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## PART 5

### 4.6 OTHER MATTERS

#### Procedural Difficulties

4.6.1 This has been a difficult and long-drawn-out investigation in which the investigation team has had to face challenges which have not normally confronted Local Government Inspectors during the course of investigations. I believe these matters should be recorded in the context of the report on this investigation, so that the issues they raise can be addressed. The major difficulties experienced were in relation to (i) witnesses who were initially unwilling to co-operate in the investigation; (ii) attempts by the Council, through legal processes, to gain access to investigation material and to prevent publication of the provisional draft report; (iii) claims by the Council of legal professional privilege which severely restricted our access to material considered to be critical to the investigation; and (iv) attempts by the former owners, through legal processes, to gain access to investigation material.

#### Unwilling witnesses

- 4.6.2 Reference was made earlier in this report to the need for the evidence of all principal witnesses in this matter to be placed on the same evidentiary level, in view of the conflicting evidence given by a number of witnesses in this investigation. Section 214 (1) of the Local Government Act 1919 (which was applicable at the time) authorised a Local Government Inspector "to take evidence upon oath or affirmation ... and may by summons ... require such persons as he thinks fit to appear personally before him ... and examine such witnesses as he thinks fit".
- 4.6.3 Inspectors did not exercise these coercive powers lightly. Without the capacity to compel the attendance of reluctant witnesses and the production of sensitive documents, Local Government Inspectors would fall victim to the perception of being the ultimate of toothless tigers. Regrettably, the exercise of these powers was required on two occasions during this investigation.
- 4.6.4 Of particular interest to the investigation team was the evidence of the former Shire President, Mr Oliver Dunne, who on the basis of the evidence of most of the principal witnesses, was considered to have taken a major role in several aspects of the "Roundhouse saga" and, in particular, the circumstances giving rise to the "great surprise" report of 14 September, 1989, and the Council's failure to take heed of the warnings of Councillor Boniface prior to the gazettal of the LEP in April, 1988.
- 4.6.5 The evidence of Council's former Chief Town Planner, Mr Ian Pickles was also vital to an understanding of how correspondence from Planning Workshop was

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misinterpreted to form the basis of the Council's submission to Mr Simpson, the alleged "pressure" placed on him by Mr Rawson, and a raft of other issues concerning the circumstances under which the acquisition clause came to be written into the LEP.

- 4.6.6 Both of these witnesses were interviewed prior to the conflicts in the evidence arising, and refused to be further interviewed when it was suggested that their evidence should be given again, under oath. The evidence of Mr Pickles was taken following summons, and after an unsuccessful approach to his local Member of Parliament and the Director General of the Department of Local Government and Co-operatives. He subsequently gave his evidence under oath freely, co-operatively and without further complaint.
- 4.6.7 More serious difficulties were encountered with Mr Dunne. Mr Pickles and Mr Dunne were the only two witnesses to question our powers as Local Government Inspectors and certainly the only two which required the exercise of those powers, which are exercised only very rarely. The background is given below.
- 4.6.8 Mr Dunne was interviewed at his home on March 5 1992. Prior to the interview, Mr Hartigan and I did not foreshadow the need for him to take the oath, as we did not expect that there would be any difficulty with him doing so, and we had not encountered any resistance whatsoever from any other witness. We were wrong in this expectation. Mr Dunne declined to take the oath, saying that he had not taken any part in the affairs of the Council for some years and was not conversant with the Council files on the Roundhouse issue. He said that, as his evidence would be weighed against others from the Council with the benefit of close knowledge of those files, it would be unwise for him to take the oath. We acknowledged his concerns and proceeded to record our interview with him. His evidence was given freely and without incident.
- 4.6.9 At the conclusion of the interview, we did foreshadow the possible need, depending on the evidence of other witnesses not interviewed at that time, to return to him with a view to his evidence being placed on a more formal footing. We said that he would be given ample opportunity to re-acquaint himself with the files at the Council chambers, and offered to make the necessary arrangements with Mr Pullinger in that eventuality.
- 4.6.10 The evidence subsequently taken, particularly that of Dr Stanley, established a need to re-interview Mr Dunne, more especially so that he may be given an opportunity to rebut the evidence of several witnesses.
- 4.6.11 When Mr Hartigan advised Mr Dunne of our decision, Mr Dunne was not co-operative, saying Mr Hartigan was overbearing in his attitude and that we were exceeding our powers in foreshadowing the need to summons him. He refused to co-operate. Mr Hartigan advised Mr Dunne we would have no alternative but to summons him.

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Appealing to Caesar?

- 4.6.12 On April 30 1992, Mr Dunne's solicitor, Mr Hertzberg, wrote to the Director-General of the Department of Local Government and Co-operatives advising of his client's perception of Mr Hartigan's "threatening behaviour and intimidation". A copy of the letter which was referred to us for reply, is attached to this report as Appendix 3.
- 4.6.13 Our reply and the reply from the Director-General are also annexed to this report. The special pleadings contained in Mr Hertzberg's extraordinary letter are, I believe, addressed in our reply and need not be repeated here. The main message should already have been clear to Mr Hertzberg: the Director General had no powers of intervention in the matter, as under the Local Government Act 1919, Local Government Inspectors were independent, statutory officers not subject to direction from others.
- 4.6.14 Our reply contained a copy of the summons we advised would be served on Mr Dunne by Byron Bay police. The summons gave sufficient particulars of the matters to be canvassed in the interview, and allowed some two weeks for Mr Dunne to either respond by making alternative and mutually satisfactory arrangements, or to acquaint himself with the files - the only problem he had raised in our earlier interview with him.
- 4.6.15 Without any further contact, apart from a letter from Mr Hertzberg denying that he refused to return our calls prior to the need to execute process against Mr Dunne (a claim I refute), and contact from time to time from the Byron Bay police saying that there had been no-one at Mr Dunne's home to collect the summons, we received a letter from Mr Dunne advising of his absence working "in Port Douglas, North Queensland"- well out of our jurisdiction. The letter concluded by saying

*"The game is over and you can all bugger off and leave those of us in the productive community to get on with our lives."*

- 4.6.16 Many of the witnesses who gave evidence during this investigation might have felt that they had more productive things to do with their time and, in some cases, may indeed have found the experience quite stressful. They nevertheless co-operated in a responsible manner, as we would have expected. The need to summons Mr Dunne and Mr Pickles arose solely as a result of their initial unwillingness to cooperate in the investigation. Contrary to Mr Dunne's perception at the time, there was no requirement under the Act for any breach of law or any corrupt conduct to have been committed in order for these powers to be exercised; it was a power vested in us to allow us to arrive at the truth. In my view, Mr Dunne's initial refusal to submit himself to the questioning of officers lawfully authorised under an Act of the New South Wales Parliament was inexcusable, as was his failure to advise us of his intention to work in another

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State for a period of several months.

- 4.6.17 We did not attempt to execute a further summons on Mr Dunne, but, to his credit, he subsequently offered to travel to Sydney to give evidence on oath. That evidence enabled me to obtain a clearer picture of events and to modify to some extent the comments about him and criticisms of him which had appeared in the provisional draft report.

### **Other legal difficulties**

#### Claims of Privilege

- 4.6.18 The intricacies of the whole Roundhouse issue may have been easier to unravel in the early stages of the investigation had the Council not invoked legal professional privilege in relation to the correspondence passing between it and its former solicitors Sly and Weigall and, from September 1990, Mallesons Stephen Jaques. We were also denied the evidence of the solicitor acting for Council at the time the LEP and the subsequent amendments to it were drafted, Mr Warwick O'Rourke.
- 4.6.19 The correspondence between Council and us on this issue is attached at Appendix 4. Our views are fully expressed in that correspondence and need not be repeated here. While I acknowledge the Shire President's argument that there was some possibility that, had our requests been acceded to, Council's privilege would thereby be waived and unfettered access made available to the claimants to Council's detriment, I was disappointed at the Council's response.
- 4.6.20 Following the determination of the Court in the compensation matter, the investigation was re-commenced and I sought access from the Council to the documents and other information previously withheld because of the Council claim that they were subject to legal professional privilege. The advice received by the Council from its solicitors on this request was that there were a number of areas where the possibility of prejudice to the Council would exist if privilege were waived by granting me access. They arose, in the main, because of the appeal proceedings initiated by the former owners (as well as to possible defamation action foreshadowed by them some time ago). Council's solicitors recommended that Council not waive its privilege but also suggested that, if Council wished to release the "privileged information", it should first obtain an undertaking so that, if possible, privilege would not be waived.
- 4.6.21 Council resolved, on 28 May 1993, to grant conditional access and forwarded an undertaking to be signed by me. The undertaking required me not to disclose, publish or communicate to any person the "privileged information" provided by Council without the prior express written consent of the Council. Advice obtained from Counsel, through the Crown Solicitor's Office, as to my position in relation to such an undertaking, was that, in his view, it would be wrong for me to do so.

- 4.6.22 Arguing from the basis that, as a Local Government Inspector, I stood in the shoes of Council, Counsel expressed the view that the provisions of s. 212(2) of the Local Government Act 1919

*"... mean that a Local Government Inspector may inspect records and documents concerning the powers etc. of a council in exercise of an express authority which the section establishes. Having been expressly authorised to inspect these matters, it would be curious if the further step of issuing process against the very body on whose behalf the inspection takes place were required.*

*I think it also follows that no question of legal professional privilege being claimed by the Council arises in the course of the inspection. ...*

*If it were the case that a council could raise a claim of legal professional privilege against an inspector acting pursuant to Part VII of the Act, matters involving litigation to which the council was a party, or legal advice obtained by the council would be effectively excluded from the inspection. But there is nothing in s.212, which is expressed in wide terms, to suggest that the activities of a council in the conduct of litigation are to be excluded from any inspection."*

- 4.6.23 Accordingly, I advised the Council that I was not prepared to sign the confidentiality undertaking and that my position on the issue of privilege had not changed from that set out in our letter of 7 April 1992 (attached as part of Appendix 4). An amended proposition was put to me by Council, following discussions with Council representatives, on 16 June 1993. As that retained the requirement of confidentiality, it was equally unsatisfactory and Council was so advised.
- 4.6.24 It appeared that a stalemate had been reached and no resolution was possible. However, as of 1 July 1993, with the commencement of the new Local Government Act, I am no longer an independent statutory officer but a Departmental representative and, as such, accountable ultimately to the Director General. Consequently, as a result of discussions with the Deputy Director General and the Manager of the Department's Legal Branch, I proposed a compromise to the Council whereby, if I were granted access, I would undertake not to publish any material which would be prejudicial to Council's case in its cross appeal, and that I would provide an advance copy of my draft report to the Shire President for consultation with Council's solicitors, and would take into consideration any comments they may wish to make before I issued the draft report to the whole Council.
- 4.6.25 Council agreed to that arrangement and granted me access to the information previously withheld. I was also able to interview Mr O'Rourke to whom access had similarly been denied.

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Subpoenas

- 4.6.26 On 23 October 1992, a subpoena was served on the Department of Local Government and Co-operatives from Council's solicitors requiring it to produce all documents, files, correspondence, file notes, plans, maps or other records relating to both Ocean Shores and the Roundhouse, including material obtained by us during the course of this investigation. We could have insisted that the subpoena was not issued to us as Local Government Inspectors and therefore did not apply to any material obtained during the course of the investigation, but, on legal advice, we complied and agreed to an informal arrangement to provide a number of documents to Council's solicitors. They were given access, on this basis, to material not specifically relevant to the terms of the subpoena and formally expressed some concern about this. They offered to have the subpoena re-listed so that the documents they required could be formally produced. Some documents and other material requested were also withheld. On advice from the Crown Solicitor, we subsequently agreed to comply with the Court's request but the matter was subsequently withdrawn.
- 4.6.27 On 11 November 1992, the complainants also requested production under subpoena of the full draft report (extracts of which had been issued to them for comment), as well as tapes of interviews conducted during the course of the investigation. Advice was sought from the Crown Solicitor on this matter also. An Assistant Crown Solicitor, in discussions with the complainants' solicitors, sought to have the subpoena withdrawn but this was refused and the matter was heard before Talbot J in the Land and Environment Court on 2 and 3 December 1992. Another subpoena was also served for the production of any report on the investigation of the Council relating to planning matters and post-implementation review. That report was still in preparation at the time and no extracts of it had been issued.
- 4.6.28 In his judgment, handed down on 4 December 1992, Talbot J stated, in respect of the draft report:

*"I am not satisfied that the material in the report could necessarily lead the applicant to a line of inquiry not already identified and available to it through the due process of discovery."*

In respect of the tapes, he concluded:

*"Because I am not able to determine by perusing the material on the tapes whether or not there will be a denial of justice to the parties I have decided that the tapes are privileged and may not be made available for inspection or transcription, even conditionally."*

He ordered that, until further order, the parties be restrained from inspecting the documents and tapes produced on subpoena.

4.6.29 In spite of having itself served a subpoena on the Department for the production of a large amount of source material relevant to the investigation, the Council was represented at these hearings and made submissions opposing the applicants' (complainants') request for production. Notwithstanding its own attempts to obtain much of this same material, the Council sought costs and the Court acceded to that request, ordering the applicants to pay the costs of both the Department and the Council.

Injunction

4.6.30 On 20 November 1992, following receipt by various Council officers and elected members of extracts of the provisional draft report, Council's solicitors wrote to Mr Hartigan and me seeking an undertaking that we would recall the copies of the parts of the report which we had distributed and not make any further distribution until the compensation proceedings in the Land and Environment Court were determined.

4.6.31 Council's solicitors claimed that the release of the sections of the provisional draft report and the proposed release of the whole draft report constituted and would constitute serious contempts of court. The contempt arose, in their view, in three ways:

(i) by dealing with matters which were *sub judice*;

(ii) by being calculated to bring improper pressure to bear on the Council and its officers to abandon litigation; and

(iii) by being calculated to bring improper pressure to bear upon witnesses and potential witnesses as to how they should give their evidence or as to whether they should give evidence at all.

4.6.32 These issues were also discussed with the Assistant Crown Solicitor, and, consistent with the advice received, we advised Council's solicitors that we did not concede that our actions constituted contempt and that we intended to proceed with the preparation and issue of the confidential draft report and eventually the final report.

4.6.33 On 26 November 1992, Council's solicitors served a Notice of Motion on Mr Hartigan and me that it was seeking an interlocutory order that we be restrained for further distributing or publishing the draft report of this investigation. They also sought an order that the Council be notified of the names and addresses of all persons to whom extracts had been forwarded, and a description of each extract.

4.6.34 Again advice was sought from the Crown Solicitor's Office and Counsel was briefed on the matter. Following discussions and subsequent negotiations, agreement was reached with Council's solicitors on a form of undertaking to be

entered into by us that we would not publish or distribute or otherwise communicate the contents of any report of this investigation, or interview any person for the purposes of the investigation, until after delivery of the judgment in the compensation case. The investigation was thus suspended for some six months. It was agreed that this course of action was preferable to the alternative of defending the injunction, which, as well as being time-consuming and wasteful of resources, would also have served to put the inspectors into an unnecessarily antagonistic relationship with the Council.

- 4.6.35 When it was re-commenced, Council's solicitors sought to have the undertaking extended. In spite of their recommendation to the Council that, should the undertaking not be given then Council should seek orders restraining further publication of the report until the conclusion of the appeal, when the request for extension was refused the matter was not pursued.
- 4.6.36 In view of the legal complications associated with the conduct of this investigation the Department of Local Government will be reviewing all the matters addressed in this section of the report, with a view to determining the implications for future investigations, and, I would expect, in particular ensuring that legal processes do not unduly interfere with the conduct of investigations.



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## 5. CONCLUSIONS

- 5.1 It is evident from the findings of this investigation, set out in some detail in previous sections of this report, that the Council's dealings with the owners of the Roundhouse site amounted to nothing less than a "war of attrition" in which no-one has come out a "winner". It has been an agonisingly protracted saga with no heroes. Although some elected members and officers have on occasions taken actions which may be regarded as positive, the conduct of Council and its officers in relation to the Roundhouse has generally been unreasonable and oppressive, and the abuse of power which has been evident has taken precedence over the honest and impartial exercise of their functions.
- 5.2 The Council's mishandling of this affair has resulted in the unnecessary, indeed wasteful, expenditure of enormous amounts of time, energy and money on the part of both Council and the former owners. While not being entirely free of responsibility for the adversarial approach taken in the process of attempting to reach a resolution of the matter and the polarisation which resulted, the former owners were largely the victims of the Council's prejudices and unwillingness to deal with them in an open, conciliatory manner. As a public authority, the onus was always on the Council to conduct itself reasonably, responsibly and impartially rather than reactively.
- 5.3 The Council as a corporate entity, many of its Councillors and senior officers over a period of about 10 years and more particularly during the past five years have gone to extraordinary lengths firstly in attempting to lay claim to the Roundhouse site as belonging, as of right, to the community (i.e. to Council), and subsequently to avoid the obligation it had imposed on itself to pay a fair price for acquiring it for the use it had designated i.e. for the use of the community. While it is highly unlikely that there was ever a conscious conspiracy amongst the numerous persons involved, there is no doubt that there has been something of a conspiratorial undercurrent influencing the Council's handling of matters relating to the Roundhouse and that this has been linked to the myths surrounding the site.
- 5.4 The way in which the Roundhouse story has unfolded has been influenced to a large extent by partial knowledge and emotional arguments which have led to incredibly strong and persistent misconceptions about how the Roundhouse came to be located on one of the most prestigious sites in the shire, what its purpose was initially, what was intended for the site originally and what happened when it was excised from the residue of the estate owned by the development company. These misconceptions have been transformed into myths about the Roundhouse building, the site and the owners - myths which appear to have had an almost mesmerising effect on many of the individuals involved in this matter, rendering them incapable of thinking and acting rationally in dealing with it.
- 5.5 One way of perceiving this situation is that the former owners of the Roundhouse

have had the misfortune of symbolising to the community the cause of its disappointment and disillusionment with the failure of the developers of the Ocean Shores Estate to fulfil the promise that they were "the goose that would lay the golden egg" for the Shire. They have been identified with "the developers" and became, in some sense, a target for the community's and the Council's retaliation, even if this was not articulated or even conscious.

- 5.6 Council's insistence on zoning the Roundhouse site for community purposes in the first place was a consequence of its fixation in this respect. It chose to reject requests from the owners to have the site rezoned and doggedly pursued a zoning consonant with its unfounded belief that the site was somehow legitimately subject to Council's claim.
- 5.7 Nevertheless, the circumstances in which the 5(a) zoning and the acquisition clause came to be included in the Byron LEP 1988 were not solely of Council's own making, nor can any one person or persons jointly be held responsible or be judged to have acted improperly in this regard. The fact remains that the Council of the day had the time and the opportunity to remove the provisions before gazettal. Instead it adopted, without seeking legal advice, a "game plan", the purpose of which was to amend the plan after gazettal. What was not considered was the possibility that the operation of s.34(4) of the EPA Act may have overridden any such strategy, particularly in view of the attempts by the then owners to require Council to acquire the site prior to and immediately after gazettal.
- 5.8 Rather than accepting its responsibilities, the Council showed a disturbing preparedness to embark on high-risk and even improper strategies to avoid them. I am satisfied, on the balance of probabilities, that one of these strategies, Amendment No. 6, involved an attempt to deceive the Minister for Planning. Had it been gazetted in the form originally proposed and in the absence of a valid Notice to Acquire, it would probably have sterilised the land and, in any case would have left the owners at the mercy of a Council antagonistic to their interests. Such conduct must be regarded as an abuse of power and of the trust placed by the community in the exercise of that power.
- 5.9 The on-again/off-again proposals to rezone the site illustrate the incompetent way in which the acquisition process and the supposed "negotiations" with the owners were carried out. There was a lack of direction and leadership, and the administration and management of the Council's planning functions were in a state of disarray. Various senior officers and the then Shire President were pursuing their own agendas, sometimes jointly but more often "tripping over each other". The Shire Clerk/General Manager may have believed that he had control of the process and would convince the owners to negotiate but made no real attempt to do so. The one common theme was that Council's obligation to acquire the site must be removed and senior officers and elected members were prepared to put their integrity on the line to achieve this end, without any

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consideration of the cost to the owners.

- 5.10 Two graphic illustrations of this are the "great surprise" and the "four strategies" reports. The "great surprise" report was a blatantly dishonest document. It was clearly a political stratagem aimed, at least in part, at stirring up the community's resentment towards Mr Mangleson and Mr Cochrane, and was one of a number of actions on the part of Council which might best be described as "machismo". Regardless of who wrote it, its inclusion in the open business paper was deliberate and it was endorsed by the Council as a whole. Its practical effect in deferring the rezoning of the site could and ought to have been achieved in a much more open and honest manner.
- 5.11 Mr Pullinger's "four strategies" report could be regarded as his apologia. He was attempting, after the Court's decision, to present to the Council his claim that he had done everything that could be expected of him. The fact that the statements made in the report were not questioned by any Councillor must be taken as evidence that its substance was endorsed by Council, demonstrating the Council's affirmation of the "strategies", including Amendment No. 6. Mr Pullinger's subsequent retraction does not negate either his or the Council's intention in relation to this matter.
- 5.12 The details presented in this report demonstrate that the evidence of some witnesses, given under oath, was contradictory, and information provided in public statements as well as to public authorities has been sometimes deliberately incomplete or deliberately misleading. However, given that most of those involved has since left Council, it no longer has authority over them. Nevertheless, I believe it would be appropriate, and in the interests of the Council and the community, that the Council give due weight to the findings of this report in any future dealings it might be considering with these persons. Council, of course, retains the discretion to take whatever action it deems appropriate in relation to persons who have been the subject of adverse comment in the report and who remain within Council. I have made no recommendation in this regard.
- 5.13 The Council has had the upper hand in this battle and has always been in a position to resist the demands of the owners. It has deliberately chosen a path which resulted in the matter not being finally resolved until almost six years from the time of the first Notice to Acquire under the LEP. In particular, it had a real opportunity to negotiate, with minimum additional cost to the ratepayers in mid-1989 when it had at hand the owners' claim for \$2 million and a Valuer-General's valuation of \$1.25 million. Instead, it embarked on another campaign - one of delaying tactics and of searching for arguments which were intended to have the effect of reducing the value of the land.
- 5.14 The Council's claims that it has always been open to negotiation do not ring true in the light of much of the evidence. The appropriate sentiments were verbally expressed but the attempts were a cynical charade. On the one hand, in pursuing

its aim to remove the obligation to acquire, it approached the former owners on more than one occasion with an offer to re-zone the land for medium density residential development, with the implication that it supported the view that medium density was indeed the most appropriate use for the site. On the other hand, it totally rejected this view in its defence of the appeal on compensation and refused to negotiate on the terms which the former owners proposed - and which, in the end, were the terms on which the case was decided.

- 5.15 The Council's arguments in relation to the constraints on development of the site resulting from deficiencies in the sewerage system were, in my assessment, never valid arguments and were raised in the context of the compensation proceedings as a way of reducing the assessed development potential (and hence the value) of the site. Officers of Council adopted expedient arguments to suit their purposes, offering to rezone the site for medium density and later claiming that it could not be developed for such purposes because of the sewerage constraints, which according to them, existed at the time the rezoning offers were made. Similarly, its arguments about the applicability of s.116 of the EPA Act and the "highest and best" use of the land were equally unsupportable. The determination of the court that compensation should be based on the potential of the site for medium density residential development is a vindication of the position taken by the former owners from the beginning. The discounting applied to take account of the lack of an immediate market (in the opinion of the court) was, in my view, a direct result of the failure of the Council to proceed expeditiously with acquisition following receipt of the valid Notice to Acquire, as it had undertaken to do prior to gazettal of the LEP.
- 5.16 At least since August 1990, the strategies in this campaign have been largely orchestrated by the Council's solicitors. While it is clearly essential for the Council to obtain legal advice in such matters, the extent to which, in this case, the Council abrogated most of its responsibility for decision-making to its legal advisers is of concern. Any realistic possibility of a creative, non-adversarial approach to settling the matter was effectively abandoned once Council stepped onto the legal roundabout. It was tied into the strategies and into paying for them not knowing where they might lead but trusting that (it would seem regardless of the cost) the final compensation figure would be minimised. There was no "circuit-breaker" which would give Council an opportunity to review the direction it was heading and the potential costs involved, and to determine whether there might be other options. I believe that the major criticism of the Council in this regard must be directed towards its leadership, namely the former Shire Clerk/General Manager and the Shire President (now Mayor).
- 5.17 I am aware of the concern of some Councillors that, if they did not follow to the letter the advice received from their solicitors, there may be a risk that they could be subject to surcharge action under the Local Government Act, if their decision led to the expenditure of an amount which was considered to be excessive (and this possibility was indeed intimated in the provisional draft report). While this

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concern is acknowledged, it must also be borne in mind that surcharge action is only applicable in circumstances where deficiency or loss is incurred as a consequence of culpable negligence or misconduct.

- 5.18 The attempts by some Councillors to examine other options and to take a less legalistic approach should be acknowledged. It is regrettable that their actions caused them to be regarded as advocates for the former owners rather than as responsible elected members whose concern was to ensure that both the community and the former owners were treated fairly.
- 5.19 Although both elected members and senior staff of Council have persistently claimed that at all times they were acting in the interest of ratepayers, already the cost to Council, when all things are considered, will far exceed the owner's highest land value claim, which was considered to be ridiculously excessive. The cost alone of the legal proceedings and the compensation and costs awarded by the court, together with the statutory interest payable, was expected to be in excess of \$2.7M. The matter of costs is one which I noted in my draft report required further examination and on which the Council ought to report to the community. I recommended that an independent audit be carried out by 31 March 1994. The Council, to its credit, was diligent in implementing this draft recommendation and an audit, carried out by Chartered Accountants Thomas, Noble and Russell, was presented to its meeting on 29 March 1994. The audit revealed that the total identifiable costs incurred to 13 January 1994 were just over \$2.8M with further future identifiable costs amounting to nearly \$974,000, giving a total of \$3,775,546.
- 5.20 The community likewise, has a right to participate in the process of determining the ultimate use of the site. It will have to bear the cost of the acquisition as well as the cost of any development which the Council might subsequently undertake. Having been led to believe that the Council was going to acquire the site for community purposes, the community should be involved in deciding whether such a use of the land is still warranted and, if not, what strategies should be implemented for maximising both the potential of the land and the benefits to the community which should accrue from any future development. I note that the Council has, in fact, initiated a process of community consultation for this purpose.
- 5.21 Through this report, I have, I believe, established without doubt that Council has acted unreasonably and improperly in the way in which it has dealt with the Roundhouse acquisition. It is my view that some of the costs Council has incurred in running its campaign have been unwarranted. In particular, I am concerned about the cost of the delaying tactics and the introduction of value-minimising arguments. In my earlier draft report I expressed the view that, in its negotiations with the former owners, the Council should seriously consider compensating them for the additional losses incurred as a result of its actions, and, in particular for the decrease in value brought about as a result of the delay in

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proceeding with resumption. Although agreement has been reached on a settlement in excess of the court's determination, the rationale for the additional compensation is not specified. I have been advised, however, that the Council intends to make a formal apology to the former owners when this report is issued.

- 5.22 The efforts of some of the Councillors, over the past two years, to adopt a reasonable and conciliatory approach to reaching a settlement of the matter must be acknowledged. Those efforts, together with those of the newly appointed General Manager, Mr Max Eastcott, appear finally to have convinced the Council that the adversarial approach was ultimately counter-productive. The work of the Dispute Resolution Committee has resulted in a formal agreement which, given the difficult circumstances of this case, has been an achievement for which the Council ought to be commended.
- 5.23 The legal hurdles placed in the way of this investigation (the need to issue summons, claims of legal professional privilege, subpoenas and injunctions) have made it a particularly difficult exercise. The fact that the investigation dealt with aspects of a matter which was the subject of pending or current litigation contributed to these complications. These issues and the way in which they impacted upon the investigation will be reviewed by the Department along with similar issues which are being raised in the context of another investigation which is currently the subject of legal proceedings.

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## 6. RECOMMENDATIONS

- 6.1 The formulation of appropriate recommendations in this case has been a task which has greatly exercised my mind. They do not easily flow from the conclusions. The fact that this matter has such a long and complex history and has involved so many individuals and authorities has contributed to the difficulty of making recommendations which are relevant now.
- 6.2 Given the difficult and extended nature of this investigation, and the costs especially in terms of lost time and opportunity costs for both those undertaking the investigation and witnesses, I have also been confronted with the question of the value of this exercise. My view is that it has been worthwhile and constructive in that it has placed on the public record the Council's conduct in its handling of the Roundhouse acquisition, and has exposed certain aspects of that conduct which had not previously been revealed. As a public authority, the Council's conduct is open to scrutiny and it ought to be accountable to the public for the way in which it has dealt with this matter. This report will, I believe, achieve this purpose.
- 6.3 I had seriously contemplated recommending that the Council take disciplinary action against some Council officers, especially Mr Pullinger and Mr Ryan. This course of action was not considered appropriate, partly because other persons against whom I have no power to make recommendations, have also contributed significantly to the circumstances, and partly because I am satisfied that the whole Council, at various times, was involved as a willing participant. With the resignations during 1993 of Mr Pullinger and Mr Ryan (and Mr Alderson) a recommendation regarding disciplinary action became even more inappropriate. It is, however, open to the Council to take whatever action in this regard is within its power and which it considers appropriate, in the light of the findings of this report.
- 6.4 I also considered the possibility of recommending a public inquiry into the Council's conduct in this matter, and in particular, its abuse of power which has been clearly demonstrated. Such an inquiry would be intended to determine whether the Council's conduct was such as would warrant its dismissal. Again I decided against making such a recommendation on the basis that this investigation has had a limited focus and because the conduct in question has involved several different bodies of elected members over the history of the matter.
- 6.5 Given my concern that some of the conduct described in this report constitutes an abuse of power, I will refer the report to the Independent Commission Against Corruption for its assessment, in accordance with my obligations under s.11 of that Act. That referral should not, however, be read as a finding by me of corrupt conduct.

6.6 I recommend

that the Council:

- (i) formally acknowledge to the former owners of the Roundhouse site its responsibility for the losses incurred by them as a result of the Council's conduct and, in particular, the delays which resulted in a discounting of the value of the site to take account of the down-turn in the market after February 1989;

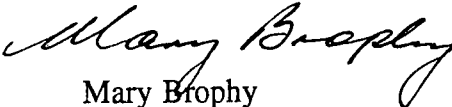
*(NOTE: The Council has already indicated that it intends making a formal apology to the former owners when this report is released.)*

- (ii) by 30 June 1994, have undertaken a thorough, independent audit of all the costs associated with the acquisition of the Roundhouse, from May 1989 to the present, and report on these costs to both the community and the Department;

*(NOTE: Council, in response to my provisional draft report, has already undertaken this audit, which was presented to its meeting on 29 March 1994.)*

- (iii) by 30 June 1994, establish a legal services committee which is responsible for overseeing the conduct of all legal matters in which the Council is involved and which has as one of its specific responsibilities the provision to Council of regular reports on current litigation, including estimates of the costs of staff time spent dealing with legal matters and other incidental staff costs, as well as the costs of legal advisings, legal representation, and expert witnesses; and

- (iv) ensure that the future development of the Roundhouse site is undertaken in such a way as to minimise the risk of any additional financial burden on rate-payers.

  
Mary Brophy  
Senior Investigations Officer

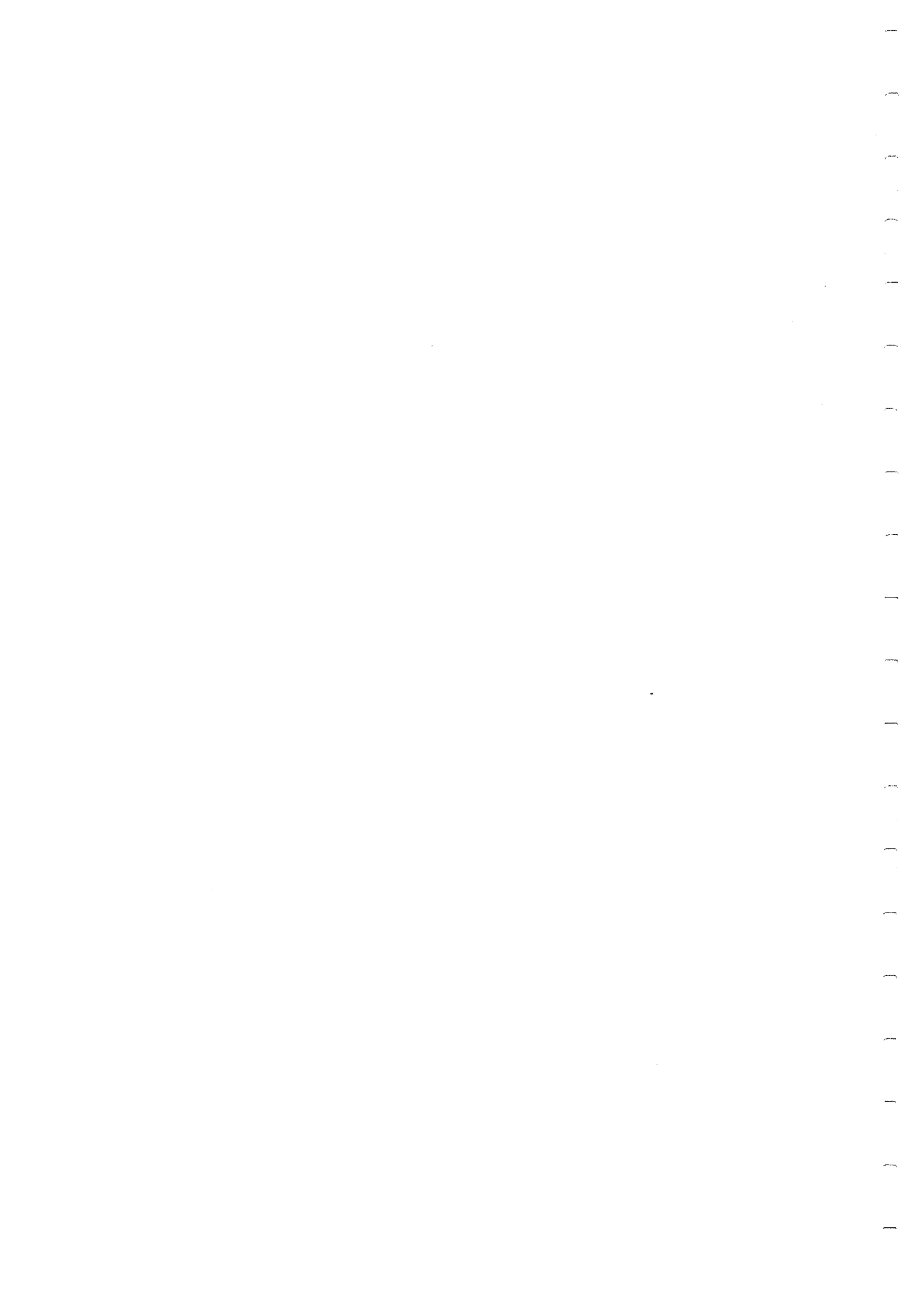
15 APR 1994



**APPENDIX 1**

**COPY OF TERMS OF AGREEMENT ENTERED INTO  
BETWEEN COUNCIL AND THE FORMER OWNERS OF THE ROUNDHOUSE**

(Ref. para 3.3.41)



DATED 18<sup>TH</sup> JANUARY, 1994

DONALD MARK COCHRANE  
JAMES HARRY MANGLESON &  
ANNABELLE LOUISE GALLAGHER  
("Releasers")

and

BYRON COUNCIL  
("Releasee")

---

DEED OF RELEASE

---

MALLESONS STEPHEN JAQUES  
Solicitors  
Governor Phillip Tower  
1 Farrer Place  
SYDNEY NSW 2000

TEL : (02) 250 3000  
TELEX : AA121332  
FAX : 250 3133  
DX : 113 SYDNEY  
REF : DST:DOD

THIS DEED is made on 18<sup>th</sup> JANUARY, 1994

BETWEEN: DONALD MARK COCHRANE of Myocum, NSW 2482  
JAMES HARRY MANGLESON of Coolamon Scenic Drive  
Mullumbimby, NSW 2482  
and ANNABELLE LOUISE GALLAGHER of Yelgun, NSW 2483 ("Releasors")]

AND: BYRON COUNCIL of Council Chambers, Lawson Street, Byron Bay  
in the State of New South Wales ("Releasee")

RECITALS:

- A. The Releasors commenced an appeal No. 40186 of 1993 ("Proceedings") in the Supreme Court of New South Wales Court of Appeal at Sydney against the Releasee from the judgment of the Land and Environment Court in proceedings 30089 of 1992.
- B. The Releasee filed a cross-appeal in the Proceedings.
- C. The Releasors and the Releasee have agreed to settle the Proceedings on the following terms and conditions.

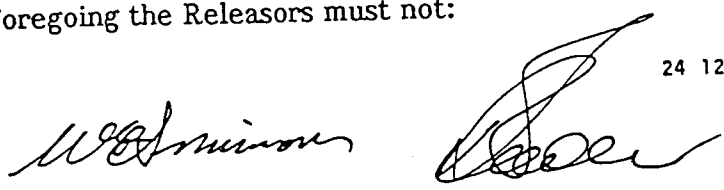
OPERATIVE PROVISIONS:

- 1. In consideration of the Releasee paying to the Releasors the following sums calculated in accordance with Schedule 1:

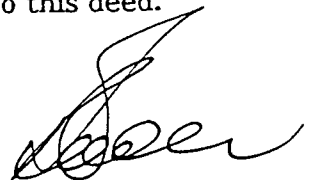
Donald Mark Cochrane	\$126,238.33
James Henry Mangleson	\$126,238.33
Annabelle Louise Gallagher	<u>\$57,874.34</u>
Total	<u>\$310,351.00</u>

the receipt of which is hereby acknowledged, the Releasors will enter into consent orders providing for the dismissal of the Proceedings and grant the release and indemnity set out in paragraphs 4 and 5 hereof.

- 2. The Releasee will enter into consent orders providing for the dismissal of its cross-appeal.
- 3. The Releasors and the Releasee will each bear their own costs of the Proceedings. The Releasors agree that their costs in the proceedings 30089 of 1992 in the Land and Environment Court are fully satisfied by the payment made under clause 1 of this deed.
- 4. The Releasors release the Releasee, its servants, agents and assigns from all actions, suits, causes of action, claims and demands whatsoever which the Releasors now have or may at any time hereafter have against the Releasee, its servants, agents or assigns and from all liability arising from or relating in any way to the Proceedings and all other proceedings between the Releasors and the Releasee in the Land and Environment Court and the Court of Appeal concerning the property known as the "Roundhouse" at Orana Road, Ocean Shores including without limitation all orders for the payment of legal costs in all such proceedings. Without limiting the generality of the foregoing the Releasors must not:



- (a) take any action alleging defamation whatsoever against individual Councillors of the Releasee or officers of the Releasee whether those Councillors or officers be current or past members or officers of the Releasee; or
  - (b) commence or continue any legal proceedings against the Releasee or its current or past officers or members arising from the investigation currently being undertaken by the Department of Local Government in relation to the property known as the "Roundhouse" at Orana Road, Ocean Shores or from any report or draft report prepared in connection with that investigation provided that this clause does not compel the parties to break any law or statute and any report or draft report prepared in connection with the investigation makes no findings of corrupt conduct (within the meaning of the Independent Commission Against Corruption Act 1988) in relation to the Releasee or any of its past or current members or officers which leads to financial damage to the Releasors.
5. Subject to clause 4(b) of this deed the Releasors will at all times hereafter keep the Releasee, its servants, agents and assigns indemnified against all actions, suits, causes of action, claims and demands which the Releasors, or any assignee of the Releasors, or any person claiming under or by virtue of any right derived from the Releasors now has or may at any time hereafter have against the Releasee, its servants, agents or assigns arising from or relating in any way to the Proceedings and all other proceedings between the Releasors and the Releasee in the Land and Environment Court and the Court of Appeal concerning the property known as the "Roundhouse" at Orana Road, Ocean Shores including without limitation all orders for the payment of legal costs in all such proceedings.
6. The Releasee releases the Releasors, their servants, agents and assigns from all actions, suits, causes of action, claims and demands whatsoever which the Releasee now has or may at any time hereafter have against the Releasors, their servants, agents or assigns and from all liability arising from or relating in any way to the Proceedings and all other proceedings between the Releasors and the Releasee in the Land and Environment Court and the Court of Appeal concerning the property known as the "Roundhouse" at Orana Road, Ocean Shores including without limitation all orders for the payment of legal costs in all such proceedings.
7. The Releasee will at all times hereafter keep the Releasors, their servants, agents and assigns indemnified against all actions, suits, causes of action, claims and demands which the Releasee, or any assignee of the Releasee, or any person claiming under or by virtue of any right derived from the Releasee now has or may at any time hereafter have against the Releasors, their servants, agents or assigns arising from or relating in any way to the Proceedings and all other proceedings between the Releasors and the Releasee in the Land and Environment Court and the Court of Appeal concerning the property known as the "Roundhouse" at Orana Road, Ocean Shores including without limitation all orders for the payment of legal costs in all such proceedings.
8. Each party agrees to pay its own legal costs in relation to this deed.



EXECUTED as a deed

THE COMMON SEAL of BYRON )  
COUNCIL is affixed in accordance )  
with its articles of association in the )  
presence of:

*W.E. Simmons*  
.....

Signature of authorised person

*ACTING MAYOR*  
.....

Office held

*WARREN ERNEST SIMMONS*  
.....

Name of authorised person



Signature of authorised person

*COUNCILLOR*  
.....

Office held

*ROSS TUCKER*  
.....

Name of authorised person

SIGNED, SEALED AND DELIVERED )  
by DONALD MARK COCHRANE in )  
the presence of: )  
)  
)

.....  
Signature of witness )  
)

.....  
Name of witness )  
)

.....  
Signature of Donald Mark Cochrane

SIGNED, SEALED AND DELIVERED )  
by JAMES HARRY MANGLESON in )  
the presence of: )  
)  
)

.....  
Signature of witness )  
)

.....  
Name of witness )  
)

.....  
Signature of James Harry Mangleson

EXECUTED as a deed

THE COMMON SEAL of BYRON )  
COUNCIL is affixed in accordance )  
with its articles of association in the )  
presence of:

.....  
Signature of authorised person

.....  
Signature of authorised person

.....  
Office held

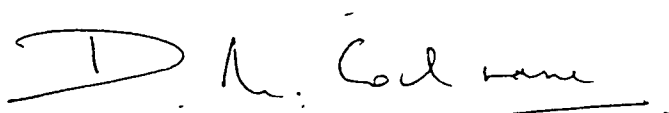
.....  
Office held

.....  
Name of authorised person

.....  
Name of authorised person

SIGNED, SEALED AND DELIVERED )  
by DONALD MARK COCHRANE in )  
the presence of: )

.....  
Signature of witness

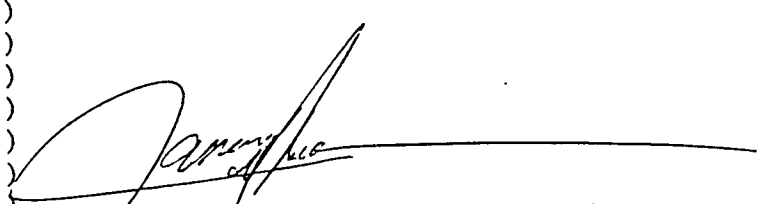


.....  
Name of witness

.....  
Signature of Donald Mark Cochrane

SIGNED, SEALED AND DELIVERED )  
by JAMES HARRY MANGLESON in )  
the presence of: )

.....  
Signature of witness



.....  
Name of witness

.....  
Signature of James Harry Mangleson

SIGNED, SEALED AND DELIVERED )  
by ANNABELLE LOUISE )  
GALLAGHER in the presence of: )

..... *M Bower* ..... )  
Signature of witness )

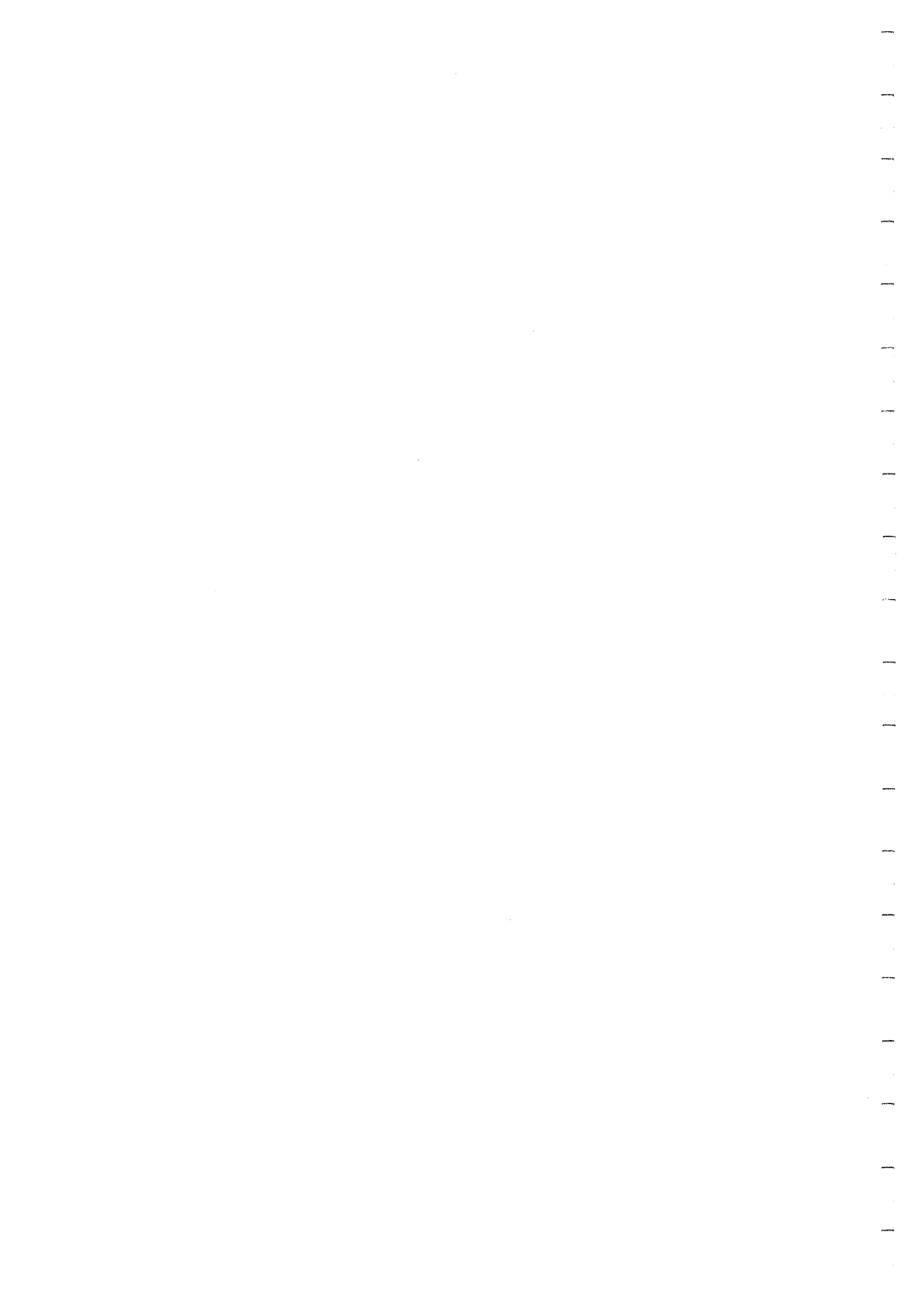
..... M BOWER ..... )  
Name of witness *SB* )  
*Mullumbimby* )

..... *A. L. Gallagher* ..... )  
Signature of Annabelle Louise )  
Gallagher )



SCHEDULE 1

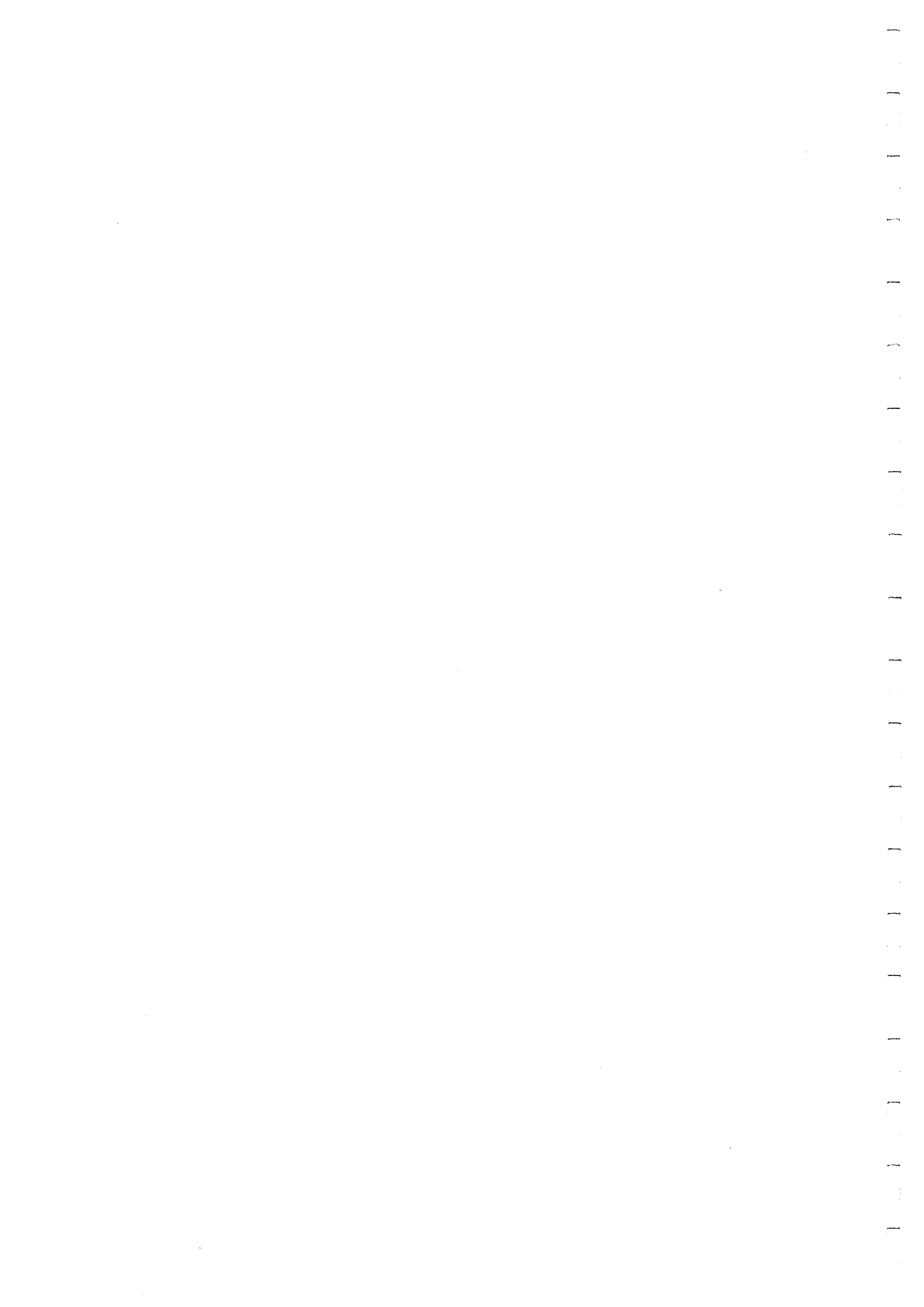
Compensation for resumption of the property known as the "Roundhouse" at Orana Road, Ocean Shores	\$992,080.00
Interest on compensation	\$107,134.25
Contribution to Releasors' legal costs (estimated as 65% of one half of estimated taxable costs) payable to Donald Mark Cochrane and James Harry Mangleson in equal shares	\$136,728.00
Additional compensation offered by the Releasee on 10 August 1993 payable to the Releasors in equal shares	\$100,000.00
Additional compensation offered by the Releasee on 31 August 1993 payable to the Releasors in equal shares	<u>\$73,623.00</u>
SUBTOTAL	\$1,409,565.25
Less amount already paid by Releasee	<u>\$1,099,214.25</u>
TOTAL AMOUNT TO BE PAID	<u>\$310,351.00</u>



**APPENDIX 2**

**RESPONSE TO PROVISIONAL DRAFT REPORT  
FROM MR ROB DOOLAN**

(Ref. para 4.3.66)



Rob Doolan

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Local Government Inspectors  
Department of Local Government & Co-operatives  
Locked Bag 1500  
Bankstown NSW 2200

**INSPECTION - BYRON SHIRE COUNCIL - ROUNDHOUSE**

Dear Sir/Madam

In relation to your letter of the 25 August and extracts of the draft report, received on the 30 August, I respond as follows:

**I consider an objective assessment of my involvement in this matter would result in no special mention of me within the report other than to state at one time I was a council officer who was not responsible for the LEP status of the Roundhouse and at a subsequent time I was an elected member, who prior to the gazettal of the LEP never dealt with any matters regarding the Roundhouse.**

**An objective reading of the draft report, statements taken and my submission in reply, reveals there has been an attempt to support preconceived ideas and conclusions by speculative, unsubstantiated evidence, comments taken out of context and rearranging to support the preconceived views. The conclusions about myself must be withdrawn.**

I formally request you to:

**A. Reconsider the preliminary findings, opinions and treatment of myself in an objective perspective and**

1. Delete references to me that are based on verbal and unsubstantiated 'evidence', conjecture, assumptions and illogical conclusions..
2. Report on my situation based on written or substantiated evidence and the public record.
3. Delete speculation, presumptions and theories of the author of the report
4. Define the term 'true status' as used throughout the report.
5. Assess your conclusions and comments against how readers could gain varying interpretations of your written material and how your comments may be significantly damaging to innocent persons.

**B In the event you choose not to amend as requested in this submission, append my response to the report in the interests of natural justice, balanced reporting and .**

**C. Provide me with your transcript of the tapes of my interview .**

15 SEP 1993

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**D The draft report be separately assessed to ensure the standing of innocent persons is not damaged by the inquiry.**

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**General Comments**

1. I do not consider the inquiry was undertaken in a process which was orderly or soundly based. I was not initially given the opportunity to meet the inspectors before an established view was formed about me, contrary to the stated procedures within the report and contrary to assurances to me by Mr F. Sut. in 1992.

2. I object to the speculative conclusions and selective, often out of context, comments made about me. I object because I consider them unfair outcomes given the written evidence, facts and the public record. I object to these comments which I consider damaging to my person and professional reputation. I object to the attitude of the author who considers these comments not to be a 'big deal' (refer to tape of my interview) and something the author doubted I would be interested in (refer to fax cover sheet to me 20/11/92). I consider the report be separately assessed to ensure the standing of innocent persons is not damaged in the inquiry.

3. I object that only isolated extracts (upon which conclusions have been made) from the report have been provided to me. This inhibits my ability to respond.

4. I object to the matters raised, conclusions formed and assumptions made based on the 'evidence' of Cr Simmons. This issue was not raised with me at the interview and it seems peculiar and strangely convenient that this verbal unsubstantiated material is being used against me in such a major way.

I challenge the author to be able to allege wrongdoing on my part, especially using the term 'mislead', based on one person's recollection of an uncertain event so long ago. In any case how could I be accused of misleading a fellow councillor based on an alleged casual conversation.

The author suggests, if this conversation did take place, that there was some sense of a duty for me to provide advice to be relied upon and knowing that someone was going to rely upon the advice that I deliberately provided incorrect advice. No such duty exists between elected councillors especially in the context of a casual conversation.

5. I object to the author apparently accepting the verbal evidence of Crs Simmons, Boniface and Sly and Wiegall but not accepting my evidence. The author has stated (record on interview tape) that her comments about me are based on speculation. The author says that the verbal evidence from Cr Boniface was accepted because it was given under oath. My evidence was also given under oath. I demand

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equal treatment otherwise the author is exposed to accusations of bias and inconsistency.

6. I strongly request that you review the authors comments in the light of how the comments about me can be misconstrued and interpreted differently to the intent of the author.

7. I object most strongly to being placed in the category of 'those who apparently knew the "true status" (your choice of words) of the Roundhouse and did not take appropriate action', especially as the author admits 'having difficulty reaching a concluded view' about my position ( see page 48).

My response as outlined in this submission shows the circumstances demonstrate I was most unlikely to know, and it certainly cannot be assumed I was aware of the impending LEP status. The truth is that this matter did not come before the Council ( between the elections in Sept 1987 and gazettal of the LEP in Mar 1988) and I therefore had no occasion to take any action. To state that I did not contribute positively to the debate when there was no debate is a nonsense.

8. The report suggests that the Roundhouse was a matter that the council, elected in Sept 1987, considered and dealt with and the author has stated the Roundhouse was a matter the council discussed. The author could not provide any documentation to show the matter was discussed by the Council, elected in Sept 1987, prior to gazettal of the plan. As stated in my evidence, I have no recollection of the matter ever being debated by the Council elected in Sept 1987.

9. The report makes much mention of Cr Boniface raising the issue and 'council debate' on the matter. The author had no evidence that the matter was ever discussed in a Council meeting following the election of 1987 prior to gazettal of the plan.

The Planning Administrator invited individual councillors to discuss planning matters with him ( Council minutes 27/10/87). Cr Boniface apparently failed to take the matter to the Planning Administrator.

Why does the report fail to include Cr Boniface in the category of 'those who knew the "true status" and did not take appropriate action".

10 The author has stated she does not consider me to be significantly involved ( refer interview tape). The author has agreed the evidence about me is not strong and that maybe I should not be in any of the categories proposed on Page 41( refer interview tape)

11. Given the manner in which Commissioner Simpson conducts Public Hearings, I find it offensive to him and me that it could be suggested ( refer interview tape) that I might have been involved in indirectly putting things to the Commissioner.

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12. The author does not properly separate my two distinct roles of a council officer and an elected councillor and the fact that they were at separate times.

13. The draft report extracts I received introduces the subject of political affiliations on Page 48 eg United Shire but does not identify that one of the owners of the Roundhouse, Mr Mangleson was Cr Bonifaces election campaign manager for the 1987 council elections( refer interview tape). This relationship or potential conflict of interest does not appear to have been investigated or mentioned by the author.

14. The author refers to me having access to information not necessarily available to other elected members post September 1987

I strongly refute this statement. What sort of access is the author referring to? This statement is improper, unsubstantiated and dangerously speculative.

What sort of information is the author referring to? Surely the author cannot make this presumption without specifying what type of information is being alluded to.

15. On many occasions within the extracts of the report, the author uses words such as "true status", "appropriate action", "constructive" and "access to information". No adequate definitions of these words are provided to show what the author means by such statements.

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### **My involvement**

The following summary of my involvement is provided as follows:

#### **As a council officer**

- My position as a council officer was as a subordinate officer, who reported to higher levels of management. I did not have any delegations or authority to reply to correspondence.
- I did not work on the Roundhouse written reporting or represent council at the Public Hearing or S68 reports finalising the LEP
- I was not working in the Forward Planning section for a period after the public hearing when the plan was being finalised
- I was not employed by council when the plan was finalised and checked
- In my only direct involvement with the Roundhouse, during mid 1986, documented evidence shows I was party to a positive initiative which may have avoided the path this saga has taken
- The Roundhouse was a controversial issue which was dealt with at higher levels of management.

#### **As a councillor**

- When I was elected to Council, I was not aware of the impending status of the Roundhouse in the draft LEP. This is the truth. The
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draft plan covered thousands of properties and it cannot be assumed that I should know the subsequent draft LEP status of this single property especially as I did not work directly on this property when the LEP was being finalised for this site and the LEP was being checked.

To suggest that I knew the impending status of the Roundhouse is pure speculation and not supported by any evidence or probability. This is similar to suggesting that a rates clerk should know the specific rates for a single property some time after they had left the employ of council when the value may have changed since they worked with council.

There is no evidence to show, as stated in the draft report, that the Roundhouse was ever debated by the council, elected in Sept 1987, prior to gazettal of the LEP. There was never any council debate, as far as I can recall on the alleged concerns of Cr Boniface. No evidence has been provided of this.

The new Councillors following the 1987 election, other than Cr Boniface, were not informed of the impending status of the Roundhouse as the General Manger did not brief the new council about the impending financial consequences. A valuation which had been requested by the earlier council was not undertaken and therefore not reported to the new Council elected in Sept 1987..

To suggest that I did not contribute positively to the debate when there was no debate is a flawed and unsustainable argument.

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**Responses to selected sections of the draft report received by me**

4.3.32

*'some degree of knowledge amongst the councillors. Members who had been re-elected would have been aware of the issues'*

The report fails to include Cr Boniface who has given evidence that he was aware of the situation. He appears to have failed to take up this matter in a formal way or the General Manager did not report on their concerns.

---

*'Cr Doolan in particular, who had been forward planner prior to his resignation in July 1987 and election to council, had had some involvement with the preparation of the draft LEP, and had discussions with the former owners of the Roundhouse site'*

I object to this statement because I have given evidence I was not aware of the situation which is the truth. The statement does not give any basis for me knowing the final outcome of the LEP status of the Roundhouse and I did not. By placing my name in this paragraph with two comments unrelated to knowing the final

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of the Roundhouse and I did not. By placing my name in this paragraph with two comments unrelated to knowing the final outcome of the LEP gives an unfair impression and serves to associate me with some knowledge I did not have.

The discussion which I attended was held in earlier times prior to the LEP status of the site being finalised or adopted. My work on the plan finished before the plan was being finalised and checked. The report is misleading as I was taken off Forward Planning duties around December 1986. Because I was involved in an earlier meeting does not mean I should therefore know the final outcome of this site when I was involved with some thousands of sites in the shire.

I object to being solely named within this paragraph as having some special degree of knowledge. This sentence has been changed from the previous draft where it wrongly stated I "was familiar". The reference to me should be completely deleted. As stated by the author of the report ( refer interview tape) these comments about me are based solely on the author's speculation.

---

*'In any case, Councillors should have been left in no doubt following the representations by the newly elected Councillor Boniface'*

I object to this statement because, as the report states, Councillor Boniface only talked about the situation. There is no evidence to show he brought the matter to a council meeting by way of a Notice of Motion, Question Without Notice or that the General Manager acted on his representations and reported the matter. Cr Boniface apparently failed to take up the matter with the Planning Administrator as invited ( refer Council Minutes 27/10/92)

Other newly elected councillors, such as myself, had no involvement in the matter as a financial issue. The General manger did not undertake the valuation or brief the new councillors. Other newly elected councillors, such as myself, had no involvement in the matter as a planning matter because prior to the gazettal of the LEP, the council did not have its planning powers. I understand the matter was not debated at a meeting of Council prior to gazettal of the LEP.

---

*'Apportionment of responsibility '*

If this refers to responsibility for the gazetted status of the site, it is clearly demonstrated in this submission that, as a council employee, I had no direct involvement in the LEP status of the site and as a councillor, the matter was never considered by the Council when I was a councillor.

I should be deleted from consideration.

The author of the draft report identifies a range of people who apparently knew of the 'true circumstances' such as Cr Boniface by admission or councillors who were members of both the pre - 1987 and post -1987 councils by evidence/fact and the General

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Manager. Are all of these persons being considered as contributing to the LEP outcome of the site?

---

4.3.36 true status - what does the author mean by 'true status'. Is the true status the fact that the site was subject to an acquisition clause. I understand that because of the report to the old Council, prior to the 1987 elections, by the then Chief Planner (who reported on the likelihood of council having to acquire the site), that the true status was on the public record. The General Manager did not brief the new council of any financial obligation in this matter. In summary the 'true status' was not a 'secret' although most people including the new councillors with the exception of Cr Boniface probably did not know of it.

---

*'those who apparently knew the true status of the Roundhouse but did not take appropriate action'*

**I object to me being include in category of 'apparently knowing the true status and did not take appropriate action' What is appropriate action. Was Cr Boniface's action appropriate?**

**As a council officer, I was not directly involved in the final LEP status of the site because I did not work on this area of the plan in terms of the public hearing or subsequent finalisation of the LEP status..**

**Also I was a subordinate officer with no delegations or statutory responsibilities.**

**As a councillor between September 1987 and gazettal of the plan in March 1988, when the Council had no planning responsibilities, the matter did not come to council**

**I object to Councillor Boniface not being in this category**

**I object if any councillors who were contacted by the former owners, are not being included**

**I object to being placed in this category. The author has accepted ( refer interview tape); as a councillor it was not my responsibility to advise other councillors even if I knew, which I did not, of the impending LEP status of the site. The author seems not only to have difficulty in distinguishing the distinct and separate roles of an employee and an elected member but the different periods when I held these roles.**

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4.3.38 *All are in varying degrees responsible for the outcome*

What does the author refer to by the words 'the outcome'. If these words refer to the zoning of the site, the councillors, elected in 1987, did not play a part in the zoning of the site and had no planning responsibilities prior to the gazettal. They were

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not briefed by the General Manager regarding the recommended zoning or the financial implications of the likely acquisition which has been reported to the previous council

**I object to any reference to me being to any degree responsible for the outcome**

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Remainder of 4.3.38

Note the author accepts the evidence of Sly and Wiegall without question

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*4.3.39 first category of players*

I find the term "player" inappropriate. Am I in this category as a council officer knowing the 'true status' and not taking action or as a councillor knowing the true status and not taking action?

Unlike the verbal evidence of Sly & Wiegall, Boniface and Simmons being accepted at face value, my evidence is not accepted despite the documented evidence of my positive input (refer draft report) when involved at one discreet step in the process. I object to the author apparently accepting the verbal evidence of Crs Simmons, Boniface and Sly and Wiegall but not accepting my evidence. The author has stated (record on interview tape) that her comments about me are based on speculation. The author says that the verbal evidence from Cr Boniface was accepted because it was given under oath. My evidence was also given under oath. I demand equal treatment otherwise the author is exposed to accusations of bias and inconsistency.

**I object to being included in this category**

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*4.3.51 he also commented .....were grounds for the view*

The proper context of this statement is that I was explaining that as a councillor, I had a responsibility the ratepayers to have an open mind and to consider all views on the matter. In this context I said that it was a complicated matter that was not clearly black or white and that there were grounds for many community opinions.

**I request that this reference being deleted or clarified and that the proper context be placed on matters assigned to what I have said.**

---

*he indicated he had no particular recollection of the Roundhouse matter being raised before the Commissioner*

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**I object strongly to this sentence which I consider to misrepresent myself. It should read:**

'he indicated he did not write the report of the Roundhouse matter to the public hearing and did not present the Council's submission to the Public hearing on the Roundhouse. He had no recollection of being in attendance when the Roundhouse matter was being raised before the Commissioner.

---

4.3.52

*"He said it was not his role and he did want to be seen to be providing planning advice to council"*

This should read

"He said it was not his role and he did not want to be seen to be providing planning advice to council"

*"i was sitting there .....I did not know what Boniface was going on about"*

This quote is misrepresenting the intention of my statement which was not suggesting that, at the time in Sept 1987 to March 1988, I knew that Cr Boniface was raising concerns. My evidence has been misinterpreted. The meaning was that now in 1993 and looking back I did not know what Boniface was going on about.

" come into the game"

This quote is taken out of context and could be misconstrued. I was referring to the fact that I was a subordinate officer and that the Roundhouse was dealt with by higher levels of management and that I was not party to those matters.

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*"This evidence may provide the clue to Cr Doolan's failure not to contribute constructively to the debate initiated by Cr Boniface"*

**I object strongly to the whole sentence, notion and implication of this sentence. I demand that it be removed and that this style of "investigating" be reviewed. Having regard to the fact that the ' the special duties and functions of the inspectors are of great public importance\*', this rhetoric is in my view highly inappropriate.**

(\* Cochrane and Others v Byron Shire Council, Land and Environment Court, 30089 of 1992, page 7)

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The author's treatment of myself in this illogical and totally wrong. It implies that -

- A. It adopts without question that there was a debate
- B. It concludes that I failed to constructively contribute
- C. It implies that only one 'clue' is somehow needed to be conclusive and support the author's views.

What opportunity was there to contribute if the matter was never considered by council ?

Where is the evidence of the "debate" initiated by Cr Boniface? Where is the Notice of Motion, Question without notice or report requested by Cr Boniface?

At which Council meeting did I fail to contribute to the debate either constructively or otherwise. Neither I nor the author has been able to establish evidence of the debate.

What does the author mean by constructive?

---

*"If it was indeed his view that Council would not have to acquire the site, then the concerns of Cr Boniface were, as far as he was concerned, simply hot air"*

This is highly speculative and I completely reject it as an unsustainable argument. When is it alleged that I held this view? Is this between Sept 87 and Mar/April 1988? What evidence is there to construct this supposition?

---

*" I have difficulty in reaching a concluded view on where Mr Doolan should be placed in the spectrum of those contributing to the zoning and associated acquisition obligation being placed in the LEP" "*

**In this case, there should only be neutral findings about me.**

The author has stated (on the interview tape) that the opinions of me within the report are based on speculation.

The written evidence and public record show quite clearly that as a subordinate officer, I was not involved in the choice of the Roundhouse zoning and had left council's employ when the draft LEP was being checked.

As a councillor in the first six months of the council elected in Sept 1987, which included a Xmas break, prior to the gazettal of the LEP, council did not have any planning powers and the matter was not debated by council.

At that time I was not aware of the impending status of this site.

There is no evidence to show I contributed to the resulting LEP status because I did not. The verbal unsubstantiated evidence of Councillors Boniface and Simmons should be classified for what it is. It is certainly no basis for forming opinions and judgements.

**I strongly object to being placed in any category or assigned any degree of apportionment of responsibility in terms of the resulting LEP status of this site.**

---

*'As a former employee with some direct involvement in the Roundhouse issue'*

I strongly reject this sentence being used in this context as written and oral evidence shows my involvement was prior to the finalisation of the impending LEP status of the site. As documented my involvement was in fact positive, providing an opportunity to avoid the current situation

*" and with access to information not necessarily available to other elected members post September 1987 ...."*

**I strongly refute this presumption. What sort of access is the author referring to? This statement is improper, unsubstantiated and dangerously speculative.**

**What sort of information is the author referring to? Surely the author cannot make this presumption without specifying what type of information is being alluded to.**

The impending status of the Roundhouse was not secret, it was on the public record ( I. Pickles report where the earlier council resolved to obtain a valuation) - so what information is the author referring to.

If I am accused of not doing anything about the impending zoning, then all councillors are equally accused as the information was within public council minutes. Cr Boniface have given evidence that he knew of this situation.

---

*"it is my opinion that he was in a position to be able to influence the direction of decision making in relation to the matter"*

**I strongly take issue with this speculative opinion of the author which I contend is wrong.**

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If this 'decision making' refers to the period when I was an employee, I was not involved in the decision making and indeed had no corporate responsibility in this regard.

If it refers to the period when I was a councillor, council did not debate or make any decisions on this matter.

**I most strongly challenge this opinion which is not based on any facts, substantiation or logic.**

---

*" but he also subsequent misled another councillor about the true nature of the Council's obligation "*

**I very strongly take issue and challenge this presumption and unfounded allegation based on verbal unsubstantiated evidence. This is an outrageous assumption based on one person's verbal, unsubstantiated and unchallenged evidence. It is illustrative of this report that the allegation has not been raised with me and I was not provided with an opportunity to answer or provide explanation.**

I object in terms of lack of natural justice that this allegation was not raised with me at my interview with the author.

This allegation of Cr Simmons does not appear to be challenged, even in a basic way, nor does it appear the author has attempted to clarify the evidence by asking such basic questions as:

- when and where did this so called event take place
- what was the context of the discussion.
- what else was said
- what was the whole discussion
- was the witness present for the whole conversation or did he take some conversation out of context.

I challenge the author to be able to allege wrongdoing on my part, especially using the term 'mislead', based on one person's recollection of an uncertain event so long ago. In any case how could I be accused of misleading a fellow councillor based on an alleged casual conversation. This is another example of the author not understanding the role of an elected member. The author suggests, if this conversation did take place, that there was some sense of a duty for me to provide advice to be relied upon and knowing that someone is going to rely upon the advice that I deliberately provided incorrect advice. No such duty exists between elected councillors especially in the context of a casual conversation.

**I have absolutely no recollection of the alleged conversation ever taking place.**



Rob Doolan

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I strongly challenge the evidence of Cr Simmons. I can provide ample written evidence to show he did not 'take my advice' on many occasions. It seems a strange coincidence and very convenient to say what he is stated as saying.

It seems a strange way to seek advice on a matter of personal concern to avoid looking at the files, consulting council officers, lodging a Notice of Motion but simply rely on an alleged casual conversation.

---


I reserve the right to comment on other parts of the report. I have simply responded to some sections in this submission to amply demonstrate that neutral findings should be made regarding myself. All references to myself, other than a statement that at separate times I was an employee and a councillor, should be removed from the report.

**The author is clearly seeking to contribute motives to me and implying some impropriety. This is highly speculative and improper.**

No doubt it is intended the final report will be made available to the public. If you persist with these unsubstantiated and speculative conclusions, it could be very injurious to my good name and standing in this community, both personally and professionally.

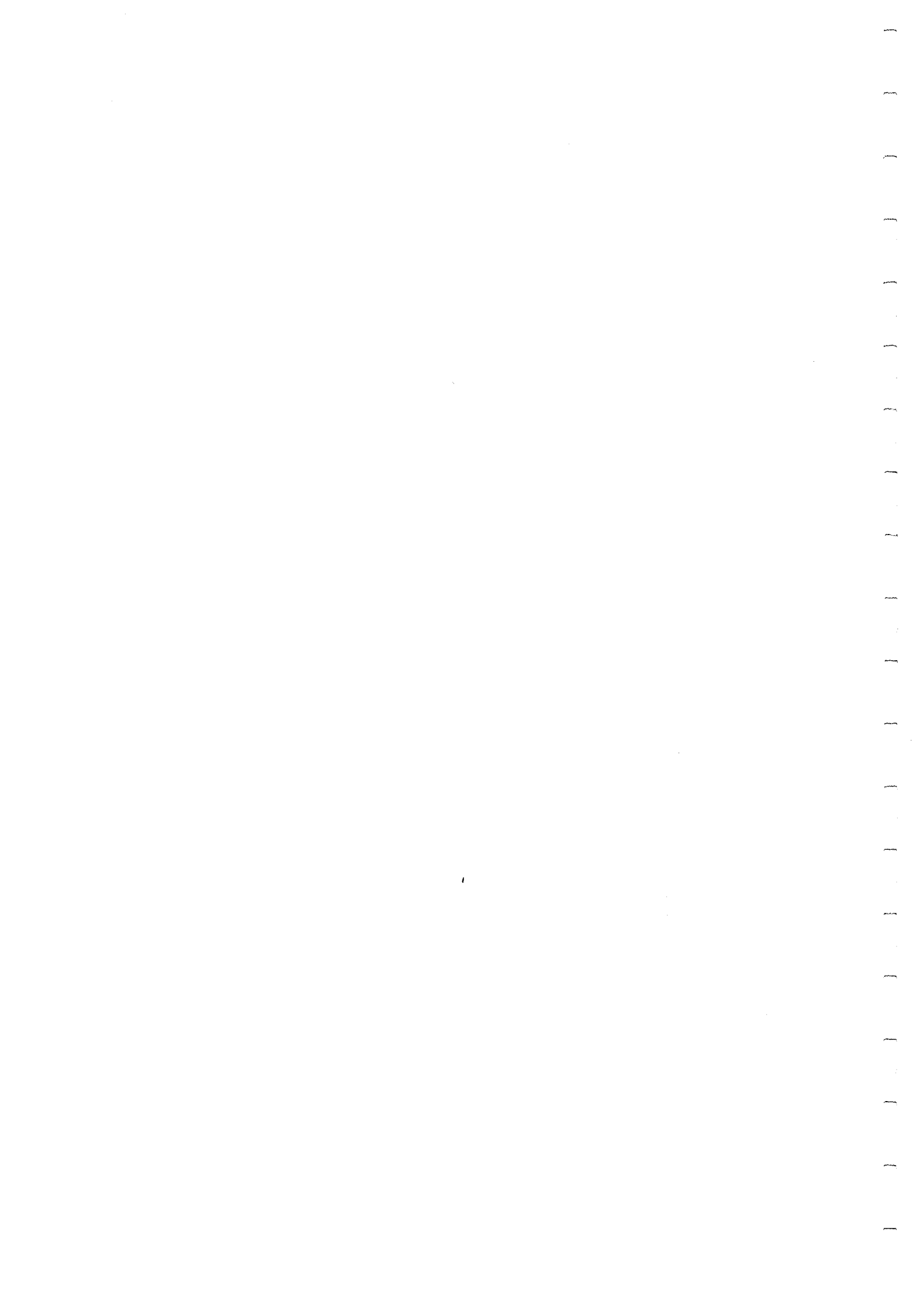
Please advise if you require clarification of any matter.

Yours sincerely



Rob Doolan

10 September 1993



**APPENDIX 3**

**CORRESPONDENCE REGARDING SUMMONS OF WITNESS**

**(MR OLIVER DUNNE)**

(Ref. para 4.6.12)

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REFERENCE No:

YOUR REFERENCE:

Further Contact: Mr. B. Pullinger

## BYRON SHIRE COUNCIL



P.O. BOX 159, BYRON BAY,  
N.S.W. 2481  
TELEPHONE No. 85 6500 (066)  
DX 27704 BALLINA  
FAX.: 85 8154

ALL COMMUNICATIONS TO BE  
ADDRESSED TO THE SHIRE CLERK

Mr. Allan Hartigan & Ms. Mary Brophy,  
Local Government Inspectors,  
Dept. of Local Government,  
& Co-operatives,  
Locked Bag 1500,  
BANKSTOWN N.S.W. 2200.

27 FEB 1992

FAX: (02) 793 0799

Dear Mr. Hartigan and Ms. Brophy,

BYRON SHIRE COUNCIL - ROUNDHOUSE

I refer to recent discussions relating to your request for disclosure of Council's confidential legal advice.

As you may be aware, the former owners of the Roundhouse have now formally rejected the Council's valuation of the property and have commenced proceedings in the Land and Environment Court of New South Wales. A copy of the claimants' Class 3 Application is enclosed for your information.

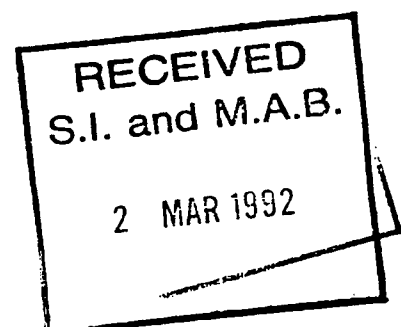
You have asked me to make available for your inspection copies of correspondence between the Council and its solicitors concerning the Roundhouse. I have referred that request to the Council's solicitors who advise that legal professional privilege attaches to the correspondence and the council is therefore not bound to provide access to the correspondence.

As discussed, the Shire President and myself are concerned that disclosure of the correspondence would amount to a waiver of the Council's privilege which would then permit the applicants in the pending Class 3 proceedings to also obtain access to the correspondence. Clearly, this has the potential to result in prejudice to the Council in its conduct of the litigation.

I believe the information contained in the non-privileged material which the Council has already made available and will make available, will enable you to see how the Council has conducted itself and the reasons for its action. I invite you to consider that material fully before pressing your request for the privileged material. If you then wish to pursue the matter please let me know and the Council will consider your request further.

Yours faithfully,

  
BARRY F. PULLINGER,  
GENERAL MANAGER.



O'MOORE HERTZBERG  
SOLICITORS & ATTORNEYS

JOHN HERTZBERG  
WROTH WALL

35 FLETCHER STREET, BYRON BAY, 2481.  
DX 27751 BALLINA

TELEPHONE: (066) 85 6188  
85 8457  
FAX: (066) 85 7825

CONSULTANT

AND AT BANGALOW

RORY O'MOORE  
JMH:EG

April 30, 1992

Mr. G. Payne,  
Director General,  
Department of Local  
Government & Co-Operatives,  
Locked Bag 1500,  
BANKSTOWN. 2000.

FAX (02) 7930599

Dear Sir,

RE: MR. OLIVER DUNNE

We act for the abovenamed who, as you are aware, was formerly President of Byron Shire Council.

We are instructed that our client was contacted by a Mr. Hartigan, an Inspector of your Department, on several occasions during the past eight weeks with regards to an investigation being conducted by your Department of, we understand, certain allegations arising from the decision of Byron Shire Council to resume what is known as the "Roundhouse" building at Ocean Shores.

Several matters of concern have arisen from the manner of contact by Mr. Hartigan and we have been instructed to write to you to formally put those concerns and also to seek clarification of certain matters.

We are instructed that Mr. Hartigan contacted our client twice by telephone and a personal interview was conducted on Thursday, 5th March, 1992 at which a Miss Brophy of your Department was also present. We are further instructed that Mr. Hartigan has requested a further interview and has indicated his requirement that our client be required to answer questions under oath.

We are also instructed that our client declined to give evidence under oath at the first meeting on the grounds that he had not been advised by Mr. Hartigan of the need for such procedure before the meeting, nor of the precise scope of the investigation and further that he had not had an opportunity to peruse Council files for a period of over two years (but which were constantly available to officers and other parties, whose veracity on issues he was supposed to confirm or deny).

.../2.

-2-

We are instructed that Mr. Hartigan immediately threatened to issue a Summons against our client if he failed to comply and made reference to severe penalties for further non-compliance. Mr. Hartigan also indicated that there would be unfavourable mention of our client in the Inspection Report. It was agreed by Miss Brophy that it would not be available to the Inspectors to make unfavourable mention of an interviewee who simply refused to take the oath on the grounds of lack of sufficient notice of such procedure.

Our client is concerned by what he perceives as overbearing behaviour by Mr. Hartigan, threatening behaviour and intimidation.

Our client has not been informed, despite repeated requests, of the precise nature or reasons for the request for investigation and interview by Mr. Hartigan.

Accordingly, we should be pleased if you would:

1. Clarify the background and the terms of reference of the inspection of Byron Shire Council currently being conducted by your Department, particularly as it relates to our client.
2. Clarify the precise nature and substance of allegations made against our client (if any).
3. Advise which Sections of the Local Government Act, its Regulations and/or its Ordinances and similarly those of the Environmental Planning and Assessment Act it is alleged have been breached (if any) and how it is alleged (if at all) that it concerns our client or his involvement by your Inspectors in the investigation.
4. Advise on what basis, including whether it is your view that Section 212 of the Local Government Act is available to an Inspector to make demands and intimidations, where the investigation was advised by Mr. Hartigan as simply "a management overview or inspection".

Our client is concerned by the statement that your Mr. Hartigan would make an unfavourable mention in the Inspection Report simply on the basis of our client requesting clarification of these and other matters and the lack of sufficient notice of investigation, etc.

We and our client, are concerned that the behaviour and intimidation may constitute an attempt to deny natural justice to our client in the absence of any specific terms of reference, advice of reasons for questions and/or specific allegations, particulars of which we have requested above.

We are instructed in the latest telephone conversation between our client and Mr. Hartigan, our client was again subject to intimidation and overbearing behaviour, which our client finds quite unacceptable.

.../3.

Again, despite our client's request, there were no matters put to our client by Mr. Hartigan concerning any alleged involvement by our client in any matters being investigated by Mr. Hartigan, nor any clarification of the nature of investigation which we refer to above.

Our client initially agreed to meet and talk with Mr. Hartigan and Miss Brophy on 5th March, 1992 on the clear basis that he was advised that there were no allegations involving either himself, or other officers or former officers of Council of either malfeasance or corruption. Our client sought this assurance as, in his opinion, if such allegations were or are made, more properly matters should be referred for consideration by the Independent Commission Against Corruption.

When these matters were put to Mr. Hartigan on 5th March, 1992, we are instructed that Mr. Hartigan advised our client that there were no apparent breaches of the Act, nor any allegation of corruption involved. Our client was also assured that the inspection was not in any way politically motivated.

On these assurances, our client gave extensive evidence to Mr. Hartigan, which was taped and, we presume, transcribed by your officers. We require a copy of the transcript of the tape.

Our client was an elected official of Byron Shire Council in the period September 1987 to December 1989. He was not General Manager of the Council, nor manager of planning functions. The delegations of powers within Council were approved and put in place in 1986 by Mr. Rawson, a former officer of your Department, which effectively placed our client as manager of the political process and nothing more.

Planning functions of Byron Shire Council were effectively controlled by your Department and the Department of Planning until March 1988, when the rezoning of the so-called "Roundhouse" was effected.

Our client is now a private citizen. Mr. Dunne is in private practice in Byron Shire and enjoys cordial, if distant, relations with his former colleagues on Council and with Council staff. He is no longer involved in any way in political life. He believes it is not his duty as a private citizen to give comment on either the ineptitude or the misfeasance of any officers of Council, or of your Department either during his term of office or afterwards. He has no desire to take any further part in the political process of the Shire irrespective of any attempt by complainants, or by present or former officers to involve him for whatever motive on their part.

If there are substantive allegations of illegality, corruption or malfeasance, then our client would indeed be happy to provide answers and to place his evidence on oath and to contest any such allegations vigorously.



We are instructed that our client holds grave concerns at his being intimidated and coerced under a purported power contained in Section 212 of the Local Government Act. We do not believe it is open to Mr. Hartigan to use his powers under the Act in the manner he has sought to do, where, as he has stated himself, no breach of the Act or corrupt activity exists. The requirements for natural justice and procedural fairness would indicate that it is untenable for him to seek to use these powers against a private citizen merely to gain evidence in a "management review" and to do so by threats of Summons and financial penalties for non-compliance.

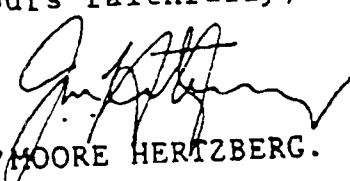
Again, threatening a form of "privileged defamation" by unfavourable mention in a report issued pursuant to Section 212 through a refusal by a private citizen, resolving quite properly not to give opinions about the management performance of present or former senior staff of Byron Shire Council, may create serious concerns about predetermined conclusions having been reached.

Neither do we believe it appropriate in this instance for officers of your Department to carry out an investigation into the performance of Byron Shire Council. Both your Department and the Department of Planning were substantively involved in the management and administration of Byron Shire Council during the period in question and of the rezoning process for Byron Shire and for Ocean Shores in particular.

Instead, if there is a substantive allegation of misconduct, illegality, malfeasance or corruption, we would require that all parties face a full and open, independently-chaired, public enquiry, properly conducted under the rules of evidence by either a judge or senior counsel experienced in Local Government and Planning Law. Or in the alternative, the matter be referred to Commissioner Temby of the ICAC for determination. If no such allegations exist, we see no reason or justification for our client's further involvement in this matter.

We should be pleased to receive your reply in writing to the above, including the precise particulars as requested and together with a copy of the transcript of the tape of interview conducted on 5th March, 1992.

Yours faithfully,



O'MOORE HERTZBERG.

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# LOCAL GOVERNMENT INSPECTORS

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Mr J Hertzberg  
O'Moore Hertzberg  
Solicitors and Attorneys  
36 Fletcher Street  
BYRON BAY NSW 2481

Department of Local Government  
Bankstown Civic Tower  
Floor 9  
66-72 Rickard Road, Bankstown  
Locked Bag 1500, Bankstown N.S.W. 2200  
Fax: (02) 793 0799  
Telephone: (02) 793 0793

Our reference:

Your reference:

19 MAY 1992

Dear Mr Hertzberg,

We refer to your recent correspondence to the Director-General of the Department of Local Government and Co-operatives on behalf of Mr Oliver Dunne, former Shire President of Byron Shire Council, regarding our conduct in seeking to have your client reinterviewed on the basis that he submit to the oath.

As Mr Hartigan explained to you in his brief telephone discussion with you recently, our decision to put Mr Dunne to the oath is a matter for judgment by us, and as independent statutory officers, the Director-General is not, and cannot be involved in that decision. Our understanding is that the Director General has written to you in confirmation of this advice.

To respond to your individual concerns, we should explain that the current inspection of Byron Shire Council is not being conducted by the Department of Local Government. Inspections (or investigations) under Section 212 of the Act are carried out by us as Local Government Inspectors. As you know, our powers are set out in detail in Sections 213A, 213B and 214 of the Act.

We have no doubt that you have explained these provisions to your client. We can understand that any person not aware of the powers of a Local Government Inspector may have some difficulty in accepting how wide ranging they are and could find their attempted application somewhat intimidating.

We wish to place on the record that we accepted your client's reluctance to take the oath on the basis that he had not sufficient notice to apprise himself of all matters that could be the subject of our discussions. In this regard, we indicated to your client that it would not be unreasonable that the status of the evidence he did give, and the circumstances in which it was given, be noted in our report.



However, we also foreshadowed to your client the possibility of our returning to him to place his evidence on a more formal footing if subsequently the totality of the evidence given by other witnesses warranted that action being taken.

After hearing conflicting evidence from other witnesses, our present view is that, in fairness as much to your client as to the investigation itself, Mr Dunne's evidence should be placed on the same level of worth as the evidence given on oath or affirmation by those other witnesses.

We have taken particularly seriously your client's view that the actions taken by us could be regarded as an attempt to deny him natural justice. We state that a request to give us evidence under oath was made of all key witnesses interviewed to date in relation to the Roundhouse, immediately prior to their interviews, and all, except your client, have agreed to give evidence on oath or affirmation when so requested. Witnesses include several persons who no longer have any involvement with the Council. It is possible that we may have to summons another witness who initially gave his evidence freely but has now refused to cooperate further with us.

As to the matters the subject of investigation, the approved Terms of Reference are:

- "1. To investigate:
  - i) *the way in which Council carries out its planning functions, particularly in relation to development control, long-term/strategic planning and infrastructure provision; and*
  - ii) *Council's conduct in relation to the Roundhouse site.*
2. *To review Council's implementation of the recommendations of the management overview undertaken in 1990."*

The process of an inspection is not adversarial; its purpose is to establish the facts and reveal the truth. It is important therefore that Terms of Reference be framed in such a way that they do not constrain the scope of the investigation to those aspects of the matters under investigation on which information is already available.

The primary focus of the inspection is the efficiency and effectiveness of the planning processes within Byron Shire Council, and the Council's dealings with respect to the Roundhouse form only part of the inspection. Because of the seriousness and complexity of matters involved in that latter issue, we have decided, pursuant to our powers under the Local Government Act, that evidence given by key witnesses should be given under oath.

The competent conduct of any such investigation necessitates interviewing any persons and obtaining any documents which we have reason to believe may contribute to a proper understanding of the issues and ultimately the determination of the truth.


At this present time, there is no indication that any of the matters under investigation involve corrupt conduct. Obviously if, during the investigation, we obtained evidence of the possibility of corrupt conduct, the relevant matters would be referred to the Independent Commission Against Corruption, in accordance with the provisions of Section 11 of the Independent Commission Against Corruption Act.

We enclose a copy of the taped interview with Mr Dunne. It is not our practice to have interviews transcribed and we have not departed from that practice in this case. Also attached for your information is a copy of a summons for Mr Dunne to attend an interview with us on Wednesday June 3 at 4pm at the Council Chambers in Byron Bay. We have taken every endeavour to ascertain from you whether this time would be convenient to your client, but in view of your failure to return three of our calls to your office, we have no alternative but to proceed with the service of process in the absence of this information.

The summons, which will be separately served upon Mr Dunne by Byron Bay police, particularises the conduct which will be covered in the interview. We would not expect that matters traversed there would depart significantly from the issues raised earlier with Mr Dunne. We have no objection to a legal adviser or counsel being present at the interview, if that is your client's wish.

We regret that this course of action has become necessary, particularly in view of the fact that we are merely seeking to understand the truth in what has become a particularly distasteful inspection. If our conduct in this endeavour is to be perceived as overbearing by your client, that is a further matter for regret. However we believe we are acting in the certitude that nothing done or proposed to be done by us in this inspection lies outside the powers vested in us by the Local Government Act, and that all reasonable steps to accord procedural fairness to your client have been taken.

Yours faithfully,

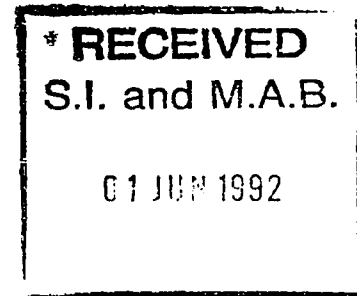
  
ALLAN HARTIGAN MARY BROPHY  
Local Government Inspectors

PO Box 556,  
Byron Bay,  
NSW 2481  
Tel: (066) 857 162  
Fax: (066) 856 484  
MP: 018 666 442

28 May 1992

The Local Government Inspectors,  
Department of Local Government and Cooperatives,  
Locked Bag 1500,  
BANKSTOWN  
NSW 2200

Attention: Mr. A. Hartigan



Dear Sir

I understand from my solicitors, O'Moore Hertzberg of Byron Bay, that you have been in communication with them and have informed them that you have issued a summons against my name for me to appear before you in Byron Bay on June 3.

I am presently resident and working in Port Douglas, North Queensland until late July or early August and will not be returning to New South Wales until that time so I am not in a position to answer your summons.

I view your action in issuing a summons against me in the manner you have done as a clear attempt by you to defame and vilify my good name within the local community of Byron Bay. It is a disgraceful act and one which I believe can only bring discredit to the office of the Inspectorate with which I have had harmonious dealings for almost a decade.

Your failure to identify any breaches of any legislation, misfeasance or malfeasance, your failure to identify any mala fides on my part or of any official after four months of alleged 'investigation' can only bring into question the real purpose and intent of this exercise.

I am also aware now of the significance of your recent attempt to prise privileged documents from Byron Shire Council (and of Council's rightful denial of same to you) and which you mentioned to me at our meeting on March 8. Combined with your current actions against me, it leads me, and I have no doubt it would any objective observer of your procedure in this matter, that this inquiry has no foundation other than a political exercise to serve the interests of parties other than ratepayers of Byron Shire and certainly not those of the taxpayers of New South Wales.

I have dealt with local government inspectors since 1983 and I am well aware of the nature and background of the office and its powers. The attempt by you to interpret your powers as wide you have sought to do, so as to invest yourself as a form of "Roving Royal Commission" with all the powers attendant to a royal commissioner are simply laughable and are not, in my view, sustainable at law.

In my opinion, your powers to summons in the manner you have done operate only where the circumstances are such that they would give cause to an objective Inspector to believe that there was an existing breach or intended breach of the Act, or if there was unlawful activity or mala fides directed towards a complainant which necessitated the Inspector to act in the manner permitted under the Act.

.../2

You cannot do as you have sought to do here, which is to use the powers of your office to set up a de facto corruption inquiry masquerading as a "management inspection" or 'inspection' into a self interested complainant's complaint, particularly one who is currently seeking before the courts to gain an advantage in a commercial struggle with council and where the council's decisions have been lawfully and validly made. You then seek to use the powers vested in your office to compel people to give evidence or to defame any person by publicly summons issued from a local police station and then by unfavourable mention in a privileged report for daring to question your legal right to do so.

You know that it is unacceptable behaviour, Mr. Hartigan and you know the courts will not support you in it as they would not have supported you in your attempt to gain the privileged documents from Council. But according to your modus operandi, you seek to bully individuals into overlooking their rights to decline or to take other counsel as you sought to do at my house on 8 March. Natural justice and procedural fairness are the mandatory requirements in all the Inspector's procedures and it should not need to be pointed out to a local government inspector by an interviewee as occurred in my case with you. Lack of legal knowledge of their rights in your other interviewees does not forgive your behaviour in so intimidating them to overlook their own protection.

You have an obligation at law to state specifically the purpose of this inquiry to me. You have not done so. Generalities are not sufficient. Furthermore you have an obligation at law to state specifically what allegations of corrupt or unlawful activity which have been levelled at me by one or a number of complainants which merit my involvement further than my original interview. You have not done so.

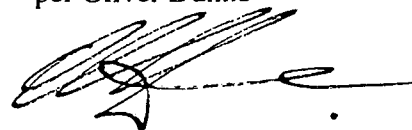
There was nothing invalid or unlawful about Council's decision to rezone and hence to resume this land and buildings. One followed logically upon the other. All were lawful and validly-made decisions of the elected Council and the appointed Planning Administrator. In this instance, Council acquires for value what it would have received for free if in excess of 5000 lots had been developed at Ocean Shores. Such development will not now occur as a result of Councils own zoning decisions but Council has still met its commitment to the ratepayers of Ocean Shores to provide community land and facilities even if the developer has not. Where is the loss to the community of Byron Shire ?

Nothing in your summons read to me in any way spells out in any detail why I should be further involved. Your time-wasting fishing expeditions can be enjoyed with your fellow bureaucrats whilst you waste our tax payers moneys in this deep recession. It is quite outrageous to see taxes squandered in this manner by highly paid bureaucrats whilst the government cries poor for so many needy projects. If the matters are sufficiently quote "serious" to warrant the taking of evidence under oath, then it must involve an allegation of mala fides, malfeasance or breach of the Act, any of which in my view constitutes prima facie evidence of corrupt activity under the ICAC legislation. As such you are duty bound (as I informed you on 8 March ) to refer these matters to Mr. Temby of the ICAC for investigation which I strongly suggest you do.

My suspicion is that such allegations have already been tested with the ICAC by the complainants and found wanting. Your office now remains their last hope to win by politics what they could not win at law, namely, their outrageous compensation claims involving millions of dollars. I have worked too many hours in Byron Shire over the past decade and have received too much trust from the ratepayers of the Shire in that period to in anyway assist in such connivance.

I am a private citizen and I will enjoy my right to privacy. I am not involved in politics in any shape or form and I will resist all of your attempts and of those behind you to re-involve me in political life. You have had your interview. Mr. McLelland's has had his; Mr. O'Donnell has had his. That's it. The game is over now and you can all bugger off and leave those of us in the productive community to get on with our lives.

per Oliver Dunne



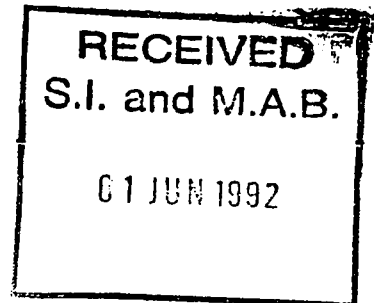
# Christine Vadasz Architects Pty. Ltd.

A.C.N. 003 101 791

PO Box 556,  
Byron Bay,  
NSW 2481  
Tel: (066) 857 162  
Fax: (066) 856 484  
MP: 018 666 442

24 May 1992

Department of Local Government and Cooperatives,  
Locked Bag 1500,  
BANKSTOWN  
NSW 2200



Attention: Miss Mary Brophy

Dear Miss Brophy

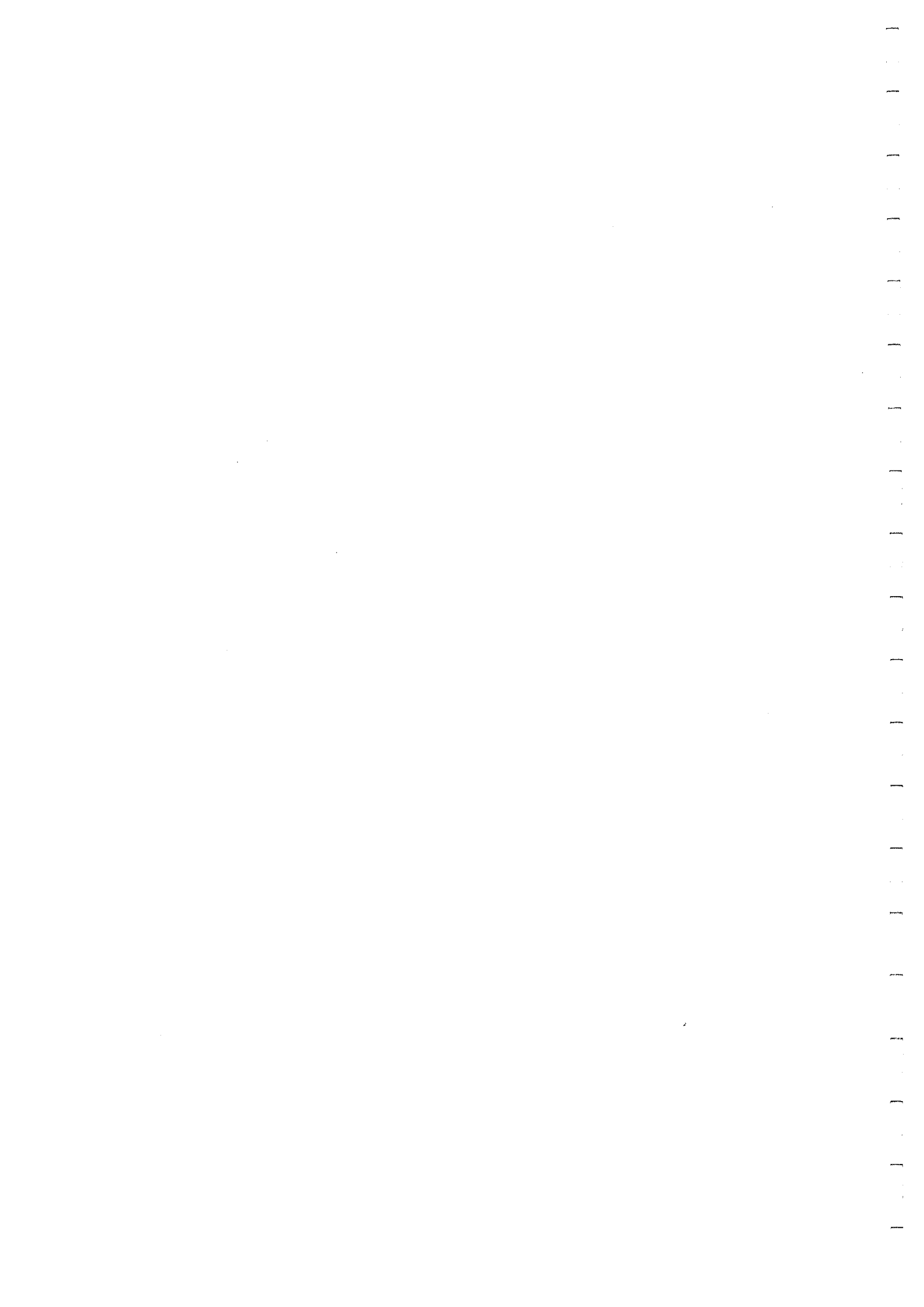
I note with interest your message left on my answering machine last Wednesday. At no time have I been uncontactable. I have returned all calls where messages were left on the tape for myself or my partner, as has been our procedure throughout this recession. This is your first message. Other callers have availed themselves of the mobile phone number which is clearly stated on the tape message.

I resent any implication in your message that I have sought to evade you or your colleague Mr. Hartigan. You are both well aware that I am currently working on a project interstate and I have made myself available to you once already when in Byron Bay. I have yet to receive any communication back from my solicitors indicating a reply from your Director to their letter querying your manner of conducting this inspection or the particular grounds for my involvement.

Yet you now indicate on the message that you are issuing a summons against me. It would appear that if any citizen dares to query the manner in which you and Mr. Hartigan exercise your powers under the Act, this is grounds for you to resort to the powers vested in your office to deal with that person and as a result to defame my name and my good character within the local community of Byron Shire. In my opinion, such behaviour and attitudes are alarming and reprehensible in any public servant and particularly in one vested with special powers under legislation.



per Oliver Dunne.

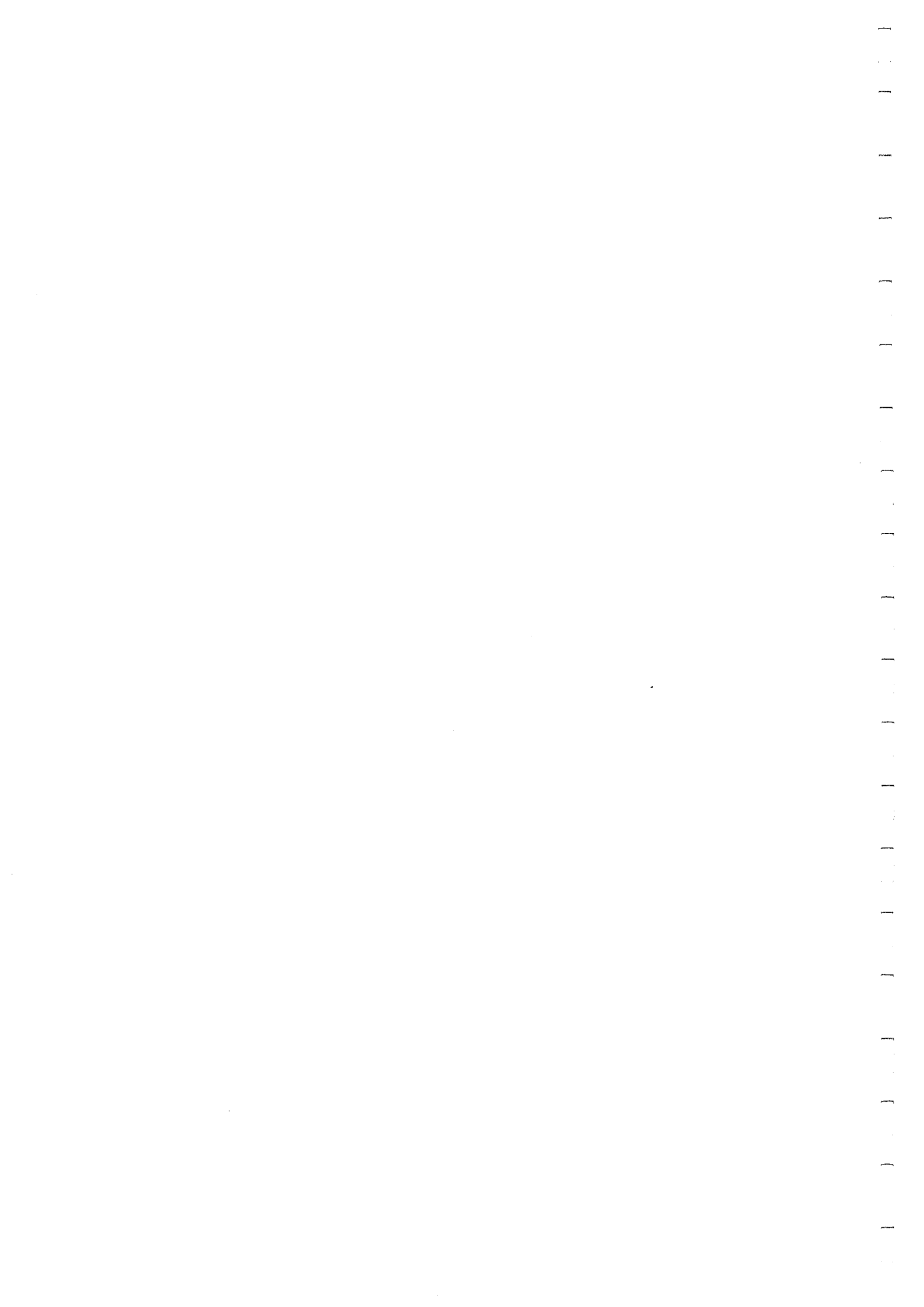




**APPENDIX 4**

**CORRESPONDENCE REGARDING CLAIMS OF  
LEGAL PROFESSIONAL PRIVILEGE BY COUNCIL**

(Ref. para 4.6.19)



REFERENCE No:

YOUR REFERENCE

Further Contact: Mr. B. Pullinger

## BYRON SHIRE COUNCIL



P.O. BOX 159, BYRON BAY,  
N.S.W. 2481  
TELEPHONE No. 85 6500 (066)  
DX 27704 BALLINA  
FAX.: 85 8154

ALL COMMUNICATIONS TO BE  
ADDRESSED TO THE SHIRE CLERK

Mr. Allan Hartigan & Ms. Mary Brophy,  
Local Government Inspectors,  
Dept. of Local Government,  
& Co-operatives,  
Locked Bag 1500,  
BANKSTOWN N.S.W. 2200.

27 FEB 1992

FAX: (02) 793 0799

Dear Mr. Hartigan and Ms. Brophy,

BYRON SHIRE COUNCIL - ROUNDHOUSE

I refer to recent discussions relating to your request for disclosure of Council's confidential legal advice.

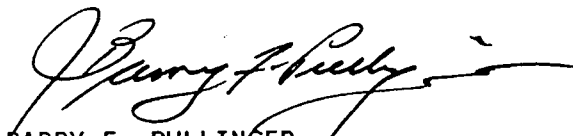
As you may be aware, the former owners of the Roundhouse have now formally rejected the Council's valuation of the property and have commenced proceedings in the Land and Environment Court of New South Wales. A copy of the claimants' Class 3 Application is enclosed for your information.

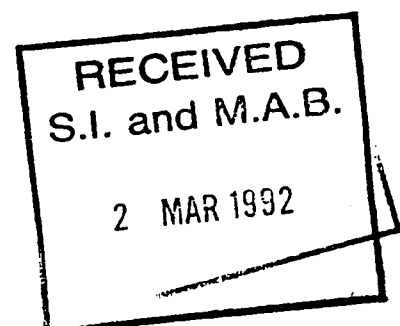
You have asked me to make available for your inspection copies of correspondence between the Council and its solicitors concerning the Roundhouse. I have referred that request to the Council's solicitors who advise that legal professional privilege attaches to the correspondence and the council is therefore not bound to provide access to the correspondence.

As discussed, the Shire President and myself are concerned that disclosure of the correspondence would amount to a waiver of the Council's privilege which would then permit the applicants in the pending Class 3 proceedings to also obtain access to the correspondence. Clearly, this has the potential to result in prejudice to the Council in its conduct of the litigation.

I believe the information contained in the non-privileged material which the Council has already made available and will make available, will enable you to see how the Council has conducted itself and the reasons for its action. I invite you to consider that material fully before pressing your request for the privileged material. If you then wish to pursue the matter please let me know and the Council will consider your request further.

Yours faithfully,

  
BARRY F. PULLINGER,  
GENERAL MANAGER.



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# LOCAL GOVERNMENT INSPECTORS

---

---

Councillor Ian Kingston  
Shire President  
Byron Shire Council  
PO Box 159  
BYRON BAY NSW 2481

Department of Local Government  
and Co-operatives  
Bankstown Civic Tower  
Floor 9  
66-72 Rickard Road, Bankstown  
Locked Bag 1500, Bankstown N.S.W. 2200  
Fax: (02) 793 0799  
Telephone: (02) 793 0793

Our reference:

Your reference:

Dear Councillor Kingston,

We refer to the General Manager's letter of 25 March, 1992 advising us that Council now wishes to claim legal professional privilege in relation to the documents and information on the Council's dealings over the Roundhouse held by Mr W O'Rourke and his firm of Solicitors, Sly and Weigall.

We are concerned that the Council now appears to have placed further limitations on the range of material it is prepared to make available to us. Your statement to Mr Hartigan that you were unaware of the existence of the General Manager's letter to us on this topic adds to that concern.

Mr Pullinger had earlier indicated to us that in declining to waive its claim to legal professional privilege, Council intended that its claim of privilege was to be restricted to material which may be prejudicial to the Council in the impending compensation proceedings. In line with this indication, and in response to our expression of concern over our ability to at least inspect the Sly and Weigall documents, Mr Pullinger excluded from this claim the material brought into existence as a result of Council's dealings with Sly and Weigall, since this material was dealt with in the Land and Environment Court proceedings which were concluded in July 1990. In fact, prior to making an appointment to see Mr O'Rourke, Mr Hartigan telephoned Mr Pullinger seeking confirmation of his earlier undertaking, and received such confirmation at that time.

If the General Manager's letter is prompted by a concern that the Council is facing the prospect of defending defamation proceedings, and that publication of material on the Sly and Weigall files may be prejudicial to Council's interests in those proceedings, we state categorically that we are not interested in obtaining further information from either Sly and Weigall or Mallesons on this issue.



If on the other hand, the letter is prompted by a concern that material on the files is prejudicial to the compensation proceedings currently before the Land and Environment Court, we are of the view that Council has already effectively waived legal professional privilege (at least in its relations with ourselves) concerning the Sly and Weigall material. All files on the Roundhouse were requested by Ms Brophy when conducting preliminary inquiries between September 1 and 6, 1991. The Council purported to satisfy this request and copies of documents considered relevant to her inquiries were taken at that time. The services of Sly and Weigall were terminated at a prior date to Ms Brophy's visit and so those files must be regarded as being comprehensive. Material covered by legal professional privilege was also made available to Mr McClellan QC, who prepared an opinion on the matter. The Council has described his opinion as an "independent" report, which was subsequently made available for inspection at the Council, to the public at large. We believe therefore that most, if not all of the Sly and Weigall documents bearing on the Roundhouse are already in the public domain. If documents have been made available to the public, Council can hardly maintain the claim of legal professional privilege with respect to them.

The effect of the General Manager's decision on behalf of the Council is that we are deprived of the evidence of Mr W O'Rourke. We believe this evidence to be crucial in determining conflicting material in the investigation, and we can see no valid reason why we should be denied this evidence at such a crucial point in the investigation. We cannot see how any evidence obtained from Mr O'Rourke could be prejudicial to the impending compensation proceedings. On the other hand, his evidence on the issues before us in our investigation may well prove determinative.

Turning now to the issues of general concern to us, you will recall that our initial response to you at the time we first learned of the Council's decision was that an issue of legal professional privilege does not arise in circumstances where Inspectors are exercising the powers conferred on them by S212 of the Local Government Act. This belief was founded on the proposition that when doing so, we effectively stand "in the shoes of the Council".

As you will be aware, we instructed the Crown Solicitor to advise on the legal standing of Inspectors so far as concerns a claim of legal professional privilege, and on other issues arising. Preliminary oral advice from the Crown Solicitor is that the most recent authority on the issue of legal professional privilege, the High Court's judgment in Corporate Affairs Commission v. Yuill, 172 CLR 319 contains statements which apparently provide support to either side of the argument. Ultimately, the case itself, being distinguishable from the present situation, offers no conclusive support for either side.

From this analysis, two points emerge. The first is that the law is unsettled on the issue of a council's legal professional privilege as it relates to a Local Government Inspector. The second is that definitive resolution of this issue can only occur at the highest level of litigation. To pursue that course would incur enormous expense for each party, and the preferred approach would be to accommodate the concerns that give rise to the Council's position on the matter. We should add here that in recent investigations involving circumstances where Councils concerned were involved in current litigation over issues arising during an investigation, legal professional privilege was not claimed in respect of those documents. The Council's present position is therefore in our experience, without precedent.

We understand from recent discussions with you that the sole concern of Council in this matter is that, in granting the inspection team what amounts to a waiver of legal professional privilege in relation to documents in the possession of Sly and Weigall and its current legal advisers, Mallesons Stephen Jaques, such waiver could be argued to apply for all purposes and for all parties. Hence Council could be exposed to a risk that opponents in prospective litigation with it could obtain access to material not otherwise available to them.

We wish to assure you and your fellow councillors that we are equally concerned to preserve the rights of the Council. In this regard, the Crown Solicitor has expressed the view (upon which, however, Council should take its own legal advice) that it should be possible for Council to protect its interest by allowing us to access limited to the purposes of our investigation.

He advises that the cases distinguish between waiver for all purposes and waiver for limited purposes. In that regard, he refers to Thomason v. Campbelltown Municipal Council 39 SR(NSW) 347 and Re Stanhill Consolidated Limited [1967] VR 749. He is further of the opinion, based on statements in Baker v. Campbell (1983) 153 CLR 1 and Attorney General for the Northern Territory v. Maurice (1986) 161 CLR 475, that Council would have excellent prospects of resisting wider disclosure of the material if it set out the basis upon which it was allowing limited access in a short letter; any remaining uncertainties between Council and ourselves as to the scope of access would, to our mutual benefit, thereby readily be identified and, we would trust, be speedily resolved.

The Crown Solicitor is of the view that the Court would probably be ready to impede the discovery of the documents in question in litigation, and to prevent their admission into evidence, if they had been the subject of correspondence clearly setting out the restricted purpose for which they had been made available to us.

We are in addition, prepared to inspect the documents subject to the waiver in the offices of the Solicitors concerned, and only to take notes (as opposed to photocopies) of material in the documents. Furthermore the draft report will be provided to Council in confidence and we will of course seriously consider all submissions on the findings of the draft before finalising the report which will ultimately be required to be published. In particular, we will consider most closely any arguments which claim that specific (privileged) material in our draft report might disclose information to litigants to which they do not have access.

The Crown Solicitor's Office has settled the terms of this letter and supports the propositions of law contained within it.

We are considering the issue of an interim report on Council's refusal to give us access to information necessary for the purposes of our inspection.

Our understanding is that the Council's claim to privilege over the Mallesons and Sly and Weigall documents was decided by executive judgment and has never been the subject of a resolution by the full Council. We believe an issue such as this should be so resolved by the full Council. This would put beyond doubt the Council's intentions in the matter.

Accordingly, we suggest that this letter be forwarded to the full Council for its consideration by way of a Presidential Minute at the earliest practicable opportunity. Such consideration might be made on a confidential basis within the Committee of the Whole. We await your response before giving our final consideration to the need for an interim report and will allow two weeks from the date of this letter for that purpose.

Yours faithfully,

*A. Hartigan Mary Brophy*

Allan Hartigan Mary Brophy  
Local Government Inspectors  
7 April 1992

REFERENCE No:

IBK/JEK/4022 x 52128 x 52121 x 36 x 5329.G x 718100

YOUR REFERENCE:

Further contact: Cr. I.B. Kingston

**BYRON SHIRE COUNCIL**

P.O. BOX 159, BYRON BAY,  
N.S.W. 2481  
TELEPHONE No. 85 6500 (066)  
DX 27704 BALLINA  
FAX.: 85 8154

ALL COMMUNICATIONS TO BE  
ADDRESSED TO THE SHIRE CLERK

Mr. A. Hartigan & Ms. M. Brophy,  
Local Government Inspectors,  
Department of Local Government & Co-operatives,  
Locked Bag 1500,  
BANKSTOWN N.S.W. 2200

16 APR 1992

Dear Mr. Hartigan &amp; Ms. Brophy,

**PRODUCTION OF DOCUMENTS: ROUNDHOUSE**

Your letter dated 7th April, 1992 was submitted to Council at its meeting of 14th April, 1992 under my Presidential Minute No. 92/1.

The matter was considered by Council in Committee of the Whole and the Committee made the following recommendation:

"That based on Council's legal advice, Council not waive its privilege in respect of legal advice by providing access to the documents by the Local Government Inspectors and that the Inspectors be advised that Council will provide complete and unfettered access to the documents by the Inspectors following the determination of the matter in the courts."

Council in open Council resolved as follows:

"Resolved that the recommendation of the Committee of the Whole in relation to Presidential Minute No. 92/1, Section 212 Investigation, Roundhouse, be adopted.

Crs. Tucker and Higgins voted against the motion."

Council trusts you will appreciate the reasons for Council's determination in this matter.

Yours sincerely,

CR. I.B. KINGSTON,  
SHIRE PRESIDENT.

**FAXED**

**RECEIVED**  
**S.I. and M.A.B.**

23 APR 1992



REFERENCE No:

YOUR REFERENCE:

Further Contact: Cr. I.B. Kingston

**BYRON SHIRE COUNCIL**

P.O. BOX 159, BYRON BAY,  
N.S.W. 2481  
TELEPHONE No. 85 6500 (066)  
DX 27704 BALLINA  
FAX.: 85 8154

ALL COMMUNICATIONS TO BE  
ADDRESSED TO THE SHIRE CLERK

Mr. A. Hartigan,  
Inspector,  
Department of Local Government  
and Co-operatives,  
Locked Bag 1500,  
BANKSTOWN N.S.W. 2200

8 MAY 1992

Dear Sir,

**DEPARTMENTAL INVESTIGATION - ROUNDHOUSE**

I wish to confirm in writing an offer I put to you on 6th May, 1992, during part of your interview process in relation to the above investigation under section 212 of the Local Government Act.

As you have been previously informed by myself, Council resolved not to agree to your request to interview Mr. W. O'Rourke in the above matter, on the basis of clear advice from our current Solicitor, that such access could prejudice Council's interest in the forthcoming compensation matter in the Land and Environment Court.

Following your reiteration on 6th May, 1992, of the importance of clarifying certain issues with Mr. O'Rourke, I suggested a possible solution to the dilemma would be for you to submit a list of questions you wish answered to me. This list could then be considered and a determination made whether waiver of privilege could prejudice Council's position in the current litigation which is before the Land and Environment Court. If the Council came to the conclusion that there would be no prejudice to its current position (you will be aware that the claimants initially claimed \$6M. from this Council), questions could then be forwarded to Mr. O'Rourke for answering.

I share your concern that your report should be as complete as possible. The issue of the Roundhouse is one that has dogged this Council for a long time, and it will continue to impact negatively on the image of Council until it is finally put to rest with the imminent court case.

I trust my offer meets with your approval, and I again state that in any event, this Council will provide you with complete unfettered access to all documents as soon as the court proceedings are finalised.

Yours faithfully,

CR. IAN B. KINGSTON,  
SHIRE PRESIDENT.

Cr I B Kingston  
Shire President  
Byron Shire Council  
P O Box 159  
BYRON BAY NSW 2481

Dear Cr Kingston,

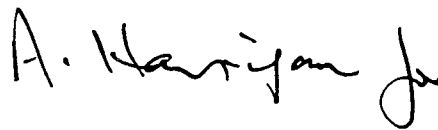
RE: ROUNDHOUSE INVESTIGATION

I refer to your letter of 8 May 1992, in which you make the offer to arrange for Council's solicitors to consider the submission of any questions we may have for Mr O'Rourke, of Council's former solicitors, Sly and Weigall. Please accept our apologies for the delay in responding to your letter.

We are appreciative of the spirit in which the offer has been made. However, for a number of reasons to be explored in our report, these arrangements are not a satisfactory means of examining Mr O'Rourke.

We accordingly advise that we decline to accept your offer. Of course, you may consider it appropriate to seek comments from Mr O'Rourke when responding to the draft report.

Yours faithfully,



ALLAN HARTIGAN                      MARY BROPHY  
Local Government Inspectors

29 MAY '92.

200/4

REFERENCE No: IBK/MAS/4022 x 52128 x 52121 x 718100 x 5329.G

YOUR REFERENCE:

Further Contact: Cr. Ian B. Kingston  
**BYRON SHIRE COUNCIL**



P.O. BOX 159, BYRON BAY,  
N.S.W. 2481  
TELEPHONE No. 85 6500 (066)  
DX 27704 BALLINA  
FAX.: 85 8154

ALL COMMUNICATIONS TO BE  
ADDRESSED TO THE SHIRE CLERK

Mr. A. Hartigan,  
Local Government Inspector,  
Department of Local Government  
and Co-operatives,  
Locked Bag 1500,  
BANKSTOWN, N.S.W. 2200

**15 JUN 1992**

Dear Sir,

Re: INVESTIGATION UNDER SECTION 212 - ACCESS TO LEGAL ADVISORS

I refer to discussions between yourself, Inspector Brophy and myself, in the Council Chambers on 1st June, 1992. The matter of access by yourselves to Mr. W. O'Rourke of Sly and Weigall was again raised, and in particular, the question of whether direct access could be allowed to Mr. O'Rourke relating to matters occurring prior to October, 1989.

As indicated at that time, I have referred this question to Council's current legal advisors and have been advised by them that, consistent with their previous advice to Council and Council's subsequent resolution in relation to privileged material, Council should not agree, at this stage, to waive its privilege over communications with its Solicitors prior to or after 1989.

You have previously indicated that Council may wish to seek comments from Mr. O'Rourke when responding to the Inspectors' draft report and I anticipate Council will indeed take such course of action. The matter of access to Mr. O'Rourke will be considered again by Council at that time.

Yours faithfully,

CR. IAN B. KINGSTON,  
SHIRE PRESIDENT.

Further contact: Mr. B.F. Pullinger  
**BYRON SHIRE COUNCIL**



P.O. BOX 159, BYRON BAY,  
 N.S.W., 2481.  
 TELEPHONE No. (066) 85 6500  
 DX 20407, BYRON BAY  
 FAX (066) 85 8154

ALL COMMUNICATIONS TO BE  
 ADDRESSED TO THE GENERAL MANAGER

Inspector M. Brophy,  
 Local Government Inspector,  
 Department of Local Government &  
 Co-operatives,  
 Locked Bag 1500,  
 BANKSTOWN N.S.W. 2200

**CONFIRMATION  
 OF FAX**

- 31 MAY 1993

28 MAY 1993

Dear Inspector Brophy,

**BYRON SHIRE COUNCIL - SECTION 212 INVESTIGATION**

I refer to your request that the Council provide you with access to all its files and documents, including legal matters, to permit you to complete your investigation. Your request was considered at a Special Meeting of the Council held today.

The Council has resolved that you be informed that the Council will disclose privileged information to you on the basis that you first agree to appropriate confidentiality undertakings so that, if at all possible, privilege is not waived.

I note that during our conversation this morning, you indicated your agreement to such a confidentiality undertaking and I attach to this letter the confidentiality undertaking as drafted by Council's solicitors.

I would be pleased if you would sign this undertaking and return it to me.

I also note your advice that you will be attending at the Council offices in Byron Bay during the week commencing 14th June, 1993. I confirm that I will be leaving the Council's employment on 17th June. I will certainly be available to you during that week, with the exception of Monday 14th June which is a public holiday. Thereafter, Mr. Eastcott as Acting General Manager or Mr. Graydon as Acting Shire Clerk, will ensure that the documents you require to inspect are made available.

Further, I confirm that at the Special Meeting held this morning, the Council resolved to file a cross appeal in the Court of Appeal proceedings brought by Messrs. Cochrane and Mangieson and Ms. Gallagher. The Council reversed its earlier decision on this matter on advice it received from its solicitors and senior Counsel.

Yours sincerely,

**BARRY F. PULLINGER,  
 GENERAL MANAGER.**

Encl.

FACED

**CONFIRMATION**

## CONFIDENTIALITY UNDERTAKING

The Council has agreed to permit the Inspector to have access to confidential legal advice and other information which is the subject of the Council's legal professional privilege (the "Privileged Information"). Access to the Privileged Information is given in response to a request by the Inspector and is given solely for the purpose of enabling the Inspector to carry out her functions pursuant to section 212 of the Local Government Act 1919.

The Inspector undertakes to the Council that she will not at any time disclose, publish or communicate nor permit the disclosure, publication or communication to any person the Privileged Information provided by the Council or any part of that Privileged Information without the prior express written consent of the Council.

.....  
INSPECTOR MARY BROPHY.

.....  
(Date)

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# LOCAL GOVERNMENT INSPECTORS

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Department of Local Government  
and Co-operatives  
Bankstown Civic Tower  
Floor 9  
66-72 Rickard Road, Bankstown  
Locked Bag 1500, Bankstown N.S.W. 2200  
Fax: (02) 793 0799  
Telephone: (02) 793 0793

Mr. B. Pullinger,  
Shire Clerk/General Manager,  
Byron Shire Council,  
P.O. Box 159,  
Byron Bay. NSW. 2481.

Our reference:

Your reference:

Dear Mr Pullinger,

Re: s.212 Investigation

I refer to your letter of 28 May 1993 and our subsequent conversations regarding access by me to Council files and documents, including those relating to legal matters, to enable me to complete my section 212 investigation into Council's conduct in relation to the acquisition of the Roundhouse site.

I hereby confirm my decision conveyed to you verbally regarding Council's offer to grant me conditional access to documents in relation to which Council claims legal professional privilege. I am unable to sign the draft Confidentiality Undertaking as proposed by Council as such an agreement would impose unwarranted constraints upon my investigative powers as a Local Government Inspector pursuant to section 212 of the Local Government Act.

My position regarding this matter is not changed from that set out in the letter to the Shire President signed by Inspector Allan Hartigan and myself, and dated 7 April 1992.

As expressed in that letter, I believe that since I effectively "stand in the shoes of Council", I am entitled to access those documents. I therefore request that they be made available to me during my visit this week.

Yours faithfully,



Mary Brophy.  
Local Government Inspector.

15. 6. 93



1003/9

REFERENCE No: DLG/MAS/36  
YOUR REFERENCE

Further contact: Mr. D.L. Graydon

## BYRON SHIRE COUNCIL



P.O. BOX 159, BYRON BAY,  
N.S.W., 2481.  
TELEPHONE No. (066) 85 6500  
DX 20407, BYRON BAY  
FAX (066) 85 8154

ALL COMMUNICATIONS TO BE  
ADDRESSED TO THE GENERAL MANAGER

Ms. M. Brophy,  
Inspector,  
Department of Local Government  
and Co-operatives,  
Locked Bag 1500,  
BANKSTOWN. N.S.W. 2200

16 JUL 1993

Dear Ms. Brophy,

Re: SECTION 212 INVESTIGATION

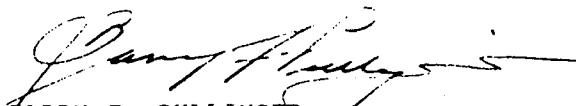
I refer to your letter of 15th June, 1993, and your subsequent discussions with the Shire President, Councillor Kingston, in the above matter and confirm that the President is prepared to submit to Council the following proposal:-

"That the Council agree to permit the Inspector to have access to confidential legal advice and other information relating to the Council's acquisition of the Roundhouse site which is the subject of the Council's legal professional privilege (the "Privileged Information"). Access to the Privileged Information be given in response to a request by the Inspector and be given solely for the purpose of enabling the Inspector to carry out her functions pursuant to Section 212 of the Local Government Act 1919 and be given on the following terms:-

1. Except as provided in paragraph 3 below, unfettered access be permitted to Privileged Information arising from communications with Sly and Weigall, Solicitors.
2. Except as provided in paragraph 3 below, access be provided to Privileged Information arising from communications with Mallesons Stephen Jaques, Solicitors, on the basis that the Inspector undertakes to the Council that she will not at any time disclose, publish or communicate nor permit the disclosure, publication or communication to any person the Privileged Information provided by the Council pursuant to this paragraph or any part of that Privileged Information without the prior express written consent of the Council.
3. Access not be permitted to any Privileged Information which relates to the alleged defamation of the former owners of the Roundhouse, Ocean Shores, arising from the publication by the Council in August, 1990 of legal advice given to the Council by Sly and Weigall, Solicitors."

I await confirmation of your agreement to this proposal.

Yours faithfully,

  
BARRY F. PULLINGER,  
GENERAL MANAGER.

Mr. B. Pullinger,  
General Manager,  
Byron Shire Council,  
P.O. Box 159,  
Byron Bay. NSW. 2481.

Dear Mr. Pullinger,

Re: section 212 Investigation - Roundhouse.

Further to our discussions and correspondence regarding arrangements for access to and use of documents referred to by Council as Privileged Information, I advise that I would be prepared to accept the proposed restrictions on access to any Privileged Information relating to alleged defamation of the former owners of the Roundhouse.

In relation to the proposed constraints on the use of Privileged Information arising from communications with Mallesons Stephen Jaques, I reiterate my previous stated position, namely that as a Local Government Inspector exercising my powers under section 212 of the Local Government Act, I act effectively as the Council and am thus entitled to have access to and to use, for the purposes of my investigation, any documents or other material in the possession of the Council.

I should further point out that there is nothing in section 212 of the Act to suggest that the activities of a council in the conduct of litigation are to be excluded from any inspection.

I trust that my position in relation to this matter will be understood and appreciated by Council and that proper access to all relevant information will be provided to me unconditionally.

Yours faithfully,



Mary Brophy.  
Local Government Inspector.

16. B. 93



128/10

FF42/0288/07

REFERENCE No: GJR/JEK/36 x 4022 x 52128 x 52121 x 71810 x 5329.G

YOUR REFERENCE:

Further contact: Mr. G.J. Rose



# BYRON SHIRE COUNCIL

P.O. BOX 159, BYRON BAY,  
N.S.W., 2481.  
TELEPHONE No. (066) 85 6500  
DX 20407, BYRON BAY  
FAX (066) 85 8154

ALL COMMUNICATIONS TO BE  
ADDRESSED TO THE GENERAL MANAGER

Inspector M. Brophy,  
Local Government Inspector,  
Department of Local Government &  
Co-operatives,  
Locked Bag 1500,  
BANKSTOWN N.S.W. 2200

Dear Inspector Brophy,

24 JUN 1993

## SECTION 212 INVESTIGATION

Council at its meeting of 22nd June, 1993, further considered your request for access to Council's legal advice and documents in respect of the Roundhouse matter.

Council resolved to endorse its offer of 16th June, 1993 and a copy of that offer is attached for your assistance.

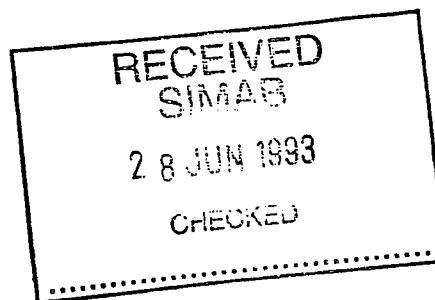
Your further advice in this matter would be appreciated.

Yours sincerely,

M.T. EASTCOTT,  
ACTING GENERAL MANAGER.

FAXED

Encl.



1. Mary B.

RECEIVED

28 JUN 1993

LOCAL  
GOVERNMENT

DLG/MAS/36 x 4022 x 52128 x 52121 x 5329.G x 718100

Further contact: Mr. D.L. Graydon

Ms. M. Brophy,  
Inspector,  
Department of Local Government  
and Co-operatives,  
Locked Bag 1500,  
BANKSTOWN. N.S.W. 2200

16th June, 1993

Dear Ms. Brophy,

Re: SECTION 212 INVESTIGATION

I refer to your letter of 15th June, 1993, and your subsequent discussions with the Shire President, Councillor Kingston, in the above matter and confirm that the President is prepared to submit to Council the following proposal:-

"That the Council agree to permit the Inspector to have access to confidential legal advice and other information relating to the Council's acquisition of the Roundhouse site which is the subject of the Council's legal professional privilege (the "Privileged Information"). Access to the Privileged Information be given in response to a request by the Inspector and be given solely for the purpose of enabling the Inspector to carry out her functions pursuant to Section 212 of the Local Government Act 1919 and be given on the following terms:-

1. Except as provided in paragraph 3 below, unfettered access be permitted to Privileged Information arising from communications with Sly and Weigall, Solicitors.
2. Except as provided in paragraph 3 below, access be provided to Privileged Information arising from communications with Mallesons Stephen Jaques, Solicitors, on the basis that the Inspector undertakes to the Council that she will not at any time disclose, publish or communicate nor permit the disclosure, publication or communication to any person the Privileged Information provided by the Council pursuant to this paragraph or any part of that Privileged Information without the prior express written consent of the Council.
3. Access not be permitted to any Privileged Information which relates to the alleged defamation of the former owners of the Roundhouse, Ocean Shores, arising from the publication by the Council in August, 1990 of legal advice given to the Council by Sly and Weigall, Solicitors."

I await confirmation of your agreement to this proposal.

Yours faithfully,

BARRY F. PULLINGER,  
GENERAL MANAGER.

FF91/0479

Councillor Ian Kingston  
Mayor  
Byron Council  
P O Box 159  
BYRON BAY NSW 2481

6 JUL 1993

Dear Councillor Kingston,

**Re: Roundhouse Investigation**

I refer to Council's letter of 24 June 1993 enclosing its offer regarding access by me to its legal advice and documents relating to the Roundhouse.

Council's offer of unfettered access to documents arising from its communications with Sly and Weigall, Solicitors, other than material relating to the alleged defamation of the former owners of the Roundhouse, is accepted.

In relation to documents arising from communications with Mallesons Stephen Jaques, Solicitors, I request the same access, and would undertake not to publish any material which would be prejudicial to Council's case in its cross appeal on the matter of compensation. In this regard I would be prepared to formalise this offer in writing to the Council and to provide you with an advance copy of my Draft Report for discussion with Council's legal advisers. I would take into consideration any comments forwarded to me as a result of those discussions, before issuing the Draft Report to the whole Council.

I have also advised the Acting General Manager in these terms, and await the Council's response.

Yours faithfully,



Mary Brophy  
Departmental Representative

Sly and Weigall  
Solicitors  
GPO Box 3872  
SYDNEY NSW 2001

793.0652

12 JUL 1993

ATTENTION: Mr Warwick O'Rourke

Dear Sir,

**Re: Investigation of Byron Shire Council - Roundhouse site**

I refer to discussions and correspondence from early 1992 in relation to this matter and in particular to your letter of 26 March 1992.

The investigation pursuant to s.212 of the Local Government Act, 1919, was suspended following the issue of a Provisional Draft Report which resulted in injunctive proceedings being initiated, on behalf of the Council, pending the handing down of the decision in the Land and Environment Court of the Roundhouse compensation case. The matter was concluded in April 1993 and the investigation has been re-commenced.


Because of the Council's claim of legal professional privilege in relation to communications between it and its legal advisers, Inspector Allan Hartigan and I were unable to obtain evidence on a number of issues which we considered to be crucial to the investigation. Following the determination of the Court in the compensation matter, I requested the Council for access to all relevant material to enable me to complete the investigation. The Council has now agreed to allow me unfettered access to the legal advice and other information relating to the acquisition of the Roundhouse, arising from communications with your firm. A copy of the Council's letter in this regard is attached. I therefore seek, pursuant to my powers under s.431 of the Local Government Act 1993, your co-operation in facilitating access to all the relevant material held by your firm.

Furthermore, you may recall that Inspector Hartigan, who has since resigned from the Department and is no longer a Local Government Inspector, sought an interview with your Mr O'Rourke, and this was refused on the basis of the Council's claim of legal professional privilege. The matter was not pursued at that stage. However, since the Council has waived any privilege it previously claimed in relation to this issue, pursuant to the power available

to me under s.431 of the Local Government Act 1993, I now request an interview with Mr O'Rourke. The matters on which evidence will be sought from Mr O'Rourke relate to the formulation of those provisions of the Council's Local Environmental Plan 1988 and subsequent amendments and proposed amendments relevant to the Roundhouse, and to certain aspects of the appeal, by the former owners, to the Land and Environment Court in 1990.

In order to prevent any further delay in finalising the investigation, I would appreciate your formal response by Tuesday 3 August 1993, and would, in the interim, I would be pleased to answer any queries you may have about this matter.

Yours faithfully,



Mary Brophy  
Senior Investigations Officer

Encl.

REFERENCE No:

MTE/JEK/36 x 4022 x 52128 x 52121 x 718100 x 5329.G

YOUR REFERENCE:

Further contact: Mr. M.T. Eastcott

**BYRON SHIRE COUNCIL**

P.O. BOX 159, BYRON BAY,  
N.S.W., 2481.  
TELEPHONE No. (066) 85 6500  
DX 20407, BYRON BAY  
FAX (066) 85 8154

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Inspector M. Brophy,  
Local Government Inspector,  
Department of Local Government &  
Co-operatives,  
Locked Bag 1500,  
BANKSTOWN N.S.W. 2200

15 JUL 1993

Dear Inspector Brophy,

**ROUNDHOUSE INVESTIGATION**

Thank you for your letter dated 6th July, 1993, replying to Council's letter dated 24th June, 1993, enclosing Council's offer concerning access by you to Council's legal advice and documents relating to the Roundhouse. The Mayor and myself have discussed your offer and have decided to accede to your request.

Your commitment to not publish any material which would be prejudicial to Council's case in its cross appeal should be understood against the background that Council is more concerned about future lower court cases which may result from the appeal case.

The Council therefore reserves the right to take any and all action required to protect the legal privilege which Council believes is still attached to its legal advice documents in spite of making them available to you.

Council believes it would be irresponsible of your Department to ignore any advice Council or its legal advisers may provide in the future on an advance copy of your Draft Report, and your commitment to follow that course is reassuring to Council.

Please provide your offer formally, in writing.

Yours sincerely,

**M.T. EASTCOTT,  
ACTING GENERAL MANAGER.**

**FAXED**

FF 91/0479

Mr Max Eastcott  
A/General Manager  
Byron Council  
P O Box 159  
BYRON BAY NSW 2481

(02) 793.0652

Dear Mr Eastcott,

**Re: Roundhouse Investigation**

Further to your letter of 15 July 1993 and my previous correspondence regarding access to Council's legal advice and documents relating to the Roundhouse, I hereby confirm that I will not publish, in the report of my investigation, any material which would be prejudicial to the Council's case in the cross appeal on the matter of compensation. I also undertake to provide the Mayor with an advance copy of my Draft Report for discussion with Council's legal advisers and will take into consideration any comments forwarded to me as a result of those discussions, before issuing the Draft Report to the whole Council.

I would also like to confirm that Janette Ryan and I will be visiting Council next week to obtain access to the material in question. We expect to arrive at approximately 11 am on Wednesday and will be at Council until Friday afternoon. It would be appreciated if the necessary arrangements could be made to ensure that all the documents arising from communications between the Council, including any Council officers, and Council's solicitors Sly and Weigall and Mallesons Stephen Jaques, relating to the Roundhouse are readily accessible to us.

Thank you for your assistance in this matter.

Yours sincerely,



Mary Brophy  
Senior Investigations Officer

16.7.93

REFERENCE No: MTE/JEK/4022 x 36 x 52128 x 52121 x 718100 x 5329.G  
YOUR REFERENCE:

Further contact: Mr. Max Eastcott  
**BYRON SHIRE COUNCIL**



PO. BOX 159, BYRON BAY,  
N.S.W., 2481.  
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Local Government Inspector,  
Department of Local Government &  
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Locked Bag 1500,  
BANKSTOWN N.S.W. 2200

21 JUL 1993

Dear Inspector Brophy,

**ROUNDHOUSE REPORT**

The legal documents that you have requested are available for your investigation.

As you are aware, the Council has attempted to specifically exclude the material relating to the alleged defamation matters. I understand from our previous conversations that you will not use any information you inadvertently gain access to, regarding the defamation matter.

Thank you for your commitment in this matter.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Max Eastcott', is written above the typed name.

**MAX EASTCOTT,  
GENERAL MANAGER (ACTING).**