unreasonable series of delaying tactics, both prior to the court hearing and subsequently - as discussed below.

4.4.159 As regards the Court's determination, there is nothing in the judgment of Cripps CJ which would be likely to provide some comfort to the Council that the position it took was supportable. Indeed the judge was quite dismissive of the Council's arguments and critical of the way it approached the defence of the appeal.

Council Response to the Court's Decision

Relevant Facts

4.4.160 The advice of Sly and Weigall following the Court's decision and in response to Council's request for guidance on the advisability of appealing the decision and on what action it should now take, was:

> *"... we do not believe that an appeal would be likely to succeed and we do not recommend that an appeal be lodged. ... Council should now proceed to*

acquire the subject land ... Council should take no further action with regard to the rezoning of the land until the compensation claim has been determined."

4.4.161 This was reported to Council in a confidential Committee of the Whole as part of the Shire Clerk/General Manager's report on 14 August 1990. The Council chose not to accept his recommendation that the solicitors' recommendations be adopted and resumption proceedings be initiated. It was not satisfied with the advice of Sly and Weigall, and, according to Councillor Kingston, in his response to the provisional draft report:

> *"It was considered by Council that Sly and Weigall had not acted in the best interest of Council in their conduct of the Court case. Council had been advised by Mr. O'Rourke that it had reasonable prospects of success, and in fact, he rejected offers of assistance from Council officers in preparation of the case due to his confidence. In the event, the conduct of the case was given to Mr. Bingham at the last minute and Council considered Mr. Bingham had been inadequately briefed by Mr. O'Rourke, and therefore Council's loss in the case may have been caused by this. Indeed, in Council's opinion, Mr Bingham's advice not to appeal was based on his possible inadequate briefings by Mr O'Rourke and his possible lack of a full understanding of the history of the matter. In other words, Council was disappointed with the advice."* (It should be noted that Council's former solicitors reject entirely Councillor Kingston's comments that Mr Bingham was not adequately briefed and that this was the cause of the Council's loss in the litigation.)

4.4.162 Instead of adopting the Shire Clerk/General Manager's recommendations, Council resolved that the Shire President, Councillor Kingston, seek "alternate advice" regarding all avenues of appeal and to fund an independent inquiry. A decision was also taken to release to the press the Shire Clerk/General Manager's report, which included, as an attachment, Sly and Weigall's letter to Council about the appeal. That letter, which was published in one of the local newspapers. the Echo, described the owners as "opportunists ... not innocent property owners whose rights needed protection". This matter was the subject of threatened defamation action by the former owners.

4.4.163 Following the Council's resolution of 14 August, the Shire President immediately began making enquiries regarding legal firms which might assist Council in this matter, and engaged Mallesons Stephen Jaques. At a conference with representatives of that firm on 21 August, they recommended that Council lodge an appeal "so as to preserve its position" while they considered all the material relating to the matter. Council agreed to this but deferred making a decision on an independent inquiry. The alternative they adopted was to have a thorough investigation of all relevant files undertaken by Mr Kanaley, Council's Strategic Planning Manager and a consultant Planner, Mr Murray. According to Councillor Kingston, this investigation was intended to clarify once and for all whether there

were any grounds for the belief that the Roundhouse site would ever be dedicated, and hence, whether there were any grounds for continuing the appeal. They were engaged on this task on a virtually full-time basis for over two months, with guidance from Mallesons Stephen Jaques, and produced a series of reports which provided a basis for further advice to Council from its new solicitors, on the feasibility of an appeal.

4.4.164 On 9 November 1990, the Shire Clerk/General Manager formalised in a memo to the Shire President the thrust of the verbal advice he had given to him since the Council resolutions of August 1990. He reminded the Shire President that some of those resolutions were contrary to his advice and covered the proposed independent inquiry, alternative advice on all avenues of appeal, the release to the public of his report of 14 August 1990 and Council's resolution thereon. In relation to the proposed inquiry, he stated:

> *"... I fail to see the purpose of such an enquiry ... If the intent of a public enquiry is to find a scapegoat or scapegoats to blame and take action against for the inevitable end of this saga, i.e. the acquisition of the property, then this is ill-founded since there have been so many persons involved over such a lengthy period.*
>
> *If the purpose is an attempt to divorce this present elected Council from the blame then again the reason is ill-founded since this Council has been advised and kept fully briefed on the whole matter. ... I do not believe the proposed public enquiry is necessary."*

4.4.165 The advice from Mallesons Stephen Jaques, following the completion of the investigation by Messrs Kanaley and Murray, as reported in the Presidential Minute to Council on 13 November, was:

> *"1. Council withdraw its appeal against the decision of His Honour Mr. Justice Cripps.*
>
> *2. Council should immediately take steps to comply with the orders made by His Honour."*

4.4.166 The Shire President also reported that Council's solicitors had advised on 21 August 1990 that

> *"... a Queens Counsel experienced in local government and planning matters be appointed to undertake a preliminary investigation and that he report to Council on whether a full enquiry is warranted."*

4.4.167 Although the Shire Clerk/General Manager, in his memo of 9 November 1990, had argued that a public inquiry was unnecessary, the Shire President noted in a draft of his Presidential Minute for Council's meeting of 13 November 1990:

"... it is my opinion that such an investigation [as proposed by Council's solicitors] is warranted and indeed is essential. I quote Mr. Dan Kelly of the Department of Local Government with whom I discussed this matter on 21 August, 1990: 'Council has a duty of competence in this matter and it should investigate'. Should this Council fail to have an independent investigation, we would be left open to accusations of a cover-up ..."

4.4.168 His recommendations to Council on 13 November 1990 were adopted. They were that Council's solicitors be instructed to withdraw the appeal, comply with the resumption order, investigate the possibility of relief under the terms of the Deed of Agreement and engage an appropriate Queens Counsel to review the research to date and determine whether a full inquiry was required.

4.4.169 Mallesons Stephen Jaques briefed Peter McClellan QC who commenced a detailed inquiry in December 1990. His findings and conclusions have been discussed at some length in various sections of this report. In spite of the Council's resolution that the appeal be withdrawn and resumption proceedings commenced, this did not occur until after the completion of Mr McClellan's inquiry in late February 1991. In the meantime, Council was still discussing the option of rezoning as a means of resolving the matter. In a report to Council's special meeting on 4 February 1991, the Shire Clerk/General Manager stated that:

"... Council's solicitors wish to meet with Council to discuss the matter of 'The Roundhouse' and a settlement of the matter in the following possible ways:

1. *Rezoning of the property with the property remaining in its current ownership and the density that would apply to such rezoning.*

2. *The basis of compensation upon acquisition by the Council."*

4.4.170 Councils' solicitors were authorised to negotiate on the basis of the applicants retaining ownership of the land

"... in the event that an L.E.P. is made for the land providing for medium density residential use to a maximum of 30-35 dwellings."

4.4.171 Council's solicitors continued to offer to negotiate on the basis of a rezoning but this was not acceptable to the owners without some unequivocal assurances from Council about future development of the site - assurances which Council was unable to give because this would pre-empt the proper processes required under the provisions of the Environmental Planning and Assessment Act. All negotiation along these lines became irrelevant following Council's decision to proceed with resumption.

4.4.172 Notices of resumption were issued by Council on 1 March 1991. The owners' solicitors immediately advised formally that their clients had no objection to the

resumption and requested that the 30 day period for receipt of objections be waived - a request which Council refused on the grounds that it wished to ensure that it strictly followed proper procedures.

4.4.173 Council's application to the then Department of Local Government for the resumption, dated 25 March 1991, stated that

> *"5. The Council proposes to acquire the land pursuant to the Order of the Land and Environment Court made on 27 July, 1990, ..."*

4.4.174 The Department advised Council verbally that the application was deficient in a number of ways, including: no Council seal and no proper statement of the purpose of the acquisition e.g. for the provision of a community facility. Council responded on 16 May 1991 explaining, in relation to the purpose, that Council "obviously did not wish to purchase the land" but was required to do so as a result of the Court's decision. The Department finally agreed to a statement of purpose in the following terms:

> *" ... giving effect to the provisions of clause 43(3) of the Byron Local Environmental Plan, 1988 ..."*

4.4.175 The Governor's approval of the resumption was finally obtained on 3 July 1991 and gazetted on 26 July 1991.

Comments and Assessment

Resumption vs Negotiation of Compensation

4.4.176 The fact that Cripps CJ went beyond the arguments put by Council in relation to the validity and application of the acquisition clause, by ordering Council (without delay, it should be noted) to apply for resumption, resulted in limiting the options available to Council. If the determination had been restricted to declarations as to validity and application of the provisions, then it may have been possible to negotiate compensation immediately. The resumption process actually provided Council with a further excuse for delaying settlement. Given the way the matter had been dealt with to that point, however, it is unlikely that the Council would have acted promptly to negotiate on the basis of a declaration.

4.4.177 As events transpired, it was almost nine months after the judgement of the Court was brought down before the Council finally withdrew its appeal against the decision, and over twelve months before the resumption was gazetted. The Council continued with the approach it had adopted in 1988, namely, looking for ways of avoiding the acquisition. Following the Court's decision, it refused to accept the advice of its solicitors not to appeal; it ordered an investigation (resulting in the Kanaley/Murray report); it engaged new solicitors; it did not accept the advice of those solicitors, following receipt of the Kanaley/Murray report that it immediately comply with the order of Cripps CJ; it ordered (on the

advice of its solicitors) a further investigation undertaken by Peter McClellan QC, and it was not until the report of this investigation was presented that it began the resumption/acquisition process. This process included, yet again, approaching the owners with an offer to re-zone the land for medium density residential development, re-affirming its judgment that medium density was indeed the most appropriate use for the site. This throws into sharp relief the cynicism of the exercise the Council went through less than twelve months later to justify paying the minimum compensation based on the use of the land for private art gallery.

Release of the Solicitors' Letter

4.4.178 Given the sacrosanct way in which Council (quite appropriately in most circumstances) holds the legal professional privilege it claims in relation to its legal advice, its action in releasing to the press the letter from Sly and Weigall is extraordinary. I was advised that the decision to release the document was announced by the Shire President at the commencement of the meeting of the Committee of the Whole on 14 August 1990, and did not have the support of all Councillors. However the decision was endorsed by a resolution of the Council. This action was, I believe, a deliberate and quite malicious attempt, in my view, to further discredit the owners.

4.4.179 In defence of the decision on this matter, Councillor Kingston has argued:

> *"Councillors of the day were devastated by the decision of the Court, and rightfully resolved to inform the public the reasons advanced by Mr. Bingham for the loss in Court. This was in no way a '... deliberate and quite malicious attempt by Council ..... to further discredit Messrs. Mangleson and Cochrane.'*
>
> *The Roundhouse case was a major concern for the community at large, and Council felt under an obligation to inform the community as to why the case had been lost. The majority of Councillors of the day had been elected on a platform of open government, in contrast to the previous Council ...*
>
> *It was to fulfil these commitments to the ratepayers that Mr. Bingham's advice was released to the public (naturally with his prior consent), and certainly not with any intent to discredit Messrs. Mangleson and Cochrane."*

4.4.180 I see no justification for pursuing this particular course of action. The information contained in the letter from Mr Bingham about the reasons for the Court's decision and his advice regarding the options available to the Council could have been conveyed to the public in a much less provocative and damaging way.

The Power of the Deed

4.4.181 It was suggested by several witnesses, during the investigation, that Council felt

much of the blame for its loss of the case before the Land and Environment Court was due to the fact that Mr Bingham did not tender to the Court the Deed of Agreement. This is a further indication of the blind faith Council continued to place in the Deed. In fact its presentation would not have supported Council's case in any way but would have made it quite clear to the judge that the argument about dedication was nonsense. Remarkably, in my view, Mallesons, in a letter to Council dated 21 August 1990, demonstrated a similarly optimistic attitude towards the Deed, commenting:

> *"It seems to us that it would have been helpful to the Court had the deed of 16 April 1969 ('the Deed') been tendered in evidence in support of proposed ground [of defence] 5."*

They also note:

> *"On our instructions it is implicit in the Deed that the art gallery and other facilities are to be constructed by the developer, or its successors in title, at its own expense.*
>
> *Should the Council now be required to acquire the land the anomalous situation would arise whereby the Council has to either make the land available for the construction of the art gallery or itself construct the art gallery."*

Council's solicitors were clearly, at this point, making pronouncements about the provisions of the Deed without having read it but relying on information supplied to them by Council officers about what was contained in it.

4.4.182 Further reference to the Deed was made in discussions between several representatives of the Council and Mr David O'Donnell and Ms Debra Townsend of Mallesons Stephen Jaques on 29 August 1990. The minutes of that meeting note:

> *"Mr O'Donnell again stressed that the principal exercise is a management exercise on the part of the Council which may mean complete renegotiation of the Deed of Agreement ..."*

4.4.183 The persistent hope that the Deed might provide a way out of the Council's Roundhouse problem was finally put to rest by Peter McClellan Q.C., whose advice to Council in November 1990 was that the Deed was invalid (although with something of a disclaimer in relation to the effect of certain provisions on the development company).

The Letter of the Law?

4.4.184 Council's action in insisting on the 30 day objection period following the gazettal of the resumption is, I believe, an indication of its determination to prolong the

whole process as much as possible - yet another delaying tactic. This provision is a matter of Ministerial practice rather than a requirement of any legislation or regulation, and is clearly intended to protect the interests of the property owner. It could have been waived on request of the affected parties - and they did make that request.

PART 4

4.5 A FIFTH STRATEGY? - DELAYING TACTICS AND NEW HURDLES

4.5.1 I have suggested in previous sections that, apart from the four strategies identified in the report of the Shire Clerk/General Manager to Council at its meeting on 14 August 1990, the Council's over-riding strategy was to postpone for as long as possible the day on which it might be required to pay for the acquisition of the Roundhouse site. The arguments about whether or not it had a legal obligation to acquire and the search for the elusive grounds on which it might be able to claim that some other body was required to fund the acquisition, may all be regarded as part of a fifth strategy. The time lapse between the receipt by Council of the valid Notice to Acquire and the date of resumption was particularly critical in terms of the amount of compensation payable to the former owners, as discussed below, but the themes of delay and new hurdles to a satisfactory resolution also permeate later phases in the process.

Post-Resumption Procedures

Relevant Facts

The Process

4.5.2 Following receipt of the Governor's approval to publish the Notice of resumption, the Shire Clerk/General Manager, on 17 July 1991, informed Council's solicitors that the notice would be published in both Government Gazette and the local press, and sought advice in relation to possible mediation. He commented:

> *"As we have discussed, it would likely be financially preferable to the Council to settle the compensation with the owners rather than have the matter proceed to determination in the court. There should be opportunity for the matter to be mediated and you are requested to give your attention to the details of such a process which should be devised in consultation with the Shire President and myself."*

4.5.3 The solicitors advised that, once the former owners' claim was received, the Council must issue a formal notice of valuation to the former owners (the claimants) and if the valuation was unacceptable to them, then both parties' valuers should enter into "without prejudice" discussions with a view to reaching a negotiated settlement. The claimants retained the right to litigate the matter but Court-sponsored mediation remained a possibility until the date the matter was set down for hearing.

4.5.4 The Shire Clerk/General Manager reported this advice to the Council on 6 August 1991 and recommended that the Council "as expeditiously as possible, comply with its obligation under the Local Government Act". Mr Pullinger, in a letter to the former owners on 9 September 1991, expressed concern that delay in the

lodgement of their claim was prejudicing proposed discussions in late September.

The Claim

4.5.5 The Notice of Claim, totalling $6M of which $3.3M was land value, was forwarded to Council by the former owners' solicitor on 11 September 1991. The claim did not contain details and these were requested by Council's solicitors on 24 September. They also suggested that the matter might be discussed at a meeting which would include the valuers for both parties. The meeting did not proceed at that time because certain information requested from Council by the former owners' solicitors (including valuation and Town Planning advice) had not been provided. The provisions of the Public Works Act relating to the resumption process require that the Council obtain a valuation within 60 days after receiving the former owners' Notice of Claim.

4.5.6 Details of the claim were forwarded to the Council's solicitors on 1 October 1991, together with the recommendation that, rather than have numerous representatives of each party involved, Mr Cochrane, who is a licensed valuer, would discuss the matter at a meeting with the Council's valuer, Mr Woodley, at the Roundhouse, to enable him to see comparable sales sites. Mr Woodley indicated to Council that assessment of the former owners' claim would be assisted by a conference with Mr Cochrane, and that conference was held on 22 October 1991.

Towards a Counter-Claim

4.5.7 Following discussions between Mr Woodley and the Council's solicitors, it was agreed that independent Town Planning advice was required and Mr Neil Ingham of Planning Workshop was engaged for this purpose. (This appointment raised issues which are discussed in paras 4.5.95ff below). In preliminary discussions, (reported in a file note by Mr Pullinger on 29 October 1991), Mr Ingham expressed the view that the land should be assessed on its community use zoning i.e. on the basis that s.116 of the EPA Act did not apply.

4.5.8 The advice of Council's solicitors on 28 October 1991, regarding the basis for valuation, was that although there may be some doubt as to whether the 5(a) zoning on the Roundhouse site does, in fact, reserve the land for a purpose under s.26(c) of the EPA Act, the decision of the High Court in Housing Commission of New South Wales v San Sebastian Limited (1978) 37 LGRA 214, requires that the current zoning be ignored in determining a valuation of the site. The relevant consideration was what planning controls would have been applied if there had never been any intention to resume the site. The solicitors proposed two other approaches to the valuation, namely the Discounted Value approach (determining the difference in value of the whole of the Ocean Shores Estate and the Estate minus the Roundhouse site) and the Residential Value approach (the value of the land based on its development for residential purposes similar to nearby land in Ocean Shores). They suggested that, in their opinion, Council's chances of

succeeding before a court on the community use approach were 50%, and on the discounted value approach better than 50%. However, **it was their view that the residential value approach was the only basis on which the claimants were likely to negotiate.**

4.5.9 By 12 November, just over 60 days after the claim was lodged, the Council's valuation had not been provided to the claimants, and their solicitors advised that, if it was not forthcoming within 14 days they would issue process for determination by the court.

4.5.10 A special meeting of Council, at which Councillors were briefed by Council's solicitors, was held on 27 November 1991 to resolve upon the claim. The Council was presented with three options, based on the planning advice provided by Mr Ingham. They were: private art gallery or similar use ($480,000); standard density residential (12 lots) with provision for an art gallery site ($650,000); and standard density residential (13 lots) with normal open space provision ($721,000). The business paper also included a report from the Executive Manager Works and Services on the provision of sewerage at Ocean Shores, and a report from the Planning Manager supporting the position put by Mr Ingham - in marked contrast, it should be noted, to his earlier assessment that the site was "admirably suited to medium density development". The Council, on the recommendation of its solicitors, resolved to accept its Valuer, Mr Woodley's, valuation of $480,000, based on the use of the site for a private art gallery.

Response to Council's Valuation

4.5.11 The basis of the quantum of Council's valuation, and hence any negotiation based on it, was not acceptable to the claimants and their solicitors advised, on 10 December 1991, that they were proceeding to issue process. The Council, in the meantime, had requested the claimants for more and better particulars of their claim for disturbance and other items, so that a proper valuation could be done. Council's solicitors noted that their client "stands ready to mediate the matter in an effort to settle it or limit the issues between the parties". The position of the claimants was that the information required to assess the items ancillary to the compensation claim had been provided to Council's valuer and that there was little point in pursuing this matter further while the Council's offer apparently ignored so much of the evidence.

4.5.12 Following the special meeting, several of the Councillors began expressing their concerns about certain aspects of the way in which the resumption process was being conducted. These concerns were formalised in a memo from Councillor Tucker to the Shire President on 2 December (see para. 4.5.99). This matter was referred to Council's solicitors for advice to assist the Shire President in his response. In their concluding comments in response on 24 December, they recommended that the Council inform the claimants that it remained ready to mediate and that they should provide it with independent town planning and valuation reports and commence proceedings in the Land and Environment Court

at the earliest opportunity so that the mediation facility of the court could be utilised. That advice was forwarded to the claimants' solicitors by Council's solicitors themselves, pursuant to Council's resolution of 3 February 1992, on 12 February, after receiving further advice that the valuation was not acceptable to the claimants.

The Discovery Process and Initial Proceedings

4.5.13 Court proceedings commenced and, following the first call-over on 10 March 1992, the formal process of discovery was initiated. Because a complete list of documents was not provided by the Council until the day before the next call-over on 16 April 1992, the claimants were unable to inspect them by the due date. At the call-over, an extension was applied for and granted, and a new schedule determined, with the next call-over on 13 May 1992. In the view of the claimants, the Council had not provided all the documentation which they required (such as documents referred to in reports and other material required for a proper understanding of the matters addressed), whereas Mr Pullinger's view was that they were requesting documents which either did not exist or which they already had in their possession. He commented that he could "only assume that the delay in getting this matter to the court suits their purpose". The positions taken by the parties were later set out in affidavits submitted to the court. Council's solicitors advised Mr Pullinger that, if the claimants were to seek further directions from the Registrar for the Council to produce the documents requested, it was their opinion that the directions would be made. They suggested that the Council complete the searches and produce the documents sought as a matter of urgency.

4.5.14 Prior to the next call-over, adjourned by agreement between the parties to 29 May, Council was advised by its solicitors that it would be appropriate, in view of the magnitude of the claim involved, that both Senior Counsel (Peter McClellan QC) and Junior Counsel be briefed. They also advised that Council would need to engage a local real estate agent to assist Mr Woodley. At the call-over on 29 May, the Registrar gave the claimants another two weeks to provide the Council with the particulars of their claim, including disturbance, and to provide the Council with a full list of relevant documents held by them. However, on 5 June 1992, the applicant's Notice of Motion to vary the directions made by the Registrar, went before Talbot J and he made a series of orders, with completion dates, including verified discovery by both parties, the production of the particulars of the claim, and the filing and serving of expert reports by both parties. The next call-over was set down for 14 August. This information was reported to Council's meeting of 23 June 1992.

Attempts to Negotiate

4.5.15 In early June, Mr Cochrane wrote to the Shire President suggesting that the former owners would be prepared to meet with a committee of Council which he understood was being proposed as an alternative means of negotiating a

settlement of the matter. After seeking the advice of Council's solicitors, the Shire President responded to Mr Cochrane stating that his understanding about the proposed committee was incorrect and re-affirming the advice already provided by Council's solicitors, that Council would be willing to utilise the mediation facility of the court, but that that was not possible until the claimants' independent town planning and valuation advice had been provided to the Council. A subsequent approach to the Shire President and the Shire Clerk/General Manager by two Councillors in support of a discussion to determine common ground and canvass the possibility of a joint venture, was likewise rejected.

4.5.16 Further correspondence passed between Council's and the claimants' solicitors regarding the discovery documents, and the claimants' solicitors noted, in a letter dated 28 July, that they had been unable to comply strictly with the court's directions, as they could not complete and present their expert reports until certain information was provided by the Council. Because the claimants had not provided their list of documents or the particulars of their claim by the due dates, Council's solicitors went before Talbot J on 30 July to seek fresh directions. These were issued and a further call-over set down for 16 September. The claimants documents were provided on 14 August; they included expert planning report, architect reports, and a valuation report. Council's solicitors then requested specific information from both Mr Alderson and Mr Ryan to enable Mr Ingham to complete his planning report. A brief status report was submitted by the Shire Clerk/General Manager to Council on 25 August.

4.5.17 At the call-over on 14 September, the matter was set down for hearing between 7 and 18 December, based on Council's solicitors' assessment that it should take no longer than two weeks. Mr Young of Counsel for the claimants believed it could take longer and a further period 1 to 5 February 1993 was also set aside.

4.5.18 Council's solicitors, in their report to the Shire Clerk/General Manager on 16 September, expressed the view that, because of the large gap between the claim and Council's "worst position" based on its expert reports, mediation or settlement negotiations may be difficult, and they recommended against any negotiation based on the claimants' assessment of compensation - now reduced to $2,971,500 plus costs and statutory interest. Nevertheless they identified a number of options for settlement negotiations, including utilisation of the Council's negotiating Team Committee, with and without legal representation. They recommended against the latter, as well as against the use of a commercial mediator/arbiter on the basis of potential prejudice to Council's case and cost. The options of court sponsored mediation or Council's Dispute Resolution Committee with both parties legally represented and on a "without prejudice" basis, were put by Council's solicitors to the claimants' solicitors on 2 October 1993. This offer does not appear to have been endorsed by a resolution of Council.

4.5.19 The response of the claimants' solicitor was that his clients likely attitude would

be that they would only agree to mediate or negotiate if the Council accepted that there was no issue as to the sewerage capacity of the site to accommodate medium density development, and that the highest and best use of the land was medium density development. He also indicated that their preferred process would be likely to be Council's negotiating team with legal representation.

4.5.20 At a special meeting on 13 October 1992, the Council resolved on the maximum figure it would be prepared to pay and the forum for negotiation. The claimants' solicitor was advised on 19 October that Council's offer of settlement options was as made previously and a meeting on 22 or 23 October was suggested. These days were not suitable to the claimants and the settlement offer was not formally responded to. On 26 October they sought additional information regarding sewerage which was necessary for the finalisation of both their planning and valuation reports. They subsequently filed of Notice of Motion for an amended verified list of documents. On 6 November the claimants' solicitor indicated that his clients would be willing to discuss settlement with the Council's Dispute Resolution Committee when their expert reports in reply were completed and served.

4.5.21 Also on 6 November, a Notice of Offer of Compromise (a Part 22 offer) in the amount of $2,150,000 plus legal costs and statutory interest, was filed. Council's solicitors, on advice from the Shire Clerk/General Manager, filed their Part 22 offer on 20 November 1992. That offer consisted of $810,000 compensation, plus $80,000 estimated legal costs and $110,000 estimated statutory interest, totalling $1,009,500.

Commencement of Court Hearings

4.5.22 There was no further movement towards settlement and the hearings commenced in the Land and Environment Court on 7 December 1992. On two occasions during the proceedings, an approach was made by Mr McClellan to Mr Young, seeking advice as to whether the claimants were prepared to entertain serious negotiations with a view to settling the proceedings, although no specific offer was made and no indication given of a figure.

4.5.23 On 23 December 1992, the claimants' solicitor suggested that negotiations, on a "without prejudice" basis, be held between them and the Council's Dispute Resolution Committee, without legal representation. It was proposed that legal advice could follow if negotiations led to an agreement in principal or strong prospects of such an agreement, and it was acknowledged that the approval of the Council would be required before any agreement was finalised. Copies of this letter were forwarded to several Councillors, including the members of the Committee. Councillor Higgins, in a memo to the Shire Clerk/General Manager and the Shire President expressed his support for the proposal. It was, however, unacceptable to Council's solicitors on a number of grounds, including the fact that the members of the Committee, unlike Mr Cochrane and Mr Mangleson, did not have the advantage of having been at the court hearings. They responded, on

24 December, by seeking advice on the likely basis of settlement and whether the claimants would be agree to negotiation in the presence of legal advisers.

Offers Made and Rejected

4.5.24 The claimants' response, through their solicitor to Council's solicitors on 7 January 1993, was that they would not object to the presence of Council's instructing solicitors, and that the basis of settlement was that the site would be suitable for medium density development, as a consequence of which the only two matters to be negotiated would be the appropriate density and the value per unit.

4.5.25 As this was the Christmas holiday period, very little progress was made. However, Mr McClellan did have discussions with Mr Young about a possible settlement. Mr McClellan's subsequent verbal advice to Mr Pullinger on 27 January, was that he was still "comfortable" with Council's Part 22 offer of $1,009,500 in total, but indicated that Council could offer more in settlement negotiations more on the grounds of a pragmatic consideration of costs. He then had further discussions with Mr Young but he had been unable to contact his clients to obtain instructions, as they were in transit to Sydney to prepare for the next phase of the court hearings due to commence on 1 February.

4.5.26 Discussions did eventually occur and an offer of settlement consisting of $1,700,000 plus costs, amounting to an estimated total of $2,029,000 was made to Council. A special meeting of Council was held on 29 January to discuss the offer and advice received from Counsel. That advice was that, based on the assessment of Council's valuers, the land value assigned in the offer was excessive. It was their view that the value the court was likely to assign would be no greater than the offer already made by the Council i.e. $819,000. They nevertheless recommended, as a compromise to avoid the costs of further court hearings (expected to last a further two weeks), an increased offer totalling $1,268,000, which included $1,000,000 land value. The Council resolved to reject the claimants' offer and to increase its offer on the land value by $75,000, making a total of $1,329,000.

4.5.27 After the scheduled two weeks of hearings, the matter was not finalised and, on 16 February, the claimants made a further offer of $1,750,000 including $1,500,000 land and statutory interest. Councillors were invited to an informal meeting on 17 February to be briefed by Mr Alderson on the proceedings and to discuss this offer. The Shire President, on the advice of the Shire Clerk/General Manager was of the view that he had the authority, granted under the resolution of Council on 29 January, to submit a further offer on behalf of Council, provided the offer did not exceed Council's previous offer. They were advised by the Shire President that it was their Counsel's opinion that the court proceedings were indicating a valuation based on a single lot subdivision and this, together with the increased legal costs suggested that Council should make an offer lower than its last one.

4.5.28 In this regard, I note that, in a statement at the end of hearings on 12 February, Bannon J appears to be indicating rather that he may be favouring medium density residential development. In requesting both parties to give consideration to the question of sewerage (following cross examination of Mr Alderson), he commented:

> *"... ultimately the court will face the question whether or not at the date of resumption even if this land was - did have* ***a potentiality for medium density housing*** *- whether or not the council would have consented to it and secondly whether or not this court on an appeal from the council would have given its consent having regard to the attitudes of the council and the state of knowledge of the situation at that time. Otherwise of course it could mean that one thing that seems fairly clear is that even if the council or the court would have permitted the* ***medium density development*** *one factor that would have to be taken into consideration is by what sum compensation would have to be discounted for contributions ..."* (Emphasis added)

4.5.29 Councillors expressed a number of concerns about the process and the nature of the offers being proposed. They were divided in their views on whether to make a counter offer or simply allow the court to determine the matter.

4.5.30 The claimants subsequently put forward an alternative offer which was discussed between Counsel for each party and later by Council's solicitors with Council representatives, but apparently not recognised as a formal offer. That offer was for an all-inclusive compensation figure of $1,550,000 and half the proceeds of the sale if the Council were to on-sell the site within three years. A similar proposal had been put by them on previous occasions in 1991 to the Shire President, Councillor Kingston, in informal discussions, but was rejected at that time on the basis that it would be unacceptable to the Council.

4.5.31 At a special meeting of Council on 18 February, it formally resolved to reject the claimants' offer of $1,750,000 and to make a counter-offer of $1,000,000 total. The alternative proposal, although discussed briefly with the Shire President by the Shire Clerk/General Manager on his return from the hearings immediately before this meeting, was not raised in his report or in discussions at the Council meeting. According to Councillor Tucker, just before the meeting concluded, Mr Pullinger indicated that he was aware that certain Councillors were unhappy about what they had been told about the proceedings. Councillor Tucker commented that the feedback from Council representatives (including that of Mr Alderson the previous day) was that Council was "winning" but the accounts appeared to be very one-sided. He asked if the Councillors had all the information. Mr Pullinger advised the meeting that the Council had been told everything and that all the Councillors knew what he, the Shire president and the legal team knew.

4.5.32 This proposal was, however, addressed in a letter to Council from its solicitors on

25 February, when it was raised by the Shire President following his discussions with Councillor Tucker who had been informed of it by the claimants. The solicitors advised that, at the time, they had indicated that they believed that the proposal was insufficiently detailed to be put to Council. They also stated that they had invited the claimants to provide them with details but these were not forth-coming. Moreover, in the opinion of the solicitors, there was some doubt about Council's capacity to agree to such a settlement. The formal offer made to Council on 18 February from the claimants' solicitor was for $1,750,000 and made no mention of the alternative proposal.

Councillor Revolt

4.5.33 At the request of Councillor Tucker, the Shire President called an informal meeting of Councillors on 2 March 1993 with a view to discussing, among other things, why neither the Shire Clerk/General Manager nor the Shire President had informed the Council of the settlement proposal put by the claimants. The Shire Clerk/General Manager was requested to attend the meeting after it had been in progress for about an hour, and was asked by the Shire President to explain why he had not informed the special meeting of Council on 18 February about the proposal. His explanation was in the terms outlined in Council's solicitors' advice of 25 February. Several of the Councillors were unhappy with this explanation; they claimed that he had misled Council and questioned his motivation. They stated that two of them had asked Mr Pullinger at the Special Meeting on 18 February, if there was any further information they should know about, and he had replied that there was not. Mr Pullinger denied that this had occurred. Councillor Tucker then called for his resignation. Mr Pullinger's denial has been formally refuted by Councillor Tucker as well as by the Council, which resolved at its meeting of 8 February 1994 to request that its refutation be reiterated in this final report.

The Court's Decision

4.5.34 The judgment in the compensation case was brought down by Bannon J on 1 April. The judgment confirmed that, **subject to two qualifications, medium density housing was the optimum potential of the land at the date of resumption**, with the optimum number of units being 46. The two qualifications were the inadequacy of the sewerage transportation system and the down-turn in the market for such sites at the time of resumption.

4.5.35 Bannon J determined that the value of the site was $1,650,000 (50 units at $33,000 per unit) but that, because there was and continues to be no market, this should be reduced on a three year deferral basis by a factor of one third, bringing the amount down to $1,100,000. This was further reduced by the cost of clearing the Roundhouse building from the site (estimated at $20,000) and the amount of s.94 contributions on 50 units (estimated at $143,880 but also reduced by one-third for futurity to $95,920), leaving a total compensation figure of $992,080. The claims for disturbance and loss of rent were disallowed and, in a separate

determination on costs, Bannon J ordered the Council to pay half the claimants' taxed costs.

Response to the Decision

4.5.36 The recommendation of the Council's solicitors following the Court's determination on 1 April was that it should not appeal. However, they expressed the view that the judgement contained an error of law in concluding that, although there was no market for medium density development sites at the date of resumption, the property should nevertheless be valued on that basis. They also suggested that, should the claimants appeal, then Council should consider filing a cross appeal seeking to have the value further reduced. This advice was reported to Council on 27 April 1993. Some Councillors saw the decision as an indication that none of the major arguments posited by Council's solicitors (s.116, sewerage constraints, and the community zoning) had real force. They called for Council to tender for new legal representation. They also requested a report on the full costs of the Council's Roundhouse proceedings, including the original proceedings in 1990.

4.5.37 On 29 April, the former owners lodged an appeal against the determinations of Bannon J in relation to both compensation and costs. The bases for their appeal were that the Judge erred in law in regard to several aspects of his judgment concerning sewerage constraints; that he also erred in law by disregarding certain evidence of demand/market, by adopting the deferral argument, and by discounting for s.94 contributions. They sought an order for payment of compensation equal to the undiscounted amount proposed by Bannon J i.e. $1,650,000.

4.5.38 Council's solicitors, on 7 May 1993, advised that the applicants were unlikely to succeed in their appeal and that, in their opinion, the Council should cross appeal. They expressed the view that the court had erred in valuing the Roundhouse site on the basis of medium density development with a three year deferral, as there was, they maintained, no evidence before the court to enable it to reach that decision. Their estimate of the legal costs of a cross appeal would be of the order of $50,000. They re-iterated their view that there were "some prospects" that the Council would be successful in reducing the amount of compensation payable should it decide to file a cross appeal, and recommended that no settlement offer be made other than a Part 22 offer for the land value as determined by the court i.e. $992,080.

4.5.39 A special meeting of Council was held on 11 May to discuss the most recent developments, and the Shire Clerk/General Manager reported to the Council the advice received from its solicitors. The Council was also advised of a letter, received on that day, from Mr Mangleson, stating that the former owners would be willing to discuss the withdrawal of the appeal subject to negotiating a satisfactory settlement. In accordance with the Shire Clerk/General Manager's recommendation, the Council resolved that its Dispute Resolution Committee

meet with the former owners on a "without prejudice" basis to discuss the withdrawal of their appeal, on the understanding that the Committee would report back to the Council for any decision in the matter. Contrary to the advice of its solicitors, it also resolved not to file a cross appeal but to defend the appeal should it proceed.

4.5.40 On receiving advice of the resolution not to cross appeal, Council's solicitors discussed the matter with Junior Counsel who expressed concern that, by taking this decision, the Council may weaken its position in any settlement negotiations, and may be prejudicing its position in defending the appeal, as the Court of Appeal may assume from the absence of a cross appeal that the amount of compensation awarded by Bannon J was too low. This advice was conveyed to the Shire President on 21 May, together with a reminder that, if a cross appeal were to be filed, it would have be done by 28 May. Following telephone discussions between Council's solicitors and the Shire Clerk/General Manager, and between the solicitors and Mr McClellan, the solicitors wrote again to Council on 26 May, forwarding the advice from Mr McClellan that he recommended a cross appeal, noting that, if Council did not file a cross appeal it would be foregoing the opportunity to further reduce the amount of compensation payable by the Council "at virtually no extra cost to Council".

Tactical Manoeuvres

4.5.41 A special meeting of Council was called for the afternoon of 28 May - the final date for the filing of a cross appeal - to discuss this advice. Several Councillors expressed concern about the limited notice given of the meeting and the lack of time allowed to give proper consideration to the information provided, and a procedural motion was put protesting that the notice given of the meeting did not comply with the Council's policy to give 24 hours notice of special meetings. Following the debate on the matters before it (which included matters relating to this investigation), the Council resolved to file a cross appeal. Believing that the meeting had concluded, several of the Councillors lodged a rescission motion on the cross appeal. They then left the meeting. However, the Shire President reconvened the meeting, claiming that the rescission motion had been lodged prior to the conclusion of the meeting and could, therefore, be dealt with at that meeting. According to Councillor Kingston, he instructed staff to determine whether the Councillors had left the chambers and a search failed to locate them. They claim that they were simply not recalled and most of them were still in the vicinity. In any case, as there was a quorum without the Councillors who had left the chambers, the rescission motion was put and defeated.

4.5.42 This incident caused considerable consternation amongst some of the Councillors and was, at the request of the affected Councillors, the subject of a complaint by the Council to the Minister for Local Government and Co-operatives. Each group argued that the other was using a tactic to get its own way in relation to the cross appeal - one group lodging a rescission motion so that the Council could not act on its decision to cross appeal before the deadline that day, and the

other claiming that the meeting had not been closed and that therefore the matter could be decided in the absence of the dissenting Councillors to allow the filing of the cross appeal to proceed. The cross appeal was filed that afternoon.

4.5.43 The circumstances surrounding this decision, as raised in the letter to the Minister, were reviewed by the Department, and it was found that, on the evidence presented, there were no grounds for questioning the validity of the resolution. The basis of this determination is that the formal record of the Council meeting, the Minutes, is taken to be a true record, and the Minutes recorded that the meeting had been adjourned. Any dispute about the accuracy of the Minutes would have to be determined by a court.

Negotiation - a Different Framework

4.5.44 In accordance with the earlier resolution of Council, its Dispute Resolution Committee met with the former owners on 10 June 1993. At that meeting they requested a deferment of 60 days for determining the index of appeal. A number of other matters were discussed, including a possible basis of settlement. The details were conveyed to Council's solicitors and their advice in response was that Council should not, for a number of reasons, accede to the adjournment sought but might agree to a shorter adjournment to further explore settlement of the matter. At its meeting on 22 June, Council resolved to agree to a 60 day adjournment subject to agreement by the former owners to forego any interest which may accrue as a result of the deferral. Council's solicitors advised against offering the former owners any additional amount of compensation in settlement of the Court of Appeal proceedings. They re-iterated their opinion that none of the grounds on which the appeal was based would succeed and that the most likely outcome would be that the appeal would be dismissed and the applicants ordered to pay Council's costs.

4.5.45 Nevertheless the Council's Dispute Resolution Committee continued to meet with the former owners, and, on 3 August 1993 offered an amount which was equivalent to the Court's determination. At subsequent meetings further offers were made, with the final offer being formalised in a letter to the former owners by Council on 14 September 1993. That offer was based on the payment of half the former owners' actual costs rather then taxed costs, and an additional $100,000. The offer, totalling $1,406,431, was conditional upon the former owners discontinuing the appeal, not proceeding with any legal action, claim or enquiry in relation to the Roundhouse "and associated matters", and the payment of each party of its own costs in relation to the appeal and its discontinuance. At the time of preparation of this draft report Council's offer was still being considered by the former owners.

Assessment and Conclusions

4.5.46 Emerging out of these facts are a number of issues which require comment. They are:

* the sewerage issue;

* the choice of Mr Ingham as Council's expert witness on Planning matters;

* the moves by some Councillors to find an alternative solution;

* the quality of the advice provided to Council in its decision-making regarding the proceedings;

* the cost of the proceedings; and

* the effect of Council's strategies on the outcome of the court proceedings.

Sewerage becomes a sticking point

4.5.47 In the early stages of this investigation it was my view that amongst the strategies Council had adopted to delay settlement of the owners' compensation claim and to minimise the ultimate cost of acquisition, it had, quite late in the day, begun mounting an argument that the development potential of the site was severely constrained by the inadequate sewerage transportation and treatment facilities servicing Ocean Shores. The issue of sewerage provision was not likely to be critical if, as suggested by Mr Ingham the site were to be used for an art gallery "or some community type purpose, along with other private community recreational activities". Such uses would not add markedly to the allegedly already overloaded system. It could only be of potential concern in the case of possible future development of the site for residential purposes or as a significant tourist development.

4.5.48 The issue became one of the major concerns raised by the Council and addressed in detail during the compensation hearings, with more than a week being devoted to evidence and cross examination on the matter. From the Council's point of view, its intention was to establish that, at the date of resumption (i.e. 26 July 1991) the sewerage problems at Ocean Shores constituted a severe restriction on the development potential of the site. From the point of view of the former owners, sewerage was not a relevant issue in determining development potential as the problems, if they did exist, were being addressed by the Council and had not prevented certain other developments from proceeding.

4.5.49 While I acknowledge that there are, and have been for some time, problems with some aspects of the Ocean Shores sewerage system (and what council in a rapidly developing area does not have problems with sewerage?), I had concerns about the timing and justification of Council's raising them as a major constraint on the development of the Roundhouse site, and, in particular, development for medium density residential purposes. The issue, therefore, is not so much with the sewerage problems as such but with how they were regarded in relation to the Roundhouse. My question then is: **when were the problems with the sewerage**

system identified as a significant constraint to the development of the Roundhouse site, and how did this process occur?

4.5.50 As noted previously, it was in September 1988 that Council first considered the possibility of rezoning the Roundhouse site for something other than community use. The critical period, as far as this exercise is concerned, is therefore between September 1988 and July 1991. In order to ascertain whether or not, during that period, sewerage was raised as a constraint on the development of the Roundhouse site, it is necessary to examine contemporaneous documents which do not provide the wisdom which comes with hindsight. Since this was a zoning matter and such matters come primarily within the ambit of responsibility of the Planning Division, it would be expected that, any concerns about sewerage constraining development of the Roundhouse site, would be found in Planning documents (reports, studies, memos). Moreover, because this is also an infrastructure matter, if there were concerns that the development of the Roundhouse site would seriously overload the sewerage system, then it would be expected that such concerns would have been conveyed by the Works and Services Director to the Planning Division. The following paragraphs summarise the relevant information from Planning documents of the period, and include, where appropriate, subsequent comments made by Council officers.

4.5.51 The draft DCP prepared for Ocean Shores and presented to Council in January 1989 stated, in respect of the Roundhouse site:

> *"The unique scenic position and size of the site suits an integrated cluster development of a low rise, high quality architectural form which maintains a large area of open space available for public use".*

4.5.52 In a report to Council's meeting of 14 March 1989, on a series of DCPs in this area, the Planning Director noted that the documentation was being examined by the Directors. She also reported that the consultant Planner, Mr Peter Cuming, had proposed a moratorium on dual occupancies and infill subdivision in Ocean Shores until upgrading of the water and sewerage infrastructure had occurred. This information was simply noted.

4.5.53 On 14 February 1989 Council had resolved to rezone the Roundhouse site, with the implication that such rezoning would be in the terms proposed in the draft DCP. On 30 May 1989 Council again resolved to rezone the site. The Planning Director's report to that meeting (prepared by Mr Kanaley) commented that the rezoning should be subject to a Local Environmental Study (LES) and that that study should address, among other things, utilities and services. The 2(a) zoning was included in a draft of the amending LEP, Amendment No. 8 without any LES having been undertaken and no evidence of concern being expressed about sewerage. Mr Alderson, in his response to the provisional draft report of this investigation, commented that he would have expressed concern about the provision of services including sewerage had he been asked.

4.5.54 On 22 August 1989, the Shire Clerk/General Manager reported to Council that the Valuer General had valued the site at $1.25 million and had stated that the valuation

> *"... reflects the strong market of recent times and also has regard to the strong interest shown by the market in larger potential development sites ..."*

4.5.55 The report notes that no provision has been made for purchase "in the belief that [Council's] obligation to acquire could be removed by rezoning". This report went to Council with a Directors' recommendation (implying that it had been discussed by the CMT) that it be noted and with no indication that the Works and Services Director was concerned about sewerage. Mr Alderson, in his response to the provisional draft report has dissociated himself from this recommendation, stating that "these recommendations are in fact the recommendations of a director/manager and not a group of directors".

4.5.56 Council's justification for not proceeding with the rezoning was stated in a file note written by the Planning Director on 11 September 1989 and following detailed discussions with the then Shire President and with other senior staff including the Works and Services Director. The justification does not include potential problems with sewerage. I note also, that in his evidence on the "great surprise" report (which went to Council on 14 September 1989), Mr Alderson commented that one of his concerns at the time was that Council should be addressing issues such a how many units could be fitted on the site (see para. 4.4.112) - thus implying that medium density residential development on the site was entirely appropriate.

4.5.57 However, the Shire Clerk/General Manager, in a memo to the Planning Director on 27 September 1989, requested that she undertake certain tasks to assist the Valuer General in reviewing his valuation. Included in those tasks was:

> *"4. Report on moratorium on development in relation to sewerage and water supply constraints, with an estimate of (a range of) possible delays in development of the site and the likely effect on holding charges and therefore maximum land costs/unit sustainable by the market ..."*

4.5.58 There is no evidence that such a report was obtained and no reference to a "moratorium on development" in other Planning documents available to me from that period, although this suggestion had been made by the consultant Planner, as reported to Council in March.

4.5.59 On 23 November 1989, in response to this memo, the Planning Director suggested that Council commission architect Graham Barr to prepare a sketch design for **medium density housing** on the site as a way of providing "an objective assessment of the site capability". This does not appear to have been

done. However, a subsequent assessment, prepared by Council's Deputy Chief Town Planner, Mr Ryan, for the Valuer General in December 1989, noted potential problems with the steepness of part of the site but made no mention of sewerage constraints. At that time he suggested that the site could accommodate up to 46 units or, more realistically, if the steep sections were not developed, 27 to 30 units. (I note that, if the recommendation of Planning Workshop in 1983 had been adopted, the residue of the site then proposed for "bonus" medium density development consisted largely of these steep sections.)

4.5.60 In his response to the provisional draft report, Mr Ryan commented:

> *"**I had no real understanding of the situation of the sewerage provision difficulties at Ocean Shores at the time** this memorandum was prepared. A full understanding of the case resulted in the sewerage issue not really becoming clear until the Land and Environment Court hearing which I obviously attended concerning this matter."* (Emphasis added)

4.5.61 On 22 March 1990, in their recommendation on proposed changes to the draft DCP for Ocean Shores, the Directors recommended that Council not resubdivide certain lots or allow dual occupancy on those lots, not because of sewerage constraints but because of stability problems. I note that, in spite of its decision in September 1989 not to proceed with rezoning the site, the report to Council on the Ocean Shores Draft DCP on 27 March 1990 states that Council is to review the 5(a) zoning "in the light of its recent appraisal of the need for community facilities and their siting in the area." (Emphasis added) (The same words were used in February 1989 and apparently referred to the same appraisal.)

4.5.62 Following the decision of the Land and Environment Court that Council was obliged to acquire the site, Council sought an independent valuation of the site and Mr Ryan was requested to provide Town Planning advice to assist in this valuation. Mr Charles Woodley of McGees National Property Consultants formed the opinion, following discussions with Mr Ryan at that time (December 1990) that:

> *"... the optimum potential development [on the site] would be 38 large strata title town houses and private open space."*

4.5.63 Again the sewerage system was not seen as a constraint, and again Mr Ryan has since argued that was because he was not aware of the seriousness of the situation.

4.5.64 Another version of the development potential of the site was provided in Mr Ryan's memo to the Shire Clerk/General Manager on 25 January 1991, in which he states:

> *"It is likely that there will be considerable public opposition to development of the Roundhouse site for medium density housing. This would add weight*

to the argument that if development of this site for medium density housing were to take place then it should be restricted and low key in nature ... [however] ... if the land is not required for community purposes it should be zoned Residential 2(a) under the provisions of the Byron Local; Environmental Plan, 1988. It is considered ***this site is admirably suited to medium density development*** *provided that it is not maximum density and does not intrude on the residential neighbourhood."* (Emphasis added)

Again no mention of sewerage constraints.

4.5.65 On 24 January 1991, Council's solicitors wrote to the solicitors for the owners regarding possible negotiation and stated:

"Our client seeks to include on the agenda an item which contemplates a rezoning and retention of the property by your client. While we understand that your client has previously rejected this alternative, nevertheless the Council is prepared to consider this matter afresh and requests that your client also takes this approach."

4.5.66 The offer was reiterated in a further letter from Council's solicitors on 31 January 1991 and the rezoning option was still "on the agenda" in the Shire Clerk/General Manager's report to Council on 4 February 1991. A file note, dated 1 February 1991, sets out the basis on which Council's solicitors were to be authorised to negotiate with the then owners, and includes:

"1. Applicants to retain ownership of the land in the event that an L.E.P. is made for the land providing for ***medium density residential development to a maximum of 30-35 dwellings."***

4.5.67 If one accepts Mr Alderson's insistence that the sewerage system was a constraint at that time, then there is no doubt that Council's offer was the ultimate cynicism! Notwithstanding the possible redress available through s.34(4) of the EPA Act, Council would convince the then owners to withdraw their Notice to Acquire, have the site rezoned 2(a) and then not approve of any development application for the property, because of problems with sewerage! The owners can hardly be blamed for suspecting a conspiracy!

4.5.68 So when <u>did</u> sewerage rear its ugly head? There is no doubt that sewerage constraints in Ocean Shores were alluded to in Planning documents from early 1989 but never addressed in any serious way. It was, in a sense, a "sleeper" issue. There is certainly no clear evidence to support the view that sewerage was identified as an issue constraining development of the Roundhouse site either at the time of gazettal of the LEP or at the time of resumption i.e. 26 July 1991. When the owners lodged their Notice of Claim in September 1991, Council instructed its valuer to prepare a valuation of the claim. Prior to doing so it obtained an expert town planning opinion from Mr Neil Ingham of Planning Workshop, which was supported by a statement prepared by Council's Executive

Manager Works and Services, Mr Alderson. It was in that statement that sewerage problems allegedly affecting this site were first canvassed.

4.5.69 The statement (presented to a special meeting of Council on 27 November 1991) refers to the findings of Commissioner Simpson in his Inquiry into the Draft LEP for North Ocean Shores and a decision of the Land and Environment Court in February 1991 (Lonergan v Byron Shire Council). It notes that:

* Council's submission to Commissioner Simpson in April 1990 resulted in the Commissioner's recommendation that further development [of the subject land viz. the Bond Corporation land and other land in North Ocean Shores] should not be permitted until the final design of the upgrading of the effluent disposal and treatment facility had been determined.

* Council should not knowingly increase the load and therefore the potential for pollution on a treatment facility which is already overloaded.

* The Land and Environment Court decision reinforced Council's DCP requirement that no further development proceed at Ocean Shores until services had been upgraded.

The statement concludes:

> *"There is presently not the capacity for the Ocean Shores sewerage treatment works to absorb the demand from the development of existing vacant single dwelling house allotments. Because of financial constraints it is not known whether, or when, additional capacity will be created. On the capacity of the existing system I have no choice but to recommend that the site be retained as a single dwelling site with a sewerage capacity of 1 E.T.* [Equivalent Tenement - effectively one dwelling unit]." (Emphasis added)

4.5.70 Mr Alderson's subsequent expert report prepared in September 1992 purported to provide documentary evidence that even in 1985 the provision of sewerage services represented a major constraint on future development and that this was reinforced in a memorandum from Council's Sewerage Engineer, Mr Mackney in March 1987. Mr Alderson's conclusion, in short, was that at the date of gazettal of the shire-wide LEP (April 1988) and at the time of the resumption of the Roundhouse site, the provision of sewerage services to Ocean Shores was inadequate in terms of capacity, performance and effluent disposal mechanisms and that Council had insufficient funds to address the problems.

4.5.71 To back up these conclusions he presented "supporting" documents. These included a comprehensive report to the Planning Administrator on water and sewerage provision in relation to the then proposed shire-wide LEP. It set out projections of equivalent population, income (from s.94 contributions) and expenditure to the year 2000. The total cost of works on the Ocean Shores sewerage system was shown as $1.5M, all being expended in the period 1989 to

1991. A later report from the Works and Services Director to Council's Estimates Committee meeting of 9 December 1986, stated in relation to sewerage generally:

> *"... I do not anticipate any problems in raising the capacity of this works to compensate for any growth proposed with the Local Environmental Plan at very reasonable cost. I have scheduled that major improvements would be required around 1990."*

4.5.72 The sewerage treatment budget for Ocean Shores shows a total expenditure of $1,055,000 scheduled over a 10 year period, and the Finance Manager's comment included the statement

> *"This budget is one which can be funded out of funds currently held by Council without further subsidy from the Public Works Department".*

4.5.73 A memo prepared by Council's Water and Sewerage Engineer, dated 13 March 1987, regarding sewerage for the proposed development of North Ocean Shores by the Bond Corporation is extrapolated by Mr Alderson to be read as a general comment about the constraints on development resulting from the limitations of the sewerage system. In fact the major concerns with that particular development proposal were environmental and related to flooding impacts. Even the comments by the Works and Services Director himself, made in a report to Council on this development proposal on 30 April 1987, do not include any reference to sewerage.

4.5.74 In my assessment, Mr Alderson's conclusions in his report of September 1992 are not supported by information presented in the report or by the data presented in the annexures. Indeed I regard his arguments as an expedient *post facto* rationalisation to support a strategy of magnifying out of proportion a consideration which might have the effect of minimising the level of compensation Council would be required to pay for the site.

4.5.75 The information contained in the report on the Sewerage Fund presented to Council's special (budget) meeting of 4 December 1990 also seems to tell a quite different story. It states, in part:

> *"The Sewerage Fund also sees some considerable capital works in 1991, the largest of which is the upgrading of the Ocean Shores treatment works and transportation system. ... This program is still in line with the 10 year program which was implemented by Council in 1986"*

the differences being that the programme has been pushed back two years and the projected cost has increased from $1.5M to $2M.

4.5.76 The report includes a five year capital works programme for the Fund, showing the following allocations:

OCEAN SHORES	1991 $	1992 $	1993 $
Minor Augmentation Treatment Works	400,000	400,000	
Transport System Augmentation	400,000	400,000	400,000

4.5.77 The information provided to Council in this report indicates that the work on the Ocean Shores sewerage system is under control, that it is "on track" and that funds are available. No funds are allocated specifically to the treatment works, and there is no suggestion that works are required but necessary funds unavailable, indicating that any problems/deficiencies there are minor. This confirms the statement made by the Shire Clerk/General Manager to Local Government Inspectors during a management overview in late 1989, that the 10 year programme for sewerage works indicates that there are no more major works required after finalisation of the Byron Bay project.

4.5.78 In commenting on this section of the provisional draft report, Mr Alderson noted:

> *"The 1991 budget showed notional expenditure figures for sewerage treatment works and transportation augmentation - all figures in the budget are subject to final design and approval by Public Works, E.P.A. and my own office. Loans are also required and the same budget from which this table is extracted clearly stated that income was dependent on loans."*

He goes on the say

> *"The Shire Clerk/General Manager's comment to the Inspectors in late 1989 is simply incorrect and there was major expenditure proposed for Ocean Shore and was in fact identified for construction through the period of 89-91 at a level of $1.5M by me in my report of the 18th March, 1986."*

4.5.79 The fact remains that the message that was being issued from the Council at that time was one of confidence that the sewerage problems were being addressed and were under control. Either the message was an accurate reflection of the real situation or certain senior staff members of the Council were dissembling.

4.5.80 Other documents do however indicate that there were problems with identifying satisfactory solutions to increasing the capacity of the Ocean Shores treatment works and to rectifying deficiencies in the transportation system. The Council's disagreements with the Public Works Department (PWD) regarding solutions also created funding difficulties and resulted in the scheduled works being postponed. Ironically, it has now abandoned the lower cost option proposed by consultants which PWD refused to fund, and has adopted the PWD proposal.

4.5.81 Much of this information relating to the performance of the system and augmentation options is contained in correspondence and studies referred to the

Works and Services Division, with very little being brought to the attention of the Council (or of the Planning staff). In one report to Council on 14 August 1990, about potential breaches by Council of the Environmental Offences and Penalties Act, the Works and Services Director suggested that

> *"... Council may have to consider a total hold on development and building applications in Ocean Shores for example or require contributions for all buildings including houses on existing allotments"*

as a means of addressing the problem of regular overflow at a number of pump stations in the area. The reason for this suggestion was that upgrading may take some time and no funds were available. Just three and a half months later, the necessary upgrading works on the Ocean Shores transportation system were scheduled in the Works Programme for completion by 1993.

4.5.82 In relation to possible pollution from sewage treatment plants generally, the recommendation was for funding to be allocated for testing and monitoring compliance with State Pollution Control Commission (SPCC) licence conditions. In March 1991 the SPCC offered to modify the licence conditions to allow for some overloading of the treatment works until the proposed augmentation works were commissioned. Some augmentation of the plant's capacity had been achieved in 1990 through the construction of an artificial wetland. The exchange of correspondence between Council and the SPCC at that time did not mention the possibility of restricting connections to the system. This implied that the SPCC had no reason to be concerned about the effluent quality and accepted that the Council's scheduled augmentation works were proceeding as planned.

4.5.83 Mr Alderson's statements in his recent reports on sewerage vis-a-vis the Roundhouse raise a number of issues and provoke certain questions, not least being: if the sewerage system servicing Ocean Shores has been so inadequate for so long, why was it never raised as a matter of concern on the numerous occasions on which the possibility of rezoning the Roundhouse site for residential purposes (including medium density) was discussed? The obvious answer (and the one put to me by both Mr Alderson and Mr Ryan) is that Mr Alderson was never asked. Although this may be literally true, it ignores the fact that Mr Alderson was involved in discussions about the rezoning of the Roundhouse site and those discussions were on the basis that rezoning meant rezoning for medium density residential development. The fact that sewerage problems were not raised as a constraint to development of the site, leads one to suspect that the issue was introduced at a late stage as an expedient strategy to divert attention from the central issue of the compensation claim, delay settlement, and attempt to limit the development potential and hence the value of the site.

4.5.84 The decision of Assessor Andrews in the Land and Environment Court in the matter of Lonergan (obo Brown) v Byron Shire Council in February 1991, to dismiss the appeal against Council's refusal of a subdivision creating one additional lot in Ocean Shores, has been used to support Council's argument in

relation to the Roundhouse. That decision was based largely on what the Assessor considered to be the "currently critical circumstances" of the sewerage system; the court was not prepared to make a decision which would contribute "one iota to the exacerbation of that problem".

4.5.85 Based on some of the evidence presented to the court in that case and the Assessor's decision, one would expect that, if this were indeed such a serious concern, then there would be a total moratorium on any development which would increase the number of dwellings above already approved levels (i.e. dual occupancies and subdivisions) anywhere within the area serviced by the Ocean Shores sewerage system. This appears not to have been the case. As well as approving a number of dual occupancies in the area (including lot 422 Orana Road and 224 Coonawarra Court), Council, in June 1992 approved a subdivision at New Brighton/South Golden Beach for an additional 7 lots with potential for future, more dense development of up to 50 dwellings. In fact, the provisions of the relevant DCP (No.14) indicate that there are no subdivision constraints on land in excess of 0.5 hectares and there are no subdivision or sewerage constraints on development at Billinudgel, part of which is included in the Ocean Shores sewerage catchment. Moreover, in Mr Ryan's evidence to the court he indicated that Council's objection to this subdivision application was more a matter of residential amenity. In response to the Assessor's question as to whether Council would have opposed the application regardless of "the servicing issue", he stated:

> *"Yes. ... the Council could have stopped development totally if the servicing issue was the primary concern and even to the stage of not approving building applications. However they proceeded with those provided that the development maintains the residential nature of the estate ... "*

4.5.86 From his point of view the sewerage system was not an impediment to development. The real impediment was one imposed by Council, in response to the perceived wishes of the residents of Ocean Shores, of not allowing any form of residential development approaching medium density other than in those few areas of the estate where medium density was permitted under the development company's Development Area Plan. It is understood that, in the estimation of load on the treatment system, provision is made for existing subdivisions which are unoccupied. In this regard, it is interesting to note that, if all the land identified in the DCP as suitable for medium density residential development, at least on one estimate, up to 600 additional dwellings units could be connected to the Ocean Shores treatment plant.

4.5.87 The evidence of Council's Sewerage Engineer to the court in the Lonergan case confirmed other evidence available to me that Council, at the time of resumption, had an augmentation programme and that sufficient funding was available to enable at least the critical components of the programme to be implemented - such as upgrading of the transportation system and of the treatment works from a current nominal (or design) capacity of 3,000 equivalent persons (e.p.) to 4,000

e.p. expected to be completed by the mid 1990s (current e.p. is estimated to be just over 3,000 and rate of growth about 4% p.a.). It is agreed amongst the technical experts that actual capacity normally exceeds nominal capacity and that this is acceptable within limits. The ultimate test of a treatment plant's ability to treat the volume of waste input is the quality of the effluent, and that has been and continues to be within acceptable limits.

4.5.88 As indicated above, the submission of evidence on the issue of sewerage, and the cross-examination of Mr Alderson in the recent Roundhouse compensation case was comprehensive. Bannon J's assessment of it was that, while he was satisfied that

> *"... the additional load from a medium density development would cause an additional overload exceeding the nominal development* [presumably meant to read 'capacity'], *I am not satisfied that this would cause a load in excess of the actual capacity of the [treatment] works, and I bear in mind that the respondent [Council] is taking steps to provide for augmentation of the works."*

4.5.89 His assessment of the transportation system was not so favourable. He commented in his judgment:

> *"The transportation system is in a different position. Both from the evidence of Mr Zerk* [for the claimants] *and Mr Alderson I am satisfied the existing transportation system is quite inadequate to carry the effluent from a medium density development, and has been so since resumption. While it works reasonably at normal times, in holiday seasons, especially in wet weather, it surcharges and overflows at two pumping station ... The respondent has set aside funds to reconstruct the transportation system in a way which would overcome the problems with medium density development of the Roundhouse site. The transportation system has not yet been constructed. There is no evidence of bad faith on the part of the respondent, nor has that been alleged. In the circumstances, and using hindsight, it is clear that transportation from a medium density development would not have been available at the date of resumption for at least two and possibly three years."* (Emphasis added)

4.5.90 Although he conceded that some time would be required for obtaining approvals (and, prior to that, re-zoning) and that connection of sewerage reticulation could be delayed until the final stages of construction, it was his opinion that there would be a delay of about one year over and above this lead time. As a consequence, that period would need to be discounted from any assessed value of the site for medium density. In addition, in his view (as I understand it), given that the compensation is to be paid by Council, there should be a further reduction for the amount of s.94 contributions which Council would, under normal circumstances, require from a developer, for sewerage.

4.5.91 I note that Bannon J depends on the wisdom of hindsight to determine that, at the date of resumption the transportation system would have been inadequate to cater for a medium density development on the site. While that might have been a fact on the day, what was also a fact was that the works were scheduled for completion in 1993 (and would, in fact, be completed in 1993, according to Mr Alderson). Hence, equally with the benefit of hindsight, it might be argued that the deficiencies with the transportation system could have been satisfactorily addressed by the time a developer was ready to connect to the system. Although Bannon J, at one point in his judgment stated that the additional time required for completion of the transportation system would need to be discounted from any assessed value of the site, he also concludes:

> *"I think it preferable to treat my deferred medium density calculation as the highest reasonable use for the land at the date of resumption, and as being the sum to award.*
>
> *On that basis the concurrent effect of the delay in building an adequate sewerage transportation system need not be considered."*

4.5.92 This, in my view, is equivalent to saying that, while there may have be a problem with the sewerage transportation system at the date of resumption, this had no effect on the value of the site because of the discounting factor applied for reasons to do with the market.

4.5.93 My conclusion in relation to the sewerage issue is that the inadequacy of the system was **not** a real impediment to the development of the Roundhouse site for medium density housing. There is no doubt that the system is not presently, nor was it in mid-1991, geared to cater for a major increase in population, but upgrades were being planned and budgeted for at that time, and are currently in progress. These would have more than adequately met the needs of a medium density development on the site, given the lead time required for development and the additional contribution which would have been made by a prospective developer by way of s.94 funds, to supplement funds already budgeted by Council. I further conclude that, while there is an element of truth in the argument, and notwithstanding its partial success before Bannon J, it was essentially raised by Council as a device for the reasons proposed above i.e. as an attempt to delay settlement and minimise the assessed development potential (and hence the value) of the site. It was another element in the "war of attrition" against the former owners who had attempted to have the Council set aside consideration of sewerage constraints as a separate and major issue in the negotiation of a compensation figure. The fact that the issue was partially successful in achieving a reduction in that figure does not alter my conclusion.

4.5.94 The examination of this issue prolonged inordinately the compensation hearing and inflated the legal costs. The amount of time and effort that went into presenting the evidence and arguing the case is not reflected in the discussion of this issue in the judgement. If the Council had not been so determined to pursue

this issue, thereby forcing the claimants into arguing against it, Bannon J might well, I believe, have reached the same conclusion on the basis of the expert reports alone.

A Provocative Ploy

4.5.95 Initially Council seemed quite prepared to obtain a valuation based on the advice of its own Planning staff. The first independent valuation report, undertaken for the purpose of resumption, was prepared by McGees in December 1991 and was undertaken on this basis. According to the Shire President, as Council was facing a valuation of $3.3M, is was imperative that it obtain the most competent advice available. Council's solicitors recommended Mr Neil Ingham of Planning Workshop and he was engaged by them.

4.5.96 In its endorsement of the selection of Mr Ingham as the Planning expert to prepare a planning report on which to base its second independent valuation of the Roundhouse site for the purposes of compensation, Council was, in my view, being unnecessarily provocative. It was Mr Ingham who, in carrying out the planning study for Council's shire-wide LEP in 1983 had initially shown the Roundhouse site as zoned 6(b) Private Open Space and had made what the former owners regarded as a misleading and potentially damaging statement about the history of the site for which they threatened legal action. The circumstances are well documented and, in their preparation for the appeal before Cripps CJ, if not otherwise, senior officers of Council must have been aware of them.

4.5.97 These issues were raised again, and reviewed by Council's solicitors, when the claimants objected to the engagement of Mr Ingham. It was their view, formally expressed in a letter to the Shire Clerk/General Manager on 7 November 1991, that Mr Ingham should be retained. The Shire President was concerned about the possible detriment to the Council's case if the complainants should challenge the evidence of Mr Ingham on the ground of bias. These concerns were formally expressed in a letter to Council's solicitors on 12 November.

4.5.98 When the provocative nature of this engagement was put to both the Shire Clerk/General Manager and the Shire President as well as Mr David O'Donnell of Mallesons Stephen Jaques at a meeting on 18 December 1991, which they requested, with the Director General of the Department of Local Government and Co-operatives, they did not deny it but defended the decision on the grounds that Mr Ingham was chosen by Council's solicitors because he knew something of the history of the site and has a reputation as being probably the best expert witness in the State on planning issues relating to compensation claims. I have neither the desire nor the competence in Planning Law to question Mr Ingham's ability, his objectivity or his reputation as an expert witness and I am aware that he is very highly regarded. However, there were other choices available to Council, and, in the circumstances, it is my view that Council's choice of Mr Ingham was not only not appropriate but a deliberate tactic intended to taunt the former owners. The Shire President has argued that this was not the case, that he

expressed his concern initially to Council's solicitors and, following an investigation of Mr Ingham's and Council's files, determined that the choice of Mr Ingham was "entirely appropriate". The fact remains however that Councillor Kingston could have insisted that Council's solicitors engage an alternative expert Town Planner.

4.5.99 My perception of this action on the part of Council appears to have been shared by Councillor Tucker, who, in a memo to the Shire President on 2 December 1991 expressing his concerns about a number of issues relating to Council's handling of the Roundhouse acquisition, stated:

> *"... Mr Ingham's current involvement seems inappropriate to me. ... I believe his involvement has the potential to aggravate negotiations because the previous owners may question his credibility. Further to this, I believe his planning advice and proposed options are ambit in nature, especially Option 1 [the option finally adopted by Council]. Should the previous owners regard our offer as ambit (or perhaps ridiculous) they may seek not to negotiate or because of the protracted nature of this matter, they may seek to get the matter before the court to expedite resolution.*
>
> *... I believe suggestions of 'private art gallery' ignore court decisions, Q.C. enquiry conclusions and the previous owners' contentions. The courts have determined that the site did not have to be dedicated for community purposes ... It seems to me that these conclusions have been disregarded. The previous owners have applied for rezoning for medium density residential development. I am concerned that we ignore and reject these realities. I do not believe the courts will ignore and reject accordingly."*

4.5.100 Mr Ingham's first Planning Report, prepared in November 1991, argued that the zoning history of the site leads to the conclusion that, if it had not been zoned for community purposes (both in the IDO and in the Byron Shire LEP 1988):

> *"... the <u>only</u> use to which the site could be put (apart from any existing use rights), is for "Art Gallery" purposes, and other <u>private</u> community recreational activities."* (Emphasis added)

4.5.101 His report did, however, contain something of a disclaimer. He offered two other options, should he be "shown to be wrong about the continuation of the 'Art Gallery' use of the site". These were low density residential development options of either the whole or part of the site.

4.5.102 In taking evidence from Mr Ingham during the investigation, I asked whether he would expect any other Planner undertaking the task for which he was engaged to come up with the same result. His response was decisive and unequivocal. He readily admitted that there would probably be as many different findings as there were Planners.

4.5.103 His finding is consistent with his view in 1983 when, prior to the community consultation process, the draft plan had the site zoned 6(b) which was intended to reflect its purported current use. This zoning was not a true representation of the facts of either the current use, the intention of the original developer or the acknowledged potential of the site.

4.5.104 It was on the basis of Mr Ingham's Planning Report that Council's first valuation following resumption was obtained. This set the value of the site at $468,000. Given the history of the owners' attempts to have the site zoned for residential purposes and the offers for such rezoning from Council, it is little wonder that they were appalled to receive an offer which was less than one sixth the value of their claim. In fact they would have been forgiven for believing it was a sick joke (and Councillor Tucker had indeed predicted such a response in his memo to the Shire President on 2 December 1991). While the former owners' original claim for $6M including compensation in addition to the property value, might be considered excessive and undoubtedly left Council no less aghast than its offer to the former owners left them, it is my view that any reasonable person would agree that Council's offer was almost offensive and might well have been regarded as yet another opportunity for retaliatory action against the former owners for the discomfiture Council has experienced in this matter.

4.5.105 Indeed Council itself may have done the proverbial "double-take" on getting this advice. It had already set aside $1.25 million in approved borrowings for the acquisition and, in March 1991 sought additional assistance from the Minister for Local Government and Co-operatives, in the form of a grant or a low interest loan or further approved borrowings, for this purpose. The Minister advised that a further loan allocation may be considered for 1991/92 "when an agreed price is reached". Council was notified, however, prior to the compensation matter being determined, of its approved borrowing of $2M for the Roundhouse acquisition. Moreover, once the site had been resumed and became Council property, Council obtained a valuation of the building for the purposes of insurance and for determining the rent to be charged to one of the owners who was continuing to operate his real estate business from the premises. That valuation was $455,000 - without any consideration being given to the land value (being essentially related to the potential replacement cost of the building). Council clearly expected that the cost of acquiring the site would be significantly greater than the valuation based on Mr Ingham's report.

4.5.106 While I share the community's concern that Council should not pay more for the site than it is worth and thus unfairly burden its ratepayers, I would argue equally strongly that Council's approach to compensating the owners must be fair and reasonable. This situation is not one of the owners' choosing but of Council's. After all, it did have numerous opportunities to avoid creating the circumstances in which it now finds itself, but rather than extricate itself with dignity, it has sunk deeper and deeper into a tangled net of strategies which, while aimed at minimising the final "payout" to the owners, has had the effect of escalating the ultimate cost to the ratepayers. Its legal and associated costs (including

valuations, expert reports and the payment of expert witnesses) have not been finally determined at this stage, but on the basis of a preliminary calculation undertaken by Council staff and reported to Council on 8 February 1994, the associated costs, excluding the compensation and statutory interest payments was of the order of $1.3M, with the estimated final cost, including compensation and interest, expected to be in excess of $3.7M. This figure does not take into account the enormous cost of the staff time taken up with this matter, including the unassessed "opportunity costs" of lost output, such as the excessive delays in finalising a number of crucial strategic planning projects by taking Mr Kanaley and Mr Murray off these tasks to work full-time on the Roundhouse for over 2 months.

4.5.107 It should be noted here that the planning arguments presented to the court in the compensation case by Mr Ingham were rejected by Bannon J. In his judgement, he states:

> *"Accepting that the land had a potential for subdivision into residential lots, with or without retention of the Roundhouse, and in spite of the cogent matters advanced by Mr Ingham, it appears to me that subject to two qualifications, medium density housing was the optimum potential of the land at the date of resumption."*

Voices in the wilderness

4.5.108 Several of the new members elected to Council in September 1991 were not comfortable with the strategies adopted by Council in relation the Roundhouse acquisition. These concerns were spelt out in a joint letter, written by Councillor Tucker and signed by Councillors Higgins, Budd, Mills, Noonan and Simmons, to the Minister for Local Government and Co-operatives in December 1991. Those concerns were:

> *"4. ...*
>
> *(a) the Shire's ratepayers will suffer a financial burden,*
>
> *(b) the advice Council has received on valuation, the basis of valuation and planning is limited,*
>
> *(c) Council is continuing to follow a course of action which has resulted in a large, and at times unpleasant dispute,*
>
> *(d) a serious attempt to negotiate with the previous owners will be jeopardised as a result of Council's resolution on the matter which was based on limited advice, and*
>
> *(e) as a result of sub-paragraph 4(d) above Council will be involved in an expensive legal battle which I believe should be our last course of action."*

4.5.109 The letter explains that these concerns have been put to the Shire President and adds:

> *"My research leads me to the firm conclusion that it has been badly handled over the last decade. I am concerned that Council is not progressing this matter in a reasonable and realistic manner."*

4.5.110 Councillor Higgins also set out his concerns in a memo to the Shire President on 13 December 1991. In that memo, he stated:

> *"... I am of the opinion that Council is in a dangerous position in trying to acquire the site for an art gallery, private use or community use. ... I cannot support option (A) further still, I am not prepared to fight option (A) in the Courts. ... I believe we, as a Council, should show some creditibility (sic) and offer a reasonable price for the land valued at 2A or whatever.*
>
> *I believe there would be substantial costs savings to the community if we adopted a business approach to this issue. We buy the land at its highest and best use at a figure no greater than a developer would pay for it. Then we either develop it ourselves in stages or sell to a developer. I am sure we could find a developer who would pay top money for this site, as long as we did not, as a Council, stuff him around as has happened in the past. What I believe should now happen:-*
>
> | | |
> |---|---|
> | *Step One* | *Council needs to get around a table with Cochrane and Company.* |
> | *Step two* | *Decide on a town planner everyone is happy with.* |
> | *Step three* | *Decide on a zoning compatible with residents and Council and Cochrane and Company.* |
> | *Step four* | *Have the land valued by independent valuer.* |
> | *Step five* | *Settle.* |
>
> *I stand to be corrected on any of this and I am doing this in what I believe the best interests of the residents of Byron Shire."*

4.5.111 The issues raised by the Councillors were subsequently discussed in a telephone conference with Mr O'Donnell of Messrs Mallesons Stephen Jaques, and he later gave advice in writing. His advice, in summary was:

* compensating the claimants on the basis of highest and best use being for a private art gallery and associated activities (Option 1 as recommended by Mr Ingham) would lead to the cheapest alternative for ratepayers; he also notes:

> *"... should the claimants be compensated on the basis of Option 1, then we do not believe it would be legally or practically possible for the Council to later rezone the land to some higher order use."*

* the town planning advice given by both Mr Ingham and Mr Ryan was not limited but the result of extensive consideration; and he notes:

> *"**We know** from discussions with Mr Woodley and Mr Gilchrist* [Council's local valuer assisting Mr Woodley] *that the claimants' Option 4 - **medium density development - cannot be sustained.**"* (Emphasis added)

* negotiation is desirable but if there is no appropriate basis for negotiating then the matter should proceed without delay to the court; he notes:

> *"It seems to us that this matter of negotiation is being used against the Council in an effort to pressure the Council to come to some other view about the highest and best use of the land."*

* it is unlikely that negotiation is possible as long as the claimants reject the option recommended by Mr Ingham and they have provided no town planning or independent valuation advice to justify departure from this option; he comments:

> *"If the Council were, at this stage, to formally depart from Option 1, the Council would prejudice its prospects in any future litigation in that it would not be able to establish Option 1 as a basis for compensation. In our opinion, Council's prospects of successfully sustaining Option 1 before the Court are about 50/50."*

* the matter of Mr Ingham's previous involvement has been examined and there is no reason why the Council should not retain him.

4.5.112 At Council's meeting on 3 February 1992, Councillor Higgins moved a motion to resolve the matter in the terms suggested by him to the Shire President. His proposal was rejected with some of the arguments against it being:

* Council's legal advice indicates that it would have a reasonable chance of success in court with a valuation based on Mr Ingham's assessment;

* detailed figures provided by the owners did not convince Council (i.e. the Shire Clerk/General Manager and the Shire President) that Council's figures were wrong;

* it was an attempt to "blatantly cheat" Ocean Shores residents by denying them the possibility of a community facility on the site: and

* it was an attempt to "blatantly cheat" the owners because their attempts to redevelop the site were denied by the Council.

4.5.113 Councillor Higgins' primary concern was that if Council accepted a valuation

based on private or community use that would commit it to purchasing the land for community purposes and it was unlikely that Council could afford to develop it for such purposes. He felt that if the valuation was based on a residential zoning then the site could be developed for residential purposes and Council could recoup most of its costs. While there may be some problem with this argument in legal terms, the sentiment reflects a desire for the matter to be settled with some degree of equity. The idea had, indeed, been floated previously by the Shire Clerk/General Manager in a report on the Roundhouse to Council on 22 August 1989, by which time Council had received notice from the owners that they were seeking $2 million for the property. Rezoning of the site was, at that time, still ostensibly "on the books" as Council's resolutions of February and 30 May had not been rescinded. The report noted:

> *"Council has not made specific provision for the purchase of this site in the belief that its obligation to acquire could be removed by rezoning. Should the Council be eventually forced to acquire, either by the acceptance of an offer made by Council or through the resumption procedures under the Act, Council's existing reserves in Capital Acquisition and Enterprise, and possibly resorting to overdraft funds would be required to purchase the property which I would recommend then upon its rezoning be immediately sold to recover these funds ..."*

The possibility of Council developing a medium density residential project on the site, under the provisions of State Environmental Planning Policy No.5 was also discussed within Council. Such a development may, as I understand it, legally be carried out on the site under the current zoning.

4.5.114 These Councillors continued to be open to opportunities for discussions with the claimants, in an attempt to resolve the compensation question in a way that was fair to both the claimants and to the ratepayers. Invariably, usually on the advice of Council's solicitors, their attempts failed. Their approach was seen as favouring the claimants and having the potential to prejudice the Council's case. The other occasions on which they attempted to have the matter dealt with in a way which they regarded as more constructive than the way Council was proceeding, are summarised below.

4.5.115 Following the Shire President's rejection of the claimants' suggestion regarding an alternative means of negotiating a settlement through Council's proposed Negotiating Committee, Councillors Tucker and Higgins, in a memo to the Shire President and the General Manager dated 25 June 1992, requested a review of the decision. They said they believed that an approach should be made to discuss the matter and to determine what common ground existed and the matters on which there was no agreement. They commented that there may be additional matters to discuss such as a joint venture development. The Shire President advised that this matter would be put to Council for its consideration when the claimants had submitted their town planning and valuation reports. Various options for a negotiation forum were eventually put to Council's meeting of 13 October 1992.

4.5.116 On 24 December, having seen the claimants' proposal for discussions with the Dispute Resolution Committee, Councillor Higgins formally expressed his support for the proposal to the Shire President. As noted above, this was unacceptable to Council's solicitors. Then there was the sequel to the meeting of 18 February 1993 and the concern of these Councillors that there had been no opportunity even to consider the alternative proposal put by the claimants.

4.5.117 The Councillors' frustration with the process and their sense that they had no control over it was understandable. They depended, for information about the progress of the case, on the reports of those senior staff of Council who attended the hearings and had first hand knowledge of the matters discussed and the prospects of success. It was, I believe, unreasonable for the Shire Clerk/General Manager to have withheld, apparently quite deliberately, the information about this proposal - even though it may not have been a formal offer. There was, in my view, no justification for not fully briefing the Councillors because, in the end, they are the ones who, collectively, are responsible and accountable for the decisions of the Council as a corporate entity.

4.5.118 The court's determination in the compensation case has, in my view, been a vindication of the position taken by these Councillors. I am aware that some of them feel somewhat betrayed by their legal advisers who persistently rejected their suggestions for a more conciliatory approach to reaching a settlement, who offered repeated assurances that the former owners had little chance of success and whose arguments appear not to have convinced the court. Moreover, the solicitors stated quite openly that the only basis on which the claimants were likely to negotiate was the "residential value" approach, yet no concession in these terms was made until the proceedings were almost completed.

Whose Decision and at What Cost?

4.5.119 I acknowledge that Council has got itself into a difficult situation and would be foolish not to have sought advice on technical and legal matters in which it does not have adequate competence. In circumstances such as this, especially circumstances involving litigation in which considerable sums of ratepayers' money are at stake, Councillors are faced with a dilemma: the Council should, acting responsibly, seek legal advice on the appropriate course of action required to comply with its statutory obligations, but then, having obtained the advice, it is faced with the question of whether it would be acting responsibly if it did not follow it. Critical to the process, of course, is the quality of the brief provided to legal advisers. If the Council is to live with a decision made on the basis of legal advice then it should be able to have confidence in the ability of those delegated to seek the advice, to present its case and to frame a brief aimed at providing answers to <u>its</u> questions and options for it to consider. There is always the potential for those delegated persons to use the briefing process to pursue a private agenda (even though they might believe they are doing so for the most commendable reason of protecting the Council from itself). This is clearly unacceptable. A Council must also be able to justify to ratepayers (and to any

external agency which might have the power to call it to account) any action it takes which is inconsistent with or contrary to such advice. One of the most important considerations in the circumstances of this case was balancing off the costs and benefits of attempting a negotiated settlement as compared with the costs and benefits of proceeding with litigation.

4.5.120 In the acquisition process, it is clear that Council was being advised and guided by its solicitors on every step it took. In my view, much of the advice related to strategy rather than points of law, and it led Council along an unnecessarily adversarial path which polarised the parties and offered little prospect for them to come together in any sort of realistic negotiating stance. In this respect, there may be some justification for the view that it was Council's solicitors, rather than the Council who were in control of the process, and Council, having stepped onto the roundabout, did not have access to a "circuit-breaker" which would enable it to stop the roundabout, or slow it down, or step off - even temporarily. It was not required to exercise its collective mind or its discretion, as it was given very few real choices by its solicitors. It is evident from the summary of events following the resumption that, in most instances, all that was required of Council was that it adopt the solicitors' recommended course of action and that it make no statement and issue no correspondence without clearance from the solicitors. Several Councillors expressed frustration at the process whereby they perceived that the Shire Clerk/General Manager and the Shire President, dealing directly with the solicitors, were following a course of action not endorsed by the body of elected members.

4.5.121 Of particular significance in terms of the ultimate cost to Council of this exercise was the solicitors' advice to it on 17 September 1992 that both Senior and Junior Counsel were clear that the case would be concluded within 10 days (even though a further week had been set aside) and that their cost estimate of just over $100,000 was calculated on this basis. At that time some Councillors were quite prepared to proceed along the course outlined by the solicitors because the legal costs were considered to be reasonable. At briefings during the hearings, they were also led to believe that the case was basically going their way and that the money they were spending was being well spent in the sense that the compensation payable would be relatively low. For example they were advised that the judge was indicating a preference for single lot subdivision when the indications (at least from the transcript of the hearings) were that he was leaning heavily towards medium density. The actual costs of legal representation and of associated legal expenses have been calculated by the Council as of the order of $864,000.

4.5.122 During the investigation, I obtained access to certain accounting records for the purpose of ascertaining, in broad terms, the total costs incurred by the Council in this litigation. My examination was by no means comprehensive nor made from the perspective of an accountant; it was also limited to the period June 1992 to May 1993 and did not cover such items as the cost of staff time involved in the preparation of documents, briefings, and attendance at court. The expenditure

clearly identified as relating to the Roundhouse case amounted to almost $680,000. Some Councillors have at various times called for reports on the expenditure associated with the matter, but have experienced difficulties, as I have, in obtaining comprehensive information. However, I estimated that the total costs were likely to be in excess of $1M - about line ball with or even more than the amount of compensation determined by the Court (excluding statutory interest). On the Council's more recent calculations, reported by the General Manager to a meeting of the Committee of the Whole on 8 February 1994, the **total cost** to rate-payers of the acquisition and associated costs was estimated to be in excess of **$3.7M**, and the non-monetary costs to the former owners (as well as to a number of Council staff and elected members) incalculable. The saga which has brought both Council and the former owners to this point borders on tragedy when it is recognised that, had Council adopted a more open and conciliatory approach in the beginning, the hardening of positions and the polarisation might have been avoided and the former owner's $2M claim of May 1989 negotiated.

4.5.123 I believe the Council had a responsibility to accurately and fully identify all the costs associated with its acquisition of the Roundhouse and report them to the community, and I recommended accordingly in my draft report. The Council immediately began this process and preliminary estimates were reported to Council, as noted above. In response to my draft report, the Council commissioned Chartered Accountants Thomas, Noble and Russell, to undertake an independent audit of costs associated with the acquisition of the Roundhouse. The period covered by the audit was May 1989 to 1 March 1994. The results were reported to Council's meeting on 29 March 1994. The audit revealed, in summary, the following:

*	compensation and acquisition	$1,409,565
*	legal and associated costs (including $66,475) for costs associated with this investigation and report)	$923,881
*	associated staff costs (not including any staff time costs other than those for the three senior staff during their attendance at the compensation case hearings)	$70,974
*	interest on the $2M loan for the acquisition	$389,239
*	preparation of a business plan for the site	$7,960
*	future interest payable on loan of $2M plus additional $200,000, to maturity	$887,647 $77,280
*	audit cost	$1,000

*	additional costs associated with business plan	$8,000
	TOTAL COSTS AND FUTURE IDENTIFIABLE COSTS	$3,775,546

4.5.124 The Council's determination, initially, to avoid the acquisition and then its unwillingness to negotiate on a reasonable basis, have thus resulted in its spending at least $2.4M of ratepayers' money over and above the compensation paid to the former owners. Although some of this expenditure may be recovered when the land is eventually sold (as it probably will be), the community would be justified in being appalled and outraged, that those who have claimed to be protecting its interests have incurred such enormous costs. There must be serious doubts about whether they were indeed committed to the community's interests or whether they were satisfying other agendas.

4.5.125 The circumstances of this case illustrate the need for councils to have effective procedures for seeking, assessing and acting upon legal advice. It also demonstrates the need for them to have access to some form of "circuit-breaker" mechanism which would allow for an independent review of the advice sought and being received, as well as of the strategies being adopted in particular legal proceedings. This matter will be referred to the Department of Local Government and Co-operatives for its attention.

A Pyrrhic Victory?

4.5.126 Both sides of this battle might well argue that they achieved victory but, in both cases, it has been at enormous cost. In the case of the Council, it "won" in the sense that, by contesting the former owners' claim for $6M it has had to pay out a total of about $3.7M - a "saving" to the ratepayers, it could be argued, of about $2M. No doubt there is, in some quarters, a sense of complacency about this and a feeling amongst those who were responsible for guiding the Council to this point, that they ought to be congratulated on their achievement. This "victory", however, needs to be seen in the light of the above discussion regarding the audited costs of the exercise.

4.5.127 On the other hand, the former owners have also "won" in that the compensation was calculated on the bases which they had consistently argued were the appropriate ones - that the site was suitable for medium density development and the only issues which had to be determined were the number of units and the value per unit.

4.5.128 Where the Council "lost" was that its arguments in relation to s.116 of the EPA Act and the lower order bases for valuation of the site were rejected. In relation to the sewerage argument it also effectively "lost" because, in the end it did not affect the calculation of the value of the site, being, in the judge's opinion, over-ridden by the more critical issue of the market. It has, I believe, also lost considerable respect and credibility as a result of the unacceptable tactics it has employed over the years in dealing with this matter.

4.5.129 It was on the issue of the market and the price that could be achieved for the site that the former owners "lost". Their assessment of the price per unit was significantly higher than that determined by Bannon J. As a result, the amount of compensation ordered by the court varied enormously from their claim and was significantly less than the lowest amount they had been prepared to concede.

4.5.130 The former owners' argument that the number of units and the price per unit were the key issues to be determined by the court is confirmed in the judgment which devotes twenty-two of its forty-seven pages to discussion of the market. The outcome has therefore vindicated their attempts to limit the matters in contention to these two. The Council's arguments served little purpose in terms of contributing to the outcome but they did have a significant negative impact in extending the proceedings and thus increasing the legal and other associated costs.

4.5.131 Apart from this negative contribution, the Council's past conduct has had a further impact on the court's determination which, from the point of view of the former owners, was also negative. It was the judge's view that, at the date of resumption, there was no market for an *en globo* medium density residential site in Ocean Shores. Nevertheless, he commented that the non-availability of an immediate market does not mean that the land lacks a retention value or the potentiality for sale as a medium density development site. Hence he valued the land on the basis of medium density but discounted the value to take account of the fact that there was no immediate market.

4.5.132 However, he also refers to a comment from Council's valuer, Mr Woodley, noting that the peak of the market in the area was February 1989. The Valuer-General's valuation for Council of July 1989 also notes that his figure assigned at that time ($1.25M) reflects the strong market "of recent times" and the strong interest shown by the market in larger potential development sites - and this figure should also been seen in the light of the "perceived wisdom" that VG's valuations in such circumstances tend to be lower than market valuations. By the date of resumption, more than two years later, the market had, in Mr Woodley's view, slowed, and the value of the site at that time was accordingly less than it would have been at the top of the market. Bannon J determined that value to be $1.65M. Given that the former owners lodged their valid Notice to Acquire in May 1989, just three months after the peak (as assessed by Mr Woodley), it is arguable that, at that point, the true value of the site would probably have been very close to the value placed on it by the then owners i.e, around $2M. Indeed they had an offer at about that time of $2.2M. Had Council acted promptly to proceed with acquisition after receiving the Valuer-General's valuation in July 1989, the chances of a settlement which was satisfactory to both parties were high. Instead, the former owners will not receive the level of compensation to which they would have been entitled at that time and the Council will have outlaid more than it need have.

4.5.133 While it is acknowledged that not all the delay in reaching the point of

resumption can be attributed to the Council, its various delaying tactics at least during the period from May 1989 to March 1991 have resulted in significant costs to both the former owners and the Council. Those costs have been not only in financial terms but also in terms of the stress suffered by many of the people involved on both sides, and by the organisation, the lost time and opportunity costs arising from the demands placed on them in dealing with this matter. The costs associated with the post-resumption processes and the court proceedings have, of course, been even greater but are not relevant to a consideration of the impact of the delays on the level of compensation due as at the date of resumption.

4.5.134 If the potential value of the site at the date of resumption was $1.65M and it is conceded that there was a down-turn in the market after February 1989 (a matter on which, being not in a position to judge, I am dependent on the expert assessment of Mr Woodley), and this value is discounted because of the lack of an immediate market, then it may be argued that the discounting required is a direct result of the delay in finalising the resumption. No such deferral discounting would have been required if the site had been independently valued soon after the valid Notice to Acquire had been lodged - near the peak of the market. Council should therefore accept some responsibility for the discounting which Bannon J considered it was appropriate to apply, and should, I believe, acknowledge in a formal way to the former owners its responsibility for the decrease in the assigned value of the land which resulted from the Council's delaying tactics during the period May 1989 to July 1991.